

The Hague Convention's Unforeseen Development: Perpetuating the Subordination of Domestic Violence Victims By Jennie Simmons

[Her husband's] physical and verbal abuse continued. In July 1999, [Rosa Teresa] Gutierrez approached the Human Rights Office in Mexico, but was told that the Office only assisted people who had been mistreated by government. One day in January 2000, [her husband] physically assaulted [Rosa], by hitting her, throwing her to the ground, and yelling profanities at her, all in the presence of Eduardo, then almost three years old. After this incident, [Rosa], at the advice of her attorney, sought the help of the local police, who insisted that she first obtain a medical report documenting her injuries. [Rosa] and her attorney went to the Red Cross, only to be turned away because [she] was not bleeding and did not yet exhibit visible bruises. A few days later, when her bruises did appear, [Rosa] was refused a second time by the Red Cross, which declined to prepare a report for her because she lacked proof that it was [her husband] who was responsible.¹

Introduction

The Department of State's Office of Children's Issues reported that during fiscal year 2009, there were 2,075 children internationally abducted by parents.² "[A]s the globe shrinks and international travel becomes more commonplace," more and more children are being transported across international borders.³ The 1980 Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") requires that a child parentally abducted from one signatory country to another promptly be returned to the home country, unless the abducting parent can successfully invoke one of the Convention's narrow exceptions.⁴ The Hague Convention's original prediction was that a non-custodial father would typically be the abductor.⁵ The Convention drafters implemented a prompt return remedy to prevent courts in the abducted-to country from addressing the merits of competing custody

¹ *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) *overruled by* *Abbott v. Abbott*, 130 S.Ct. 1983 (2010).

² JEFFREY L. EDLESON ET AL., FINAL REPORT: HAGUE CONVENTION AND DOMESTIC VIOLENCE 11(2010) [hereinafter Final Report], available at <http://www.haguedv.org/reports/finalreport.pdf> (last visited Feb. 25, 2011).

³ Michael R. Walshand & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 30 (2006); *See also* Final Report, *supra* note 2, at 6 (stating that the number of American children with at least one foreign parent increased from 15% in 1994 to 22% in 2008).

⁴ Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 159 (2010).

⁵ Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 Am. U.J. GENDER SOC. POL'Y & L. 749, 765 (2003) [hereinafter Weiner, *Transnational Litigation*].

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

claims.⁶ The Convention thereby endeavored to deter parents from engaging in international forum shopping to achieve a more favorable custody determination.⁷ However, published figures now indicate that seventy percent of abductors are actually mothers, many of whom are like Rosa, trying to escape domestic violence.⁸ Given this chasm between reality and the Convention's original vision, the Convention's current framework, demanding prompt return of the child, does not make sense.⁹

The Convention assumes that it is in the best interests of all children for welfare issues to be determined by the country in which they are habitually resident.¹⁰ Thus, courts frequently interpret the Convention as compelling a child's return, even in situations where return will almost certainly risk exposing the child or child's mother to the same violence or abuse from which they originally sought to escape.¹¹ One study concluded that approximately one-third of all published and unpublished U.S. Hague proceedings involved some type of violence within the home.¹² Another study suggests that in at least half of the parental abduction cases, violence was a "relevant presence in the parental relationship."¹³ Despite these startling numbers and a

⁶ Carrie Nelson, *Recent United States' Interpretations of Article 13(b) of the Hague International Child Abduction Convention: We're on the Right Road*, 15 TEMP. INT'L & COMP. L.J. 297, 297 (2001).

⁷ Weiner, *Transnational Litigation*, *supra* note 5, at 765; "The Hague Convention discourages parents from resorting to the most extreme form of interference, child abduction, by providing a judicial remedy for removal." Karpenko v. Leendertz, 619 F.3d 259, 266 (3rd Cir. 2010).

⁸ Nigel v. Lowe & Katarina Horosova, *The Operation of the 1980 Hague Abduction Convention—A Global View*, 41 Fam. L.Q. 59, 67 (2007); *See also* Final Report, *supra* note 2, at 4 (stating that "empirical research confirms that 68 to 69 percent of 'taking persons' are now mothers, not fathers.").

⁹ Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 599 (2000) [hereinafter Weiner, *Escape*].

¹⁰ Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four*, 13 INT'L J.L. POLY & FAM. 191, 195 (1999).

¹¹ Final Report, *supra* note 2, at 2.

¹² Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 120 (2005); *See also* Weiner, *Transnational Litigation*, *supra* note 5, 765 ("Seven of the nine cases that reached the United States Courts of Appeals between July 2000 and January 2001, for example, involved an abductor alleging that she was a victim of domestic violence.").

¹³ Kaye, *supra* note 10, at 193 (stating that "[v]iolence against women is a notable risk marker for parental abduction.") (citing Geoffrey Greif & Rebecca Hegar, *When Parents Kidnap: The Families Behind the Scenes* 45 (Free Press 1993)). Greif and Hegar's book on parental kidnapping provides important insight about the frequency of domestic violence in cases of abduction. Greif and Hegar conducted a survey of 368 parents in forty-five states

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

growing national and international recognition of domestic violence,¹⁴ U.S. courts have appeared reluctant to look upon the victim-abductors in Hague proceedings sympathetically.¹⁵ This reluctance stems from intrinsic structural flaws in the Convention's remedy of return where domestic violence is essentially accorded no weight.¹⁶ Because the Convention has no ordained domestic violence defense, courts often appear "inhospitable" to domestic violence victims' attempts to employ the Convention's preexisting exceptions to return.¹⁷ Thus, the Convention has become "a substantial barrier" to many women seeking to flee domestic violence.¹⁸

Attempting to explain the courts' reluctance to utilize the Convention's outlined exceptions in cases of domestic violence, one commentator stated that the courts' concern about the exceptions swallowing the return rule has developed into "an improper disregard for the Convention's intended protections against danger."¹⁹ Indeed, as advocated by renowned Hague Convention scholar, Professor Merle Weiner, "[m]uch substantive work needs to be done in Hague cases to make the Hague Convention less devastating for domestic violence victims."²⁰ The threat is that "[l]anguage and themes in the Hague Convention cases which minimize,

and six countries. It is one of the most cited in abduction literature. Overall, the study found that the majority of the marriages in which abductions occurred involved spousal domestic violence (54% to be exact). Final Report, *supra* note 2, at 22.

¹⁴ See generally Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57 (2007) (discussing violence against women as a human rights violation and the various international approaches to domestic violence); See also Weiner, *Escape*, *supra* note 9, at 593-4 (discussing how every state now considers domestic violence relevant to determinations of child custody); Weiner, *Transnational Litigation*, *supra* note 5, at 751 (discussing the new legal recognition in the U.S. that domestic violence harms children).

¹⁵ Norris, *supra* note 4, at 160.

¹⁶ For example, under Article 13(b) of the Convention, a country need not return a child if "there is a grave risk" that the "return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." However, domestic violence is not typically considered a significantly grave risk to children and therefore does not qualify as a viable defense for the victim-abductor. Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. no. 11 at 1670, 1343 U.N.T.S. 89, art. 13(b) [hereinafter Hague Convention].

¹⁷ Weiner, *Transnational Litigation*, *supra* note 5, at 766.

¹⁸ *Id.* at 799.

¹⁹ Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 535 (2004).

²⁰ *Id.*

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

trivialize or normalize violence against women and children are in danger of colluding with the violent partner.”²¹ As the Convention currently stands, mothers subjected to domestic violence are not only victims of their partner’s violence, but rather, they are also “victims of an international treaty, written with good intentions, but, [which] when implemented has unintended negative consequences.”²²

The Convention’s presumption of abductors being fathers who had lost or feared losing custody has turned out to be the antithesis of reality.²³ The official 2006 Fifth Meeting of the Special Commission of the Convention even acknowledged that “two-thirds of abductors involved in Hague proceedings are primary caretakers, most mothers, and that this gives rise to issues which had not been foreseen by the drafters.”²⁴ Thus, the base premise for the Convention is erroneous. Its narrow tailoring of exceptions which essentially discounts domestic violence as a defense is inappropriate and misguided. Certainly, in order for the Convention to operate successfully, there must be global consistency in Convention interpretation, and countries must be in compliance with one another.²⁵ However, domestic violence victims should

²¹ Kaye, *supra* note 10, at 205.

²² Shetty & Edleson, *supra* note 12, at 135; *Contra* Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557, 558 (1998). Skoler takes a completely different approach to domestic violence allegations in Convention proceedings. Discussing how false allegations of abuse are becoming increasingly frequent in U.S. family law litigation as one parent tries to gain an unfair advantage over the other, Skoler claims that these abuses of psychology are also being used to undermine the Convention by turning abduction hearings into hearings on the best interests of the child and parental fitness.

²³ Weiner, *Escape*, *supra* note 9, at 599.

²⁴ Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 282 (2008) [hereinafter Weiner, *Fifth Meeting*] (citing Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 1 Oct. 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, § 1.1.1, at 3 (Oct. 30- Nov. 9, 2006)).

²⁵ “If the courts fail to consistently interpret the Convention, it would result in undermining its value in deterring parental abductions, and also allow the Convention to become subject to varying national approaches and perspectives, thereby hindering the attainment of the core objectives set forth in the treaty.” *See* Nelson, *supra* note 6, at 310.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

not be sacrificed for the mere sake of global uniformity.²⁶ Therefore, if the Convention is diverging from its original premise and no longer deterring what it intended, then changes must be implemented.²⁷

The U.S. Supreme Court recently decided its first parental abduction case under the Convention.²⁸ Unfortunately, despite the growing global recognition of domestic violence as a human rights violation, the Court's decision in *Abbott v. Abbott* will most likely perpetuate the Convention trend that domestic violence victims are afforded little to no protection under the Convention.²⁹ Therefore, hopefully, the upcoming second-half gathering of the Sixth Meeting of the Special Commission to Review the Practical Operation of the 1980 Hague Convention, which is set to begin in January 2012, will resolve the vast uncertainties faced by Hague courts dealing with allegations of domestic violence, thereby finally enabling victims to find some relief under the Convention's auspices.³⁰

Given the Convention's continued disservice to domestic violence victims, this paper illuminates the vast discrepancies between the vision that the Convention originally sought to achieve and its inadvertent, but harsh, contemporary effect on desperate mothers fleeing from domestic violence with their children. Specifically, this paper identifies Mexico as a prime example of a country with wholly inadequate protection for domestic violence victims and the

²⁶ Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 721 (2004) [hereinafter Weiner, *Strengthening Article 20*].

²⁷ Weiner, *Fifth Meeting*, *supra* note 24, at 282 (citing Hague Conference on Private International Law, Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, at 458-9, Prelim. Doc. No. 2 (Oct. 2006), available at http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf) (stating that in the pre-meeting questionnaires, "country after country, including the United States," recognized that domestic violence is frequently raised in Hague proceedings).

²⁸ See *Abbott v. Abbott*, 130 S.Ct. 1983 (2010).

²⁹ *Id.*

³⁰ For more information on the upcoming conference, see Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=text.display&tid=20 (last visited August 1, 2011) [hereinafter HCCH]. The first half of the meeting was recently held June 1-10, 2011.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

incredible injustice done to the mothers who desperately attempt to escape with their children from Mexico and who are afforded no relief under the Hague system. By discussing the perils of domestic violence, the original intent and narrow framework of the Convention, and the limited redress currently available for domestic violence victims, this paper explains how judges are hamstrung by the current system, which often compels them to order return as being in the child's best interest, even despite evidence to the contrary. After describing how the Convention goals are now being undermined by a reality which was not even contemplated by the Convention drafters, the paper concludes by suggesting that the Convention adopt a new policy similar to that which appears in Sections 207 and 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), thereby allowing for judicial consideration of a domestic violence defense in Hague proceedings.

I. Domestic Violence: The Effect on Women and Children

The Convention drafters did not consider domestic violence in their initial discussions, because the global recognition of domestic violence is of relatively recent origin. Simply put, domestic violence is “a violation of women’s basic human rights.”³¹ The American Psychological Association defines domestic violence as “[p]hysical, visual, verbal, or sexual acts that are experienced by a woman or a girl as threat, invasion, or assault and have the effect of hurting her or degrading her and/or taking away her ability to control contact (intimate or otherwise) with another individual.”³² The United Nations further defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical,

³¹ Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN’S L.J. 181, 207 (2003).

³¹ See generally *Walsh v. Walsh*, 221 F.3d 204, 209-11 (1st Cir. 2000).

³² Final Report, *supra* note 2, at 16.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”³³

A. Domestic Violence Generally

Domestic violence usually includes coercive control, a pattern of behavior that utilizes intimidation and terror-inducing threats with the goal of controlling a woman’s behavior, her relationships with others, and her life.³⁴ In a recent Hague case, for example, Cathleen Mendez Lynch fled from Argentina with her children because she had suffered severe physical abuse by her husband. Among other things, her husband “slammed a door into her, held her down, spit on her, placed his hands around her neck, pushed and ‘smacked’ her, and threw things at her.”³⁵ Other demonstrations of coercive behavior may also include: isolation from friends and family, threats to harm the woman or her children, constant degrading or demeaning criticisms, and forced economic dependence.³⁶

When a woman is living abroad in her partner’s country, away from her friends and family, she may be subjected to an even greater degree of coercive behavior.³⁷ For example, in

³³ Andreea Vesa, *International And Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL’Y & L. 309, 312 (2004).

³⁴ Final Report, *supra* note 2, at 16.

³⁵ *Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347, 1350 (M.D. Florida 2002). In the proceeding, there was no claim that either child was ever physically abused. The court quoted the court in *Nunez-Escudero* in saying, “The assessment focuses upon the children, and it does not matter if the Respondent is the better parent in the long run, had good reason to leave her home in Argentina and terminate her marriage, or whether she will suffer if the children are returned to Argentina. *Id.* at 1364 (quoting *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir.1995). Imposing undertakings, the court ordered return. The mother “testified in no uncertain terms” that even if the children were ordered to return, she would not go back to Argentina. *Id.* at 1366.

³⁶ Final Report, *supra* note 2, at 16.

³⁷ *See generally* *Prevot v. Prevot*, 59 F.3d 556 (6th Cir. 1995). Victims living abroad face additional barriers including lack of access to passports or travel documents, lack of access to finances and financial information (which is often exacerbated when the woman cannot work in the foreign country due to visa issues), language and foreign cultural barriers, etc. Brief of the Domestic Violence Legal Empowerment & Appeals Project, et al, *Abbott v. Abbott*, 12 2009 WL 4271310 (U.S.) (2009) [hereinafter *Abbott* brief] at 23-4. In *Baran v. Beaty*, the court explained how the mother came to fear for her life and that of her child’s. She “felt isolated and believed none of [her husband’s] family could provide any kind of support or intervention necessary to protect [them] from [his] explosive outbursts. [She] never went to the Australian police or judicial system for help because she firmly believed those institutions would be unable to help her.” *Baran v. Beaty*, 526 F.3d 1340, 1343 (11th Cir. 2008). In *Vasquez v. Colores*, the mother testified that she was “given little money to buy groceries and other necessities” and

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

Tsarbopoulos v. Tsarbopoulos, Dr. Tsarbopoulos often subjected his wife, Kristi, to “pinching, punching, and pushing.”³⁸ After moving the family from New Jersey to Greece, Dr.

Tsarbopoulos not only maintained exclusive control over the couple’s finances, refused to pay for expenses incurred by Kristi, forced her to sleep on a bottom bunk in the children’s room, socially isolated her by expecting her to be home whenever he called, and screened all of her phone calls, but he also greatly increased his verbal and physical abuse.³⁹

Domestic violence is a global affliction, known to every country, every society. In analyzing the global statistics on domestic violence, one scholar has said, “[a] binding characteristic of communities throughout the world, almost without exception is the battering of women by men.”⁴⁰ The difference between countries lies in their vastly varied approaches to domestic violence, the diverse structures of their legal systems, and the various religious and cultural underpinnings of the societies which in turn affect how domestic violence is treated.⁴¹ Historically, domestic violence was often considered a “permissible activity” based on the basic tenets of patriarchy.⁴² Authorities often consider domestic violence a private family issue, declining to intervene. For example, in Hague case *Van de Sande v. Van de Sande*:

that “she had to get permission from [her husband] to leave the home and that [he] did not let her speak to neighbors.” *Vasquez v. Colores*, 2010 WL 3717298, 6 (D. Minn. 2010).

³⁸ *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1050 (E.D. Wash. 2001). Dr. Tsarbopoulos was described by the court as the “decision maker in the marriage, whom Kristi Tsarbopoulos obeyed in all matters.” Friends said that prior to the marriage, Kristi had been an “energetic, socially active and optimistic person,” but during her marriage, she became “increasingly isolated.” *Id.* at 1050.

³⁹ *Id.* at 1050-54.

⁴⁰ Adams, *supra* note 14, at 62 (quoting Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 371 (2003)). Adams lists staggering statistics such as fifty percent of all women have been struck by their male partner at some point and twenty-five percent are in permanently violent relationships. In the U.S., two to four million women are beaten by their husbands or intimate partners each year, which adds up to one woman every eighteen minutes. In South Africa, one in every six women is in an abusive relationship. In Russia, 15,000 women died as a result of domestic violence during 2001. Adams says that in many countries, “domestic violence is so ingrained in social norms that statistics are not available.” *Id.*

⁴¹ *Id.* at 64. Adams says that often “due to cultural mores and societal attitudes, legal recourse is available only in theory” for domestic violence victims. *Id.* at 72.

⁴² *Id.* at 64.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

Davy began beating Jennifer shortly after their marriage in 1999. The beatings were frequent and serious. For example, when she was seven months pregnant with their first child, Davy slammed Jennifer's head against a wall, choked her, and pushed her toward the top of a flight of stairs, threatening to topple her down them. The beatings, which typically consisted of choking Jennifer, throwing her against a wall, and kicking her in the shins. . . occurred several times a week throughout the marriage. . . She complained several times to the Belgian police, but they said they could do nothing. . .⁴³

Domestic violence was and continues to be “one of the crucial social mechanisms” perpetuating the subordination of women.⁴⁴

Since many societies traditionally viewed domestic violence as an act exclusively confined within the private realm, it was not included in international law discussions until the last few decades.⁴⁵ Indeed, only in the 1980s did the international community begin to recognize domestic violence as a serious issue, finally acknowledging that women's rights were human rights.⁴⁶ In 1989, the United Nations Commission on the Status of Women published a report concluding that “[w]omen have been revealed as seriously deprived of basic human rights. Not only are women denied equality within the balance of the world's population, men, but also they are often denied liberty and dignity, and in many situations suffer direct violations of their physical and mental autonomy.”⁴⁷ In 1993, the United Nations Declaration on the Elimination of Violence Against Women condemned all forms of human rights violations against women, thereby bringing women's issues into the public spotlight and establishing domestic violence as “a pervasive human rights problem requiring state intervention.”⁴⁸

⁴³ Van de Sande v. Van de Sande, 431 F.3d 567, 569 (7th Cir. 2005). The court ended up ordering an evidentiary hearing in order to explore the issues more fully. All of the cases cited in this paper are Hague proceedings involving allegations of domestic violence.

⁴⁴ *Id.* See generally *Id.* at 70-2 (presenting country-to-country domestic violence statistics).

⁴⁵ *Id.* at 104.

⁴⁶ Vesa, *supra* note 33, at 313-4; Adams, *supra* note 14, at 105.

⁴⁷ Adams, *supra* note 14, at 105-6.

⁴⁸ *Id.* at 106.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

The world has thus finally made steps towards acknowledging the “horrors of domestic violence.”⁴⁹ However, despite this formal recognition, domestic violence continues to exist. A 2005 study of ten different countries found that the rates of physical and sexual violence against women ranged from fifteen to seventy-one percent with most countries falling somewhere between having twenty-nine to sixty-two percent of their women abused.⁵⁰ In the U.S., every state now criminalizes domestic abuse, makes protection orders available to victims, and treats domestic violence as a significant factor in custody determinations—with many states having created a rebuttable presumption against a batterer receiving custody.⁵¹ Congress passed the federal Violence Against Women Act in 1994 largely to investigate and prosecute violent crimes against women.⁵² In the International Parental Kidnapping Crime Act of 1993 (IPKCA), Congress provided an explicit defense for parents fleeing from domestic violence.⁵³ Thus, there are many changes currently underway in how courts and social services respond to domestic violence.⁵⁴ Yet, despite the growing awareness and mounting activism, domestic violence remains a “global pandemic.”⁵⁵

B. Domestic Violence in Mexico

Mexico is a country with one of the worst records for protecting women from domestic violence. Indeed, even today, women in Mexico face significant barriers to protection from

⁴⁹ Weiner, *Escape*, *supra* note 9, at 593.

⁵⁰ Final Report, *supra* note 2, at 22.

⁵¹ Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, *JUV. & FAM. CT. J.* 57, 57 (2003); Weiner, *Escape*, *supra* note 9, at 593-4.

⁵² United States Department of Justice, Office on Violence against Women, *available at* <http://www.ovv.usdoj.gov/regulations.htm>. The VAWA also creates new criminal penalties, establishes funds for violence prevention programs and shelters, provides for interstate enforcement of orders of protection, and creates a private civil rights remedy. In *United States v. Morrison*, the Supreme Court struck down the VAWA’s private federal civil remedy for gender-motivated crimes of violence. *See* 529 U.S. 598 (2000).

⁵³ Weiner, *Escape*, *supra* note 9, at 596; 18 U.S.C. § 1204(a) (2006). Addressing and criminalizing the unlawful removal of a child from the U.S., the statute says, “It will be an affirmative defense under this section that—the defendant was fleeing from an incident or pattern of domestic abuse.” 18 U.S.C. §1204(c)(2).

⁵⁴ Shetty & Eldeson, *supra* note 12, at 127.

⁵⁵ Adams, *supra* note 14, at 129; Vesa, *supra* note 33, at 317 (“Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still exists.”).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

domestic violence.⁵⁶ Domestic violence is finally beginning to receive some official attention in Mexico; however, Mexico continues to lag far behind the United States and other nations in terms of providing substantive legal remedies and social services to victims.⁵⁷ According to statistics, one in four women in Mexico has suffered abuse at the hands of her partner.⁵⁸ Another study puts the number at six out of ten.⁵⁹ Whatever the exact numbers, domestic violence remains a serious national problem, considered “widespread and vastly underreported.”⁶⁰ For example, on August 31, 2005, Marcela Blumenkron Romer’s ex-husband broke into her home in Sonora State.⁶¹ He stabbed her in the back, leaving her paralyzed for four months and with serious long-term nerve damage and limited mobility.⁶² On numerous occasions over the years, she had made emergency calls to the Mexican police; she filed more than ten complaints at the public prosecutor’s office.⁶³ On every occasion, she was refused protection.⁶⁴ As Marcela found out the hard way, unless the victim sustains serious physical injury, prosecution is unlikely.⁶⁵ Though a federal law, The General Law on Women’s Access to a Life Free from Violence, was finally passed in 2007 to protect women from domestic violence, not all of the Mexican states

⁵⁶ Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT’L L.J. 1, 7-8 (1999).

⁵⁷ *Id.*

⁵⁸ AMNESTY INTERNATIONAL, *Women in Mexico Let Down by Failures in Justice System* (Aug. 1, 2008) [hereinafter Amnesty International], available at <http://www.amnesty.org/en/news-and-updates/report/women-mexico-let-down-failures-justice-system-20080801> (last visited Aug. 1, 2011) (describing the story of Susana who faced ten years of physical and psychological violence, suffering broken bones in her hands, a fractured nose, and a dislocated collarbone, and explaining how although Susana filed numerous complaints at the local public prosecutor’s office, she was told each time that it was not a crime and that there was nothing they could do).

⁵⁹ *Mexico’s Efforts to End Violence Against Women Stymied by Macho Culture* (May 13, 2008) [hereinafter Macho Culture], available at <http://www.azcentral.com/news/articles/2008/05/13/20080513mexmacho.html> (last visited Aug. 1, 2011).

⁶⁰ Teran, *supra* note 56, at 63.

⁶¹ Amnesty International, *supra* note 58.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* According to Marcela, she was told, “When you come with a bruise, we’ll do something.”

⁶⁵ Teran, *supra* note 56, at 66-67 (stating that physical abuse by a spouse is generally considered a minor offense).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

adopted the law, and even in those states where the law was adopted, it continues to not be applied.⁶⁶ Certainly, it's one thing to have a law on the books; it's another thing to enforce it.⁶⁷

Women thus continue to face a wide range of obstacles when trying to report cases of domestic violence, including: the refusal of officials to accept complaints, deficient investigations, and poor enforcement of rarely granted protective measures.⁶⁸ Despite an official push to move beyond the cliché machismo image,⁶⁹ “Mexico is still very much a man’s world when it comes to violence against women.”⁷⁰ Furthermore, progress is hard to come by in a country where just a few years ago, the punishment for killing a cow was greater than for killing a woman.⁷¹ For example, in Hague case *March v. Levine*, after a heated argument, the father “intentionally inflicted severe physical harm and serious bodily injury on [the mother, and]... the

⁶⁶ Macho culture, *supra* note 59;

⁶⁷ *Id.*

⁶⁸ Amnesty International, *supra* note 58; *see also* Teran, *supra* note 56, at 67 (“Police protection in Mexico is woefully inadequate to protect victims of family violence, and most Mexican citizens still view the police as corrupt and incompetent”).

⁶⁹ Mary Jordan, WASHINGTON POST, *In Mexico, an Unpunished Crime: Rape Victims Face Widespread Cultural Bias in Pursuit of Justice* (June 30, 2002) [hereinafter Washington Post], available at <http://www.pulitzer.org/archives/6709> (last visited July 28, 2011) (describing Mexico as the country that made the term “machismo” famous). In recent decades, Mexico has certainly made strides to improve women’s rights and opportunities. For example, women were finally given the right to vote in 1953, and during the 1990s, laws that said married women needed their husband’s permission to hold a job outside were abolished. However, when it comes to punishing sexual violence against women, “surprisingly little has changed in a century.” “In Mexico’s march toward modernity, there is great tension... between protecting women from violence and honoring indigenous customs.”

⁷⁰ Macho Culture, *supra* note 59. According to the National Institute for Women in Mexico, twice as many women suffer abuse than the worldwide average. As stated by the Institute’s executive secretary, “The problem is violence against women is ingrained in our culture. It’s considered natural.” Another commentator adds, “Much of the law enforcement of the nation still hides behind the macho mentality that allows violence to be hidden away.” *Mexico’s Macho Culture Hinders Putting a Stop to Domestic Violence* (May 14, 2008), available at <http://timeinmoments.wordpress.com/2008/05/14/mexicos-macho-culture-hinders-putting-a-stop-to-domestic-violence/> (last visited Aug. 1, 2011).

⁷¹ *Id.*; *See also* Washington Post, *supra* note 69 (stating that in many parts of Mexico, the penalty for stealing a cow is harsher than the punishment for rape). Ciudad Juarez, a city of 1.3 million people across the border from El Paso, Texas, has the infamous reputation for being known as the “femicide capital” because of the numerous disappearances and murders of women since 1993; human rights organizations estimate that the total number of murders could surpass 4,000. Adrian Reyes, *Gender Violence Continues to Claim Its Victims* (Aug. 14, 2006), available at <http://ipsnews.net/news.asp?idnews=34338> (last visited Aug. 1, 2011). As stated by one commentator, “The murders in Ciudad Juarez seem to be nothing more than the visible excesses of an all too common daily reality for millions of Mexican women.” VIOLENCE AGAINST WOMEN IN MEXICO, <http://www.mamacash.org/page.php?id=2693> (last visited Aug. 1, 2011).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

intentional physical assault caused such severe bodily injury [to her] that she died.”⁷² The father was apparently never convicted, and the Hague court ordered that the children be returned to the father in Mexico.⁷³ As of 2008, a rapist in Mexico could still escape punishment in 21 out of Mexico’s 31 states by claiming that he was seeking to satisfy an erotic fantasy; he could escape punishment in 19 states if he agreed to marry the victim.⁷⁴

Domestic violence in Mexico is “pervasive and mostly unreported.”⁷⁵ A 2006 survey suggested that sixty-seven percent of women over the age of 15 had suffered some abusive treatment.⁷⁶ The 2010 Human Rights Report on Mexico states that even though Mexican law criminalizes rape and imposes penalties of up to 20 years’ imprisonment, rape victims rarely file complaints with police because the authorities do not take the reports of rape seriously.⁷⁷ Additionally, despite the General Law on Women’s Access to a Life Free from Violence stating that “when [officials] are made aware of acts that may constitute offenses or crimes involving violence against women,” protection orders must be issued; the reality is that protection or restraining orders are rarely used or enforced.⁷⁸ Therefore, when a woman asserts a claim of abuse against her abuser, she is afforded no form of protection. As told by one woman,

In June [2006] I went to the local public prosecutor’s office after being beaten by my husband. There was another severely beaten lady there. The local prosecutor told the lady he couldn’t help her and then he said to me ‘I don’t know what I am going to do with this lady as she has already been here several times.’⁷⁹

⁷² March v. Levine, 136 F.Supp.2d 831, 847 (Tenn. Dist. Ct. 2000) (The father filed a Hague petition against the maternal grandparents for the return of his children to Mexico).

⁷³ *Id.* at 861.

⁷⁴ Macho Culture, *supra* note 59.

⁷⁵ U.S. DEPT. OF STATE--BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO (April 8, 2011) [hereinafter Country Report], *available at* <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154512.htm> (last visited Aug. 1, 2011).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Amnesty International, *supra* note 58.

⁷⁹ *Id.* (quoting Rosa from Oaxaca State).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

Rather than receiving help, victims are usually socially stigmatized and ostracized; those who do report rape or violence to the authorities are generally met with “suspicion, apathy, and disrespect.”⁸⁰

Mexican federal laws not only prohibit rape; they also prohibit domestic violence. However, while on the books, fines may equal 30 to 180 days’ pay and detention may be imposed for up to 36 hours, actual sentences are normally extremely lenient.⁸¹ State laws sanctioning domestic violence are even weaker than the federal laws; seven states do not criminalize domestic abuse at all, and fifteen punish it only when it is a repeated offense.⁸² According to Amnesty International, many senior officials in Mexico have insufficient knowledge or understanding, particularly at the state level, that violence against women constitutes a serious human rights violation.⁸³ When women do seek protection against their abusers, more often than not, they are merely encouraged to participate in arbitration or conciliation with their attackers.⁸⁴ Typically, as part of the conciliation process, the women have to deliver the notice of arbitration to their abusers in person.⁸⁵ Most women, of course, fear retaliation and do not deliver the letters, and their cases are effectively closed.

⁸⁰ Country Report, *supra* note 75; HUMAN RIGHTS WATCH, MEXICO 2008: REPRODUCTIVE RIGHTS, DOMESTIC VIOLENCE, AND SEXUAL ABUSE (2008), available at <http://www.hrw.org/en/node/79216> (last visited July 28, 2011).

⁸¹ Country Report, *supra* note 75.

⁸² *Id.*

⁸³ Amnesty International, *supra* note 58. For example, in one village in Guerrero state, the town elders who act as judges in local criminal matters were asked how they punish rape. The six men looked confused, as if they did not know what the term meant. When it was explained to them, they all laughed and said it sounded more like a courting ritual than a crime. When they stopped laughing, they said a rapist would probably get a few hours in jail, or he might have to pay the family a \$10 or 20 fine. However, all would be forgotten if he and the victim got married. In the case of a cow thief, they said the robber would be jailed, and unlike the rapist, the cow thief would be brought before the elders for a lecture on the severity of the crime. Washington Post, *supra* note 65.

⁸⁴ *Id.*; As described by a sixteen year-old victim’s mother, “They make the few women who dare to report rape give up.” Adding, “In 90 percent of the cases of rape, the Mexican police blame the women. In the few cases where they know the man is guilty, they let him ‘fix’ it with money.” Washington Post, *supra* note 65.

⁸⁵ THE HAGUE DOMESTIC VIOLENCE PROJECT: MEXICO, available at <http://www.haguedv.org/resources/country-specific.html> (last visited Aug. 1, 2011) (compiling a variety of sources on domestic violence in Mexico) (citing Amnesty International, *supra* note 67).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

World human rights organizations, such as Amnesty International, recognize that Mexico has made some recent positive advances in the arena of domestic violence. Yet, they also emphasize that the new laws have not yet focused on removing the actual barriers to women seeking protection.⁸⁶ For example, there are currently only 60 shelters for domestic violence victims in the whole of Mexico; most are run by civil society organizations.⁸⁷ Access to shelters and advocacy centers and service agencies are essential to the protection of victims.⁸⁸ Thus, practical measures are still needed to improve the registration, investigation, and prosecution of violence against women.⁸⁹ Indeed, an urgent need remains to bridge the gap between the law and its implementation.⁹⁰

C. The Effect of Domestic Violence on Children

Domestic violence not only affects women; it also affects children. Documented studies have shown that children exposed to domestic violence may themselves be at greater risk of physical harm and may exhibit more behavioral problems than children not exposed.⁹¹ Until recently, exposure to domestic violence was assumed to be “innocuous;” however, emerging social science research suggests otherwise.⁹² It has been found that most of the children in homes where domestic violence is prevalent actually witness the violence.⁹³ Certainly, “witnessing violence in the home has a profoundly disturbing affect on children.”⁹⁴ Studies now indicate that children in violent homes suffer increased physical and psychological illnesses

⁸⁶ Amnesty International, *supra* note 58.

⁸⁷ *Id.*

⁸⁸ Teran, *supra* note 56, at 68.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Jaffe, *supra* note 51, at 61.

⁹² *Id.*

⁹³ Weiner, *Escape*, *supra* note 9, at 621. Weiner says that harm to the child can occur even if the child never actually sees the abuse but simply hears it.

⁹⁴ *Id.* (quoting Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 JUV. & FAM. CT. J. 1, 4 (1999)).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

that undermine their social and emotional development and interpersonal behaviors.⁹⁵ One study reports, “A high percentage of men who batter their wives also batter their children, but domestic violence is traumatic for children even if they simply witness abuse or live in homes suffused with the tension and fear violence generates.”⁹⁶ Researchers have found a forty-one percent median co-occurrence of child maltreatment and adult domestic violence, with the majority of studies finding a co-occurrence of thirty to sixty percent.⁹⁷

Children exposed to domestic violence are “more prone to anxiety, depression, learning disabilities, and delinquency.”⁹⁸ They exhibit more aggressive and anti-social behaviors (called externalized behaviors) and more fearful and inhibited behaviors (called internalized behaviors) as compared to nonexposed children.⁹⁹ In addition to the emotional and behavioral problems suffered, exposed children may also experience a variety of trauma symptoms including nightmares, flashbacks, hypervigilance, depression, and regression to earlier developmental stages.¹⁰⁰ Childhood exposure to domestic violence is also associated later in life with drug and alcohol use, truancy, violence in relationships, and other significant problems with adult social adjustment.¹⁰¹ Furthermore, when their parents are separating, children exposed to domestic violence may themselves be at a higher risk of direct abuse because batterers may be more likely

⁹⁵ Abbott brief, *supra* note 37, at 7; *See also* Final Report, *supra* note 2, at 27-9.

⁹⁶ Abbott brief, *supra* note 37, at 7.

⁹⁷ Shetty & Edleson, *supra* note 12, at 126. Citing numerous social science studies, the First Circuit in *Walsh v. Walsh* noted that “serial spousal abusers are also likely to be child abusers.” *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000)

⁹⁸ Abbott brief, *supra* note 37, at 7.

⁹⁹ Shetty & Eldeson, *supra* note 12, at 126.

¹⁰⁰ Jaffe, *supra* note 51, at 60. In *Rodriguez v. Rodriguez*, the child recounted how he observed his father choke his mother and push her down the stairs when she was pregnant, and he testified “to the fear that he experienced during the physical altercations between his parents, which was exacerbated by the explosive nature of his father’s temper and the inability to anticipate the extent to which it would be manifested.” *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456, 460 (D. Maryland 1999).

¹⁰¹ Jaffe, *supra* note 51, at 61.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

to abuse their children when the marriage is dissolving and they are losing their control over the mother.¹⁰²

Despite the growing awareness about childhood exposure to domestic violence, the Convention imprudently continues to focus solely on the negative effects of abduction on children, declining to acknowledge the equally detrimental effects of domestic abuse exposure. A recent U.S. congressional report states that “[a]bducted children are at risk of serious emotional and psychological problems and have been found to experience anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt and fearfulness, and as adults may struggle with identity issues, their own personal relationships, and parenting.”¹⁰³ It says nothing about domestic violence. Indeed, courts in Hague proceedings, the U.S. Convention delegates, and the Convention itself seem to vastly underestimate the risks to children associated from contact with domestic violence.¹⁰⁴

II. Background: The Hague Convention

Entered into force December 1, 1983, the 1980 Convention remains the principal international treaty dealing with child custody and violations of custody rights.¹⁰⁵ A civil remedy meant to “discourage abduction as a means of resolving a custody matter,”¹⁰⁶ it was initially organized to remedy the problems associated with the Hague Convention of 1961 on the Protection of Minors. Under the 1961 Convention, courts in the abducted-to countries often assumed the power to adjudicate custody orders using their own “cultural dictates” as to what was in the abducted child’s best interests, thereby inadvertently encouraging international forum

¹⁰² Abbott brief, *supra* note 37, at 14.

¹⁰³ H.R. 3240, 111th Cong. § 1 (2009).

¹⁰⁴ Kaye, *supra* note 10, at 202.

¹⁰⁵ Hoegger, *supra* note 29, at 186.

¹⁰⁶ Katrina M. Parra, *The Need for Exit Controls to Prevent International Child Abduction from the United States*, 31 WHITTIER L. REV. 817, 819 (2010).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

shopping.¹⁰⁷ The 1980 Convention attempted to reduce the occurrence of international parental abductions by establishing mutual rights and duties among the contracting states.¹⁰⁸ The drafters enunciated the Convention objectives as follows: “[T]o secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.”¹⁰⁹ The best interests or custody of a child are not “the paramount concern” under the Convention.¹¹⁰ Indeed, “[t]he Convention does not address who should have custody of the child; it addresses where the custody case should be heard.”¹¹¹ The Convention itself consists of six chapters and forty-five articles.¹¹² According to Article 3, the cornerstone of the Convention,¹¹³ a child is wrongfully removed or retained when the removal or retention is in “breach of the rights of custody. . . under the law of the State in which the child was habitually resident immediately before the removal or retention,” when “at the time of removal or retention those rights were actually exercised,” and if the child is under age sixteen.¹¹⁴ As the Sixth Circuit in *Friedrich v. Friedrich* stated, “[W]rongful removal is a legal term strictly defined in the Convention. . . [It] does not require an ad hoc determination.”¹¹⁵

There are three threshold determinations that a petitioner must establish for a *prima facie* Hague case: (1) prior to removal or wrongful retention, the child was habitually resident in a

¹⁰⁷ Laura C. Clemens, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT’L L. & COM. 151, 156 (2003).

¹⁰⁹ Hague Convention, *supra* note 16, at art. 1.

¹¹⁰ Kaye, *supra* note 10, at 195.

¹¹¹ OFFICE OF CHILDREN’S ISSUES, *The Hague Convention on Civil Aspects of International Child Abduction—Legal Analysis*, 51 Federal Registrar 10494 [hereinafter Legal Analysis], available at http://travel.state.gov/pdf/Legal_Analysis_of_the_Convention.pdf (last visited March 2, 2011).

¹¹² *Id.* (analyzing and discussing the articles in great detail to “facilitate understanding” of the Convention).

¹¹³ DEPT. OF STATE, PUBLIC NOTICE 957, HAGUE INTERNATIONAL CHILD ABDUCTION CONVENTION: TEXT AND LEGAL ANALYSIS, 51 FED. REG. 10494-01, 1986 WL 133056 (F.R.) (1986) [hereinafter PUBLIC NOTICE 957].

¹¹⁴ Hague Convention, *supra* note 16, at art. 3; Kaye, *supra* note 10, at 191; Walshand & Savard, *supra* note 3, at 32.

¹¹⁵ *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

country other than that to which they were abducted, (2) the removal or wrongful retention was in breach of custody rights, and (3) the petitioner was actually exercising custody rights at the time of removal or wrongful retention.¹¹⁶ The Convention embraces the principle that it is in the best interests of the child that any custody or welfare dispute be resolved before a court of the country in which the child is habitually resident.¹¹⁷ Parties to the Convention must take all appropriate measures to implement the mandates of the Convention and to return the abducted child expeditiously.¹¹⁸ The return remedy is a “provisional” remedy as the purpose is simply to reestablish the pre-abduction factual status quo; the merits of the custody dispute are then adjudicated in the country of habitual residence once the child is returned.¹¹⁹ However, if the abducted-to country does not comply with the return remedy, even if it is a signatory state, the state of habitual residence can do little to actually enforce the Convention.¹²⁰ Thus, as with all international treaties, there is a strong need for global jurisprudence for the Convention to operate effectively.¹²¹ Currently, over eighty countries subscribe to the 1980 Convention.¹²²

¹¹⁶ See Walshand & Savard, *supra* note 3, at 32-9. “The Convention is silent as to the definition of place of habitual residence. This silence is thought to be deliberate, ‘the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems.’” *Id.* at 33 (citing *Walton v. Walton*, 925 F.Supp 453, 457 (S.D. Miss. 1996)).

¹¹⁷ Kaye, *supra* note 10, at 195, 192; See also Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 11 (1994) [hereinafter Silberman, *Brief Overview*] (stating that the courts in the country of habitual residence are often seen as being the best suited and situated for making such a determination).

¹¹⁸ Clemens, *supra* note 107, at 156.

¹¹⁹ Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 301 (2002) [hereinafter Weiner, *Uniformity and Progress*]; Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005) [hereinafter Silberman, *Global Jurisprudence*].

¹²⁰ Parra, *supra* note 106, at 825.

¹²¹ See generally Silberman, *Global Jurisprudence*, *supra* note 119.

¹²² HCCH, *supra* note 30; TRAVEL.STATE.GOV, *Hague Abduction Convention Country List*, http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html (last visited March 2, 2011) (listing countries and their dates of entry into force with the US); See Lowe & Horosova, *supra* note 8, at 60 (stating that “[i]n terms of ratifications and accessions, the Hague Convention is one of the most successful of the international family law instruments.”). Currently, the U.S. only recognizes sixty-eight of those countries. U.S. DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6 (April 2010) [hereinafter Dept. Report], *available at*

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

A. U.S. Implementation of the Convention

The United States entered the 1980 Convention into force on July 1, 1988, implementing it through the enactment of the International Child Abduction Remedies Act (ICARA).¹²³ ICARA “essentially mirrors” the Convention’s original provisions with Congress finding that international child abduction is harmful to children, that parents should not be allowed to obtain custody unlawfully, and that an international agreement is necessary to combat the increasing trend of international abductions.¹²⁴ ICARA establishes standards of proof for establishing the various exceptions set forth in the Convention, and it explicitly provides that courts are “to determine only rights under the Convention and not the merits of any underlying child custody claims.”¹²⁵ Significantly, under ICARA, state and federal courts are given concurrent jurisdiction to hear Hague petitions.¹²⁶ Although “expertise and uniformity” are particularly vital in Hague proceedings,¹²⁷ in the U.S., “literally thousands of judges” can hear these cases.¹²⁸ The petitioner designates whether the case will be heard in federal court or state court.¹²⁹ Both courts are required to hear and dispose of the cases in an expeditious manner¹³⁰ because as one court

<http://travel.state.gov/pdf/2010ComplianceReport.pdf> (last visited March 2, 2011). See also Weiner, *Transnational Litigation*, *supra* note 5, at 771-2 (Weiner explains that each signatory country to the Convention can decide individually whether or not it wants to accept a new member’s application since the Convention entails such a great deal of trust and cooperation among the nations. The Convention rests on the belief that all member countries will be able to decide the underlying custody dispute adequately and fairly). Currently, Japan, India, and the Philippines are not Convention partners.

¹²³ Dept. Report, *supra* note 122, at 13.

¹²⁴ *Id.* at 13; 42 U.S.C. § 11601 (2006).

¹²⁵ 42 U.S.C. § 11601(b)(4); 42 U.S.C. § 11603(e) (2006).

¹²⁶ 42 U.S.C. § 11603(a). See Weiner, *Fifth Meeting*, *supra* note 24, at 232 (describing the U.S. system as “particularly diffuse”).

¹²⁷ Weiner, *Fifth Meeting*, *supra* note 24, at 234.

¹²⁸ *Id.* at 232-7 (The State Department itself acknowledges that a multitude of judges can oversee these cases.). Weiner argues that if it wanted to, Congress could limit the number of judges hearing Hague cases by divesting state courts of their jurisdiction and thereby concentrating jurisdiction wholly in the federal branch. She points to other subjects areas where Congress has granted exclusive jurisdiction to federal courts. She claims, “Congress could better achieve a ‘uniform international interpretation of the [Hague] Convention’ by concentrating jurisdiction in a single specialized federal court.” *Id.* at 236.

¹²⁹ Clemens, *supra* note 107, at 160.

¹³⁰ *Id.*; See Hague Convention, *supra* note 16, at art. 11 (“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.”).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

put it, an “inquiry that focuses on too lengthy a period of time runs the risk of turning into a ‘child’s best interest’ analysis, which is not the proper standard under the Convention.”¹³¹

According to the National Center for Missing and Exploited Children’s training manual, most Hague practitioners recommend that cases be filed in federal district court, not in state court, “for the simple reason that a Hague return case is not supposed to focus on the best interests of the child but on the proper forum in which such a decision should be made.”¹³² On the other hand, some scholars have expressed concern about the adequacy of the training for federal judges, especially those unaccustomed to overseeing such proceedings, and have advocated for specialized training on abduction cases involving domestic violence.¹³³ Because federal judges do not regularly hear family law cases, they may not recognize the special consideration which must be given to a domestic violence situation.

B. The Hague Convention in Operation

As charged by the Convention, each contracting state is required to create a Central Authority responsible for coordinating with other signatories and facilitating the return of abducted children.¹³⁴ However, the location and recovery process for abducted children varies significantly from country to country.¹³⁵ As the administrative bodies through which applications for return or for access can be made and received,¹³⁶ the Central Authorities have

¹³¹ *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007).

¹³² NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 64 (2007), available at http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf (last visited March 5, 2011). The manual goes on to say that federal judges may be more suited for overseeing Hague proceedings because while state judges are accustomed to making best interests of the child determinations, federal judges typically have no experience in the realm of family law and are therefore less likely to drift into a best interest determination, which is disallowed in Hague proceedings. Conversely, federal judges may not comprehend the many nuances involved in family law proceedings, particularly those involving allegations of domestic violence.

¹³³ Shetty & Edleson, *supra* note 12, at 134.

¹³⁴ Silberman, *Global Jurisprudence*, *supra* note 119, at 1056.

¹³⁵ H.R. 3240, *supra* note 65.

¹³⁶ Lowe & Horosova, *supra* note 8, at 59-60.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

“two-way responsibilities.”¹³⁷ In “outgoing cases” where a child has been taken to another country, they are obligated to help the left-behind parent (i.e. the parent that is not the abductor) initiate the process for return and to request assistance from the country to which the child has been taken; for “incoming cases” where a child has been abducted into their country, the Central Authority is obliged to help locate the child and to secure a voluntary return.¹³⁸ In the U.S., the State Department has been designated as the Central Authority (USCA). The Department’s Office of Children’s Issues handles the outgoing cases,¹³⁹ and the National Center for Missing and Exploited Children (NCMEC) deals with the incoming cases.¹⁴⁰ Though “only a percentage of all cases are reported” to the State Department,¹⁴¹ according to one report, the USCA has been contacted in at least 16,000 cases of child abduction both into and out of the United States since the late 1970s.¹⁴² The U.S. receives and makes more applications for return than any other country.¹⁴³ Both USCA agencies report that their efforts tend to focus exclusively on assisting left-behind parents in locating and seeking the return of their children.¹⁴⁴

Each year, the Office of Children’s Issues is required by law to submit to Congress a report of compliance with the Hague Convention.¹⁴⁵ Covering the period from October 1, 2008

¹³⁷ Silberman, *Global Jurisprudence*, *supra* note 119, at 1056.

¹³⁸ Silberman, *Brief Overview*, *supra* note 117, at 13.

¹³⁹ Silberman, *Global Jurisprudence*, *supra* note 119, at 1056; *See generally* TRAVEL.STATE.GOV, http://travel.state.gov/abduction/abduction_580.html (last visited March 2, 2011).

¹⁴⁰ The NCMEC is the U.S. non-governmental agency officially charged with assisting left-behind parents. Silberman, *Global Jurisprudence*, *supra* note 36, at 1056; Shetty & Edleson, *supra* note 12, at 118; *See generally* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (last visited March 2, 2011). The NCMEC has published a training manual for litigating Hague Cases which is available at http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf (last visited March 2, 2011).

¹⁴¹ H.R. 3240, *supra* note 103.

¹⁴² Shetty & Edleson, *supra* note 12, at 117-8.

¹⁴³ Lowe & Horosova, *supra* note 8, at 65 (citing the results of surveys conducted in 1999 and 2003).

¹⁴⁴ Shetty & Edleson, *supra* note 12, at 118. Shetty and Edleson maintain that “[t]his is a reflection of the belief as embodied in the Convention and much of the social science literature, public policy, and current intervention efforts that child abduction has grave negative implications for a child’s development and that a prompt return of the child to their country of habitual residence is almost always in the best interests of the child’s well-being.” *Id.*

¹⁴⁵ Clemens, *supra* note 107, at 163.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

through September 30, 2009 (i.e. fiscal year 2009), the 2010 Compliance Report reflects a “steady increase in the number of international parental child abduction cases.”¹⁴⁶ For example, the Report states that in FY 2009, the USCA received 1,135 new requests for assistance in the return of 1,621 children as compared to the 642 requests it received in FY 2006, thereby almost doubling the number of new outgoing USCA cases.¹⁴⁷ A 2009 congressional report similarly found that the number of outgoing abductions reported to the USCA “increased by about 60 percent in the last three years, and by about 40 percent in 2008 alone.”¹⁴⁸ The 2010 Compliance Report explicitly “highlight[s] the urgency of redoubling efforts to promote compliance with Convention obligations.”¹⁴⁹ As one of its reporting obligations, the USCA also evaluates the compliance of Convention partner countries in three areas: central authority for performance, judicial performance, and law enforcement performance.¹⁵⁰ For example, in FY 2009, the USCA found Brazil, Honduras, and Mexico to be “Not Compliant,” and Bulgaria to be “Demonstrating Patterns of Noncompliance.”¹⁵¹ As acknowledged by Congress, the first obstacle to recovering abducted children is “presented by countries who are signatories to the Hague Convention, but have not acted in compliance with the [Convention] responsibilities.”¹⁵² One of the common problems associated with compliance involves the “inappropriate consideration of facts going to the issue of custody” when determining whether or not to return a child.¹⁵³ Prior USCA compliance reports have criticized other countries for overusing the exceptions to return

¹⁴⁶ Dept. Report, *supra* note 122, at 3.

¹⁴⁷ *Id.* at 6. For more information, see the Report generally as it breaks down the numbers for each specific country, giving statistics for both incoming and outgoing cases.

¹⁴⁸ H.R. 3240, *supra* note 103.

¹⁴⁹ Dept. Report, *supra* note 84, at 3.

¹⁵⁰ *Id.* at 7.

¹⁵¹ *Id.*; *See also* at 15-25.

¹⁵² H.R. 3240, *supra* note 103.

¹⁵³ Clemens, *supra* note 69, at 164.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

provided in the Convention.¹⁵⁴ The USCA appears to view such overuse as indicative that the reviewing country is improperly entering into the forbidden best interest of the child analysis.

C. Mexico under the Convention

Unlike the U.S., Mexico has no specific federal legislation implementing the Hague Convention.¹⁵⁵ A party to the Convention since 1991, Mexico is the destination country of the greatest number of children abducted from the U.S. by a parent.¹⁵⁶ Because Mexico lacks federal Convention legislation, the Convention is implemented under existing Mexican state law; thus, official involvement with Hague cases varies state to state.¹⁵⁷ Mexico's Central Authority is part of the Ministry of Foreign Affairs (Secretaria de Relaciones Exteriores).¹⁵⁸ However, the primary Mexican agency responsible for locating missing children is the police authority.¹⁵⁹ For a number of years, Mexico has been demonstrating patterns of non-compliance in both the areas of law enforcement and judicial performance in Hague proceedings.¹⁶⁰ In FY 2009, the State Department found Mexico "Not Compliant," and observed the following causal factors for the lack of compliance: lack of implementing legislation or procedures for hearing Convention applications, as demonstrated by many Mexican judges following inapposite procedures found in state civil codes, and lack of understanding of the Convention as a whole.¹⁶¹ Of late, according to the most recent State Department Compliance Report, Mexico's Central Authority has finally

¹⁵⁴ *Id.*

¹⁵⁵ TRAVEL.STATE.GOV, *International Parental Child Abduction Mexico* [hereinafter Travel.State], available at http://travel.state.gov/abduction/country/country_508.html (last visited August 1, 2011).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ U.S. DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (April 2011) [hereinafter 2011 Dept. Report], available at <http://travel.state.gov/pdf/2011HagueComplianceReport.pdf> (last visited July 28, 2011).

¹⁶¹ Dept. Report, *supra* note 122, at 22-23.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

begun to act more cooperatively with the U.S.¹⁶² However, Mexican courts continue to apply the Convention inconsistently, often impermissibly adjudicating the merits of the underlying custody dispute.¹⁶³ Additionally, Mexican courts often suffer from delays in processing return applications.¹⁶⁴

III. The Abbott Decision

On May 17, 2010, the U.S. Supreme Court finally handed down a decision in the much-anticipated Hague case *Abbott v. Abbott*, involving the legal significance of *ne exeat* clauses in custody orders.¹⁶⁵ The case was significant because not only was this the first Hague proceeding to reach the U.S. Supreme Court but also because the decision would surely have reverberating effects for the many Hague cases to come.¹⁶⁶ As stated in an amicus brief for the case, “because domestic violence is associated with so many Convention cases, and because *ne exeat* orders are particularly likely in abuse cases. . . the resolution of this case will significantly—if not primarily—impact adult and child victims of abuse.”¹⁶⁷ Though neither the district court nor the Fifth Circuit opinions made it apparent, this case, like the majority of Convention cases, also had a backdrop of domestic violence.¹⁶⁸ Ms. Abbott originally alleged in the Chilean custody litigation that Mr. Abbott had physically and psychologically abused her for more than ten years.¹⁶⁹ The case before the Supreme Court, however, merely focused on whether a non-custodial parent’s *ne exeat* right gives rise to the Convention’s return remedy.¹⁷⁰

¹⁶² 2011 Dept. Report, *supra* note 160, at 5.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Abbott v. Abbott*, 130 S.Ct. 1983 (2010).

¹⁶⁶ “Further, a court’s interpretation of a treaty will have consequences not only for the family immediately involved but also for the way in which other courts—both here and abroad—interpret the treaty.” *Walsh v. Walsh*, 221 F.3d 204, 221-22 (1st Cir. 2000)

¹⁶⁷ *Abbott* brief, *supra* note 37, at 7.

¹⁶⁸ *Id.* at 10.

¹⁶⁹ *Id.* at 10-11.

¹⁷⁰ *See generally* *Abbott v. Abbott*, 130 S.Ct. 1983 (2010).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

Reversing both the Western District of Texas District Court and the Fifth Circuit, the Supreme Court held that the petitioning father's *ne exeat* right, as granted by the Chilean family court, was indeed a "right of custody" under the Convention and that the mother's unlawful abduction of her child thereby required the invocation of the Convention's return remedy.¹⁷¹ The Supreme Court remanded the case to determine if Ms. Abbott could meet one of the Convention's narrow exceptions to return.¹⁷² With its decision, the Court thereby significantly expanded the situations which compel orders of return. The Court did not consider any applicable exceptions to return. The return remedy now also includes noncustodial parents who hold a *ne exeat* right. Because *ne exeat* rights are quiet common in custody determinations,¹⁷³ the holding invites an expansion of the return remedy. The rights of the custodial parent, the victim-abductor, thus are once again sacrificed at the behest of the noncustodial parent, the batterer. Yet, the grave risk defense continues to remain elusively out of reach for domestic violence victims.

IV. The Remedy of Return

Though the Convention establishes several explicit defenses to the remedy of return,¹⁷⁴ the exceptions are intended to be "narrow," according to ICARA, and the reviewing courts should consistently maintain a strong inclination towards return. The remedy of return is set forth in Article 12 of the Convention. It states:

¹⁷¹Abbott, 130 S.Ct 1984-87. A *ne exeat* right is the authority or right to consent before the other parent may take the child to another country. Under the Chilean law, it was described as a joint right to decide the child's country of residence. See also *Id.* at 1990. The Convention defines "rights of custody" as including rights relating to the care of the child and the right to determine the child's place of residence. The Fifth Circuit had concluded that a breach of a *ne exeat* right did not give rise to the Convention's return remedy because it did not qualify as a right of custody.

¹⁷²*Id.* at 1997.

¹⁷³For example, see *Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) (addressing *ne exeat* clause in Mexican divorce agreement) *overruled by* *Abbott v. Abbott*, 130 S.Ct. 1983 (2010).

¹⁷⁴See generally *Weiner, Uniformity and Progress*, *supra* note 119, at 302-03.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

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.¹⁷⁵

Professor Weiner has argued at length that though the return remedy works well when the abductor is the non-custodial parent, the remedy is “inappropriate when the abductor is the primary caretaker and is seeking to protect herself and her children from the other parent’s violence.”¹⁷⁶ Though return to the country of habitual residence must usually be prompt, the Convention does establish a few narrow exceptions, or defenses, to the remedy of return. However, none of them provides “any sort of exclusion for justifiable abductions,” such as escape from domestic violence.¹⁷⁷ As mentioned previously, both the official explanatory report of the Convention and ICARA provide for an extremely narrow interpretation of the exceptions.¹⁷⁸ The official report states that “a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.”¹⁷⁹ It holds that the exceptions are “to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.”¹⁸⁰ The drafters intended the narrow exception interpretations to foster “global jurisprudence” and to harmonize Convention law.¹⁸¹ Because signatory states “need to act as one legal community,”¹⁸² the Convention

¹⁷⁵ Hague Convention, *supra* note 16, at art. 12.

¹⁷⁶ Weiner, *Transnational Litigation*, *supra* note 5, at 766.

¹⁷⁷ Weiner, *Escape*, *supra* note 9, at 636.

¹⁷⁸ See 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 Quatorzieme Session, Oct. 6-25, 1980, at ¶ 34 [hereinafter Pérez-Vera Report] (saying that the exceptions must be applied “only so far as they go and no further”). Elisa Pérez-Vera was the official Hague Conference reporter for the Convention. Her explanatory report is recognized as the official history and commentary on the Convention and serves as the background source on the meaning of the provisions.

¹⁷⁹ *Id.* at ¶ 31.

¹⁸⁰ *Id.* at ¶ 34

¹⁸¹ Silberman, *Global Jurisprudence*, *supra* note 119, at 1080.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

drafters assumed that signatory countries would be more inclined to act uniformly if the courts were thus restricted in the interpretive options available to them.

A. U.S. Interpretations of the Return Remedy

U.S. courts have attempted to adhere to the narrow exception mandate. For example, the Second Circuit in *Blondin v. Dubois* stated, “[A] federal district court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.”¹⁸³ Thus, even if the abducting parent can establish a sanctioned exception to the remedy of the return, the court may nevertheless still order return. The U.S. courts’ “overriding concern not to undermine the Convention has meant that a decision to return a child will generally be considered a ‘good’ decision *per se*.”¹⁸⁴ One study concludes that globally, only thirty-two percent of cases brought through the Central Authorities result in judicial return orders, while conversely in the U.S., eighty-three percent of the cases result in return orders.¹⁸⁵ Another report found that of all the cases that went to U.S. courts, sixty-six percent ended in return and twenty-nine percent in judicial refusal.¹⁸⁶ In any event, because the Convention fervently endorses the return of the child in the majority of circumstances, U.S. judges are often circumscribed in what they can order. Very rarely can judges accept an exception argument, especially in cases of domestic violence. The remedy of return “uniquely disadvantages” domestic violence victims, for the remedy puts the “victim’s most precious possession, her child, in close proximity with her batterer either without her protection [if she does not return with the child]. . . or with her protection, thereby exposing her to further

¹⁸² Nelson, *supra* note 6, at 300.

¹⁸³ *Blondin v. Dubois*, 189 F.3d 240, 246 FN 4 (2nd Cir. 1999).

¹⁸⁴ Kaye, *supra* note 10, at 196.

¹⁸⁵ Walshand & Savard, *supra* note 3, at 39 (citing statistics from 1999).

¹⁸⁶ Lowe & Horosova, *supra* note 8, at 78.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

violence.”¹⁸⁷ The return remedy thus becomes “an important tool by which batterers can harass and further control their victims.”¹⁸⁸

B. Exceptions to Return

The exceptions to return are found specifically in Convention Articles 12, 13, and 20.¹⁸⁹ According to ICARA, the exceptions set forth in Articles 13(b) and 20 require “clear and convincing evidence;” any other exceptions arising under Articles 12 and 13 require a “preponderance of the evidence.”¹⁹⁰ Pursuant to Article 12, when a child has been wrongfully removed or retained, the court may nevertheless still order the return of the child even if the proceedings have commenced after the expiration of one year, unless it is determined that “the child is now settled in its new environment.”¹⁹¹ To ascertain whether a child may be classified as well-settled, courts can look to factors such as school enrollment, friendships, and extracurricular activities.¹⁹² Some courts require that the child be fully integrated into the new community and not just the household of the abducting parent.¹⁹³ The Article 13(a) defense allows for an exception to return when the left-behind parent 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.”¹⁹⁴ Determinations about what constitutes an exercise of custody rights may sometimes be tricky, for a decision about “the adequacy of one parent’s exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute.”¹⁹⁵ Article 13 also establishes that a court may refuse return where a child “objects to being returned and

¹⁸⁷ Weiner, *Escape*, *supra* note 9, at 634.

¹⁸⁸ *Id.*

¹⁸⁹ See generally Hague Convention, *supra* note 16.

¹⁹⁰ 42 U.S.C § 11603(e)(2).

¹⁹¹ Hague Convention, *supra* note 16, at art. 12.; Walshand & Savard, *supra* note 3, at 39.

¹⁹² Walshand & Savard, *supra* note 3, at 39.

¹⁹³ Weiner, *Escape*, *supra* note 9, at 674.

¹⁹⁴ Hague Convention, *supra* note 16, at art. 13(a).

¹⁹⁵ Walshand & Savard, *supra* note 3, at 40 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996)).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

has attained an age and degree of maturity at which it is appropriate to take account of its views.”¹⁹⁶ According to one report, seventy-nine percent of the children abducted are under the age of ten.¹⁹⁷ The few courts that have attempted to consider the child’s preference have found the children to be of insufficient age and maturity to have an actual say in the return decision.¹⁹⁸

Because the official Convention report and ICARA both state that the exceptions to the return remedy must be construed narrowly, many U.S. court have unduly limited the exceptions to return. For example, the Second Circuit has reasoned, “Were a court to give an overly broad construction to its authority to grant exceptions under the Convention, it would frustrate a paramount purpose of that international agreement—namely, to ‘preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.’”¹⁹⁹

The Article 20 exception is a perfect example of an exception being reduced to nothing by the courts. The Article 20 exception, which is rarely evoked and generally unsuccessful, holds that return may be refused if it “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”²⁰⁰ Among her many suggestions for potential changes to the Convention, Professor Weiner has advocated for a strengthening of Article 20 to make it more applicable to domestic violence victims.²⁰¹ At the present, Article 20 has “minimal doctrinal significance,” in part because the State Department has said that this defense should only apply when return would “utterly shock the conscience of the court or offend all notions of due process.”²⁰²

¹⁹⁶ Hague Convention, *supra* note 16, at art. 13.

¹⁹⁷ Walshand & Savard, *supra* note 3, at 46 (citing statistics from 1999).

¹⁹⁸ *Id.*

¹⁹⁹ *Blondin v. Dubois*, 189 F.3d 240, 246 (2nd Cir. 1999) (quoting *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)).

²⁰⁰ Hague Convention, *supra* note 16, at art. 20.

²⁰¹ See generally Weiner, *Strengthening Article 20*, *supra* note 26, at 702.

²⁰² *Id.* at 702, 706 (citing PUBLIC NOTICE 957, *supra* note 113, at 10,510).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

C. Article 13(b): The Grave Risk Defense

Without doubt, the exception which is the most widely litigated is that under Article 13(b), the grave-risk defense.²⁰³ Not only is the grave-risk defense the most litigated exception, it is also the one which rouses the most controversy.²⁰⁴ Even the official report explains that the language of Article 13(b) was the “result of a fragile compromise.”²⁰⁵ The drafters worried about the exception creating a large loophole in the Convention. As written, Article 13(b) permits a court to refuse return where “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.”²⁰⁶ In analyzing the defense, courts may consider any information about the child’s social background as provided by the Central Authority.²⁰⁷ The harm required must be “something greater than would normally be expected on taking a child away from one parent and passing him to another.”²⁰⁸ In other words, the court does not want the abductor to be able to argue that the child is now well-established in the new home and that returning the child to the left-behind parent constitutes the requisite psychological harm. The abductor must therefore show that the “risk to the child is grave, not merely serious.”²⁰⁹

²⁰³ Walshand & Savard, *supra* note 3, at 41; *See Shetty & Edelson, supra* note 12, at 123 (“Almost two thirds of family violence-related Convention cases we located appeared to raise claims that children would face a grave risk if they returned to their country of habitual residence.”); *See also* Nelson, *supra* note 6, at 307 (saying that 13(b) is more litigated than any other exception because it provides the best opportunity to have the abducted-to state’s court assess the original custody dispute).

²⁰⁴ Shetty & Edleson, *supra* note 12, at 124. There is a lot of controversy over the degree to which Article 13(b) can and should be applied as it has the potential to be broadly interpreted. For example, *see contra* Skoler, *supra* note 22, at 559 (stating that some of the “most egregious abuses” have occurred under Article 13(b) and its “psycho-legal loopholes”).

²⁰⁵ Pérez-Vera Report, *supra* note 178, at ¶ 116.

²⁰⁶ Hague Convention, *supra* note 16, at art. 13(b).

²⁰⁷ Weiner, *Escape, supra* note 9, at 651. *See also* Weiner, *Transnational Litigation, supra* note 5, at 789-90. Weiner states that upon request, the NCMEC will seek from foreign Central Authorities information relating to the child’s social background but that courts often feel pressure not to seek such information since there is such an emphasis on speed in Hague cases.

²⁰⁸ *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

²⁰⁹ PUBLIC NOTICE 957, *supra* note 113, at 10,510.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

U.S. courts are habitually strict in the requirement that the exception not be seen as “a license for a court in the abducted-to country to speculate on where the child would be happiest.”²¹⁰ According to one court, the grave risk “threshold is necessarily a high one.”²¹¹ Courts do not want a Hague proceeding to turn into a determination of the child’s best interests.²¹² However, looming at the other end of the spectrum, “there is a danger of making the threshold so insurmountable that district courts will be unable to exercise any discretion in all but the most egregious cases of abuse.”²¹³ Courts are rapidly approaching that end where the grave risk exception is all but impossible to meet. For example, in *Whallon v. Lynn*, the father ordered gunmen to hold the mother and daughter at gunpoint at the airport in Mexico; while the district court found these incidents “regrettable,” it concluded that they still did not rise to the appropriate level of grave risk and ordered the child returned.²¹⁴

Professor Weiner claims that a cursory review of U.S. cases indicates that courts considering the 13(b) exception frequently analyze facts only under the “grave risk of physical or psychological harm” standard, either ignoring the “intolerable situation” language or assuming that it coincides with the grave risk.²¹⁵ As such, she and numerous other scholars have argued that courts are too restrictive in their interpretations of the grave risk exception. Courts are often unwilling to apply the defense in situations involving domestic violence allegations, unless there is specific, direct abuse of the child itself by the left-behind parent.²¹⁶ As articulated by one

²¹⁰ *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

²¹¹ *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007). One district court cited a study in its decision that claimed that as of January 2006, U.S. courts had found the grave risk defense applicable in only ten out of forty-nine invocations of the defense. *Krefter v. Wills*, 623 F.Supp.2d 125, 136 (D. Mass 2009).

²¹² “[W]ho is the better parent in the long run” has no bearing in Convention decisions. *Fabri v. Pritikin-Fabri*, 221 F.Supp.2d 859, 863 (E.D. Ill. 2001).

²¹³ *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007).

²¹⁴ *Whallon v. Lynn*, 230 F.3d 450, 453 (1st Cir. 2000).

²¹⁵ Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 345 (2008) [hereinafter Weiner, *Switzerland’s Example*].

²¹⁶ Weiner, *Escape*, *supra* note 9, at 651.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

scholar, the Convention puts women immediately on the defensive without providing them with a valid domestic violence defense.²¹⁷ Unfortunately, as many women come to find, there are “no legal panaceas for abuse,” particularly in Hague proceedings.²¹⁸ For example, in *Lopez v. Alcala*, the father filed a Hague petition, seeking the return of his two youngest children to Mexico after the mother fled with them to the U.S.²¹⁹ The mother argued that the father was an alcoholic and that he’d been physically abusive to her and the children in the past.²²⁰ A court-appointed child psychologist interviewed the children, who both independently stated that their father had hit them with his hand and a belt and that he had hit and kicked their mother.²²¹ The court determined that because the only evidence of abuse was the testimony of the mother and the children, it did not rise to the level of clear and convincing evidence and that the alleged abuse was not so severe as to rise to the level of an intolerable situation.²²² The court ordered that the children be returned to Mexico.²²³

When considering application of the grave risk exception, courts look to factors such as the nature and frequency of the alleged abuse, whether it may constitute a pattern of abuse, the likelihood of its recurrence, and whether there is any possibility of imposing undertakings to ameliorate the potential risk of harm associated with return.²²⁴ In *Nunez-Escudero v. Tice-Menley*, an oft-cited Hague decision, Stephanie Rose escaped with her baby from her abusive

²¹⁷ Weiner, *Transnational Litigation*, *supra* note 5, at 787.

²¹⁸ Abbott brief, *supra* note 37; Kaye, *supra* note 10, at 199 (“The fact is that no legal system can ever fully protect women and children from violence.”).

²¹⁹ *Lopez v. Alcala*, 547 F.Supp.2d 1255 (Fla. Dist. Ct. 2008).

²²⁰ *Id.* at 1257.

²²¹ *Id.*

²²² *Id.* at 1261-62.

²²³ *Id.* at 1262.

²²⁴ *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007). Courts do not consider isolated incidences of violence as amounting to domestic violence. For example, in *Whallon v. Lynn*, the First Circuit found that verbal abuse and one shoving incident, “while regrettable,” did not reach the requisite level of violence. *Foster v. Foster*, 654 F.Supp.2d 348, 351 (W.D. Penn. 2009) (citing *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000)). “An abusive situation is less likely to be considered ‘grave’ where the allegations of abuse concern ‘isolated or sporadic’ incidents.” *Foster v. Foster*, 654 F.Supp.2d 348, 351 (W.D. Penn. 2009) (citing *Simcox*).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

husband in Mexico.²²⁵ She submitted an affidavit with detailed evidence that she was physically, sexually, and verbally abused by her husband.²²⁶ Additionally, she alleged that she was “treated as a prisoner” by her husband and her father-in-law.²²⁷ She also offered some general evidence that her baby would likewise be subject to a grave risk of physical or psychological harm.²²⁸ The Eighth Circuit interpreted Article 13(b) as requiring harm “to a degree that also amounts to an intolerable situation.”²²⁹ The court remanded the case and instructed the mother to present clear and convincing evidence of the grave risk to the baby, otherwise an order of return would be issued.²³⁰ In the *Nunez-Escudero* case, the mother was able to gather some evidence of her abuse; however, in most Hague cases, such as in *Alcala*, the courts fail to consider that because witnesses and physical evidence of abuse are usually located in the other country, victims of domestic violence often face real difficulties in collecting the demanded indicia of abuse.²³¹ Yet, as seen in *Nunez-Escudero*, even when presented with explicit accounts of abuse, “[j]udges do not appear to use a child’s exposure to adult domestic violence as a sole or even primary reason for finding grave risk, despite growing social science evidence to the contrary.”²³² They do not consider the wholly inadequate protection afforded domestic violence victims in the countries, such as in Mexico, from which the mothers sought to escape. Rather, judges often appear to view domestic violence as “irrelevant to the Article 13(b) defense.”²³³

²²⁵ *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376 (8th Cir. 1995).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 377.

²³⁰ *Id.* at 378.

²³¹ Weiner, *Escape*, *supra* note 9, 658. Other studies of domestic violence, not just in the international arena, also indicate that evidence of domestic violence is notoriously difficult to substantiate. Understandably, the problems are therefore compounded when the domestic violence occurred overseas. See Jaffe, *supra* note 48, at 62.

²³² Shetty & Edleson, *supra* note 12, at 126.

²³³ Weiner, *Escape*, *supra* note 9, at 654. Occasionally, courts will take a rogue approach and consider domestic violence in their grave risk analysis. For example, in *Tsarbopoulos v. Tsarbopoulos*, the court said, “Spousal abuse, found by the Court in this case, is a factor to be considered in the determination of whether or not the Article 13(b)

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

A recent analysis of published U.S. judicial decisions indicates that courts seldom see children exposed to domestic violence as falling under the grave risk defense.²³⁴ Indeed, although a growing number of studies have revealed that “children exposed to domestic violence may experience subsequent negative developmental outcomes,”²³⁵ courts have consistently found the grave risk defense applicable only where there is direct evidence of child abuse; spousal abuse alone is insufficient, no matter the severity.²³⁶ This may be due in part to the outmoded, mistaken belief that domestic violence only occurs between spouses and therefore does not affect children.²³⁷ For example, in *Ibarra v. Quintanilla Garcia*, the mother testified that the father had abused her physically and emotionally while in Mexico; however the court concluded that she failed to establish by clear and convincing evidence that the return of the child to his father in Mexico would satisfy the grave risk defense.²³⁸ In *Walsh v. Walsh*, a case where the mother suffered years of severe domestic violence,²³⁹ the court issued an order of return for the children despite having explicit evidence of the father’s violent behavior.²⁴⁰ The court stated:

The evidence demonstrates that John is intemperate and often 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 the petition. Whatever damage long term exposure to such a

exception applies because of the potential that the abuser will also abuse the child.” *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057-58 (E.D. Wash. 2001). However, this particular case had explicit evidence of both spousal and child abuse at the hands of the father, and the court did not cite any other court decision when it made this statement.

²³⁴ Final Report, *supra* note 2, at xi.

²³⁵ Shetty & Edleson, *supra* note 12, at 115 (also explaining that almost “half of the families in which adult domestic violence occurs also show evidence of child maltreatment”).

²³⁶ See generally *Charalambous v. Charalambous*, No. 10-2227, 2010 WL 4963063 (C.A.1 (Me.)), 11 (1st Cir. Dec. 8, 2010) (finding that given the district court’s factual determinations, “There is no grave risk to the children under Article 13(b) associated with any potential future abuse of their mother.”).

²³⁷ Hoegger, *supra* note 31, at 185.

²³⁸ *Ibarra v. Quintanilla Garcia*, 476 F.Supp.2d 630, 636 (Tex. Dist. Ct. 2007).

²³⁹ See generally *Walsh v. Walsh*, 221 F.3d 204, 209-11 (1st Cir. 2000). The domestic violence included things like John beating Jacqueline after he was not asked to be a pall-bearer at her aunt’s funeral. Her Irish physician recalled seeing bruises on her body when she was seven months pregnant. Other times he noticed that her “face, chest, and knees all were swollen and bruised, her arms were marked by hard gripping, and she had suffered a broken tooth.”

²⁴⁰ *Walsh v. Walsh*, 31 F.Supp.2d 200, 206 (D. Mass 1998). The First Circuit overruled the district court later in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

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.²⁴¹

Though the First Circuit later overturned the decision on appeal, the trial court's opinion exemplifies the entrenched resistance among judges to upholding an Article 13(b) defense. Even though the appellate court eventually overturned the return order, the time and effort put forth in appealing the original decision are themselves contrary to the expediency requirement mandated by the Convention. From either perspective, the Convention is not operating as intended. Furthermore, "[a]lthough the broader interpretation of Article 13(b) . . . [may be] gaining currency [in some jurisdictions], victims still often face doctrinal hurdles to the defense's successful invocation."²⁴²

Despite a handful of favorable judicial outcomes for victim-abductors, overall the Article 13(b) defense is still not a reliable vehicle for most domestic violence victims. One research study indicates that the grave risk defense has been asserted in over eighty percent of Convention domestic violence cases but has been successful in less than a third of the time.²⁴³ To make matters worse, the U.S. officially opposed all efforts at the Fifth Meeting to broaden the grave risk defense.²⁴⁴ Professor Weiner described it as the United States' "hostility to the plight of domestic violence victims."²⁴⁵ Instead of looking sympathetically upon domestic violence victims, the U.S. took the position that the grave risk defense is becoming broader than it was originally intended and that the Fifth Meeting should not recommend to international courts that the parent's safety has any relevancy under the Article 13(b) defense.²⁴⁶ As Professor Weiner

²⁴¹ *Id.*

²⁴² Weiner, *Escape*, *supra* note 9, at 662.

²⁴³ Abbott brief, *supra* note 37, at 32.

²⁴⁴ Weiner, *Fifth Meeting*, *supra* note 24, at 286.

²⁴⁵ *Id.* at 289.

²⁴⁶ *Id.* at 286.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

said, “When the federal government fails to seek either domestic or international reform of the Hague Convention, it contributes to batterers’ abilities to control their victims.”²⁴⁷

V. Hague Proceedings: The Courts in Action

In order to convince the court to refuse return under the grave risk exception, respondents are often asked to prove a negative—to prove that the courts of the habitual residence are either unwilling or incapable of providing assistance.²⁴⁸ Courts tend to express “confidence in the willingness and ability of the habitual residence courts to sort out these claims and take the necessary protective measures.”²⁴⁹ The court in *Friedrich II* said that “courts in the abducted-from country are as ready and able as we are to protect children.”²⁵⁰ However, in reality, this overconfidence in other countries’ abilities may be flawed. Several State Department reports indicate that various Convention signatories often fail to actually protect domestic violence victims, despite the country having facially satisfactory domestic violence laws on the books.²⁵¹ For example, in Elena Avan’s case, she contended that she repeatedly sought the assistance of the Argentine police and court system, especially after her husband threatened her with a gun, but that they did nothing, which she attributed to the numerous bribes her husband paid to the

²⁴⁷ Weiner, *Transnational Litigation*, *supra* note 5, at 782.

²⁴⁸ See generally Hoegger, *supra* note 31, at 199-201 (discussing how the “allocation of burdens is extremely unfair to victims”).

²⁴⁹ Weiner, *Escape*, *supra* note 9, at 657. However, case after case suggests that many habitual residence countries are often not able or willing to intervene in domestic violence situations. For example, one mother went to three or four different police stations in Mexico to seek help, “only to be told that the police would not become involved in a domestic dispute.” *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456, 460 (D. Maryland 1999).

²⁵⁰ *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

²⁵¹ Weiner, *Escape*, *supra* note 9, at 624-5. Weiner argues that not only do some countries have inadequate domestic violence laws but that those that do may not enforce them. She also indicates that some countries lack shelters for battered women; See also Abbott brief, *supra* note 35, at 12 (saying that the U.S. State Department’s Human Rights Reports document inadequacies in countries including Chile, Columbia, Poland, Hungary, Macedonia, Spain, South Africa, and Venezuela). The brief claims that a critique of other countries’ inadequate legal protections for domestic violence victims does not stem from a nationalistic indictment but rather from objective observations about realities. *Id.* at 20. Cf. Silberman, *Global Jurisprudence*, *supra* note 119, at 1075 (discussing the danger of turning a Hague proceeding into a full-blown custody evaluation and raising the problematic issue of demonstrating a lack of confidence in other countries’ legal systems). Silberman says that the need to avoid “State chauvinism” is important. *Id.* at 1073. Roxanne Hoegger also discusses the dangers of cultural imperialism. See Hoegger, *supra* note 31, at 202.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

local police officers and judges.²⁵² In addition, the deciding courts do not take into account that the victim may believe that accessing the legal channels in her abuser's home country will "increase the immediate danger to her and her child" by incensing her abuser.²⁵³ In *Miltiadous v. Tetervak*, the mother testified that her husband had beaten her repeatedly, including breaking her nose to the extent that it required surgery,²⁵⁴ but that while in Cyprus, she was "afraid to call the authorities because she feared the local police, who were well acquainted with [her husband] would not help."²⁵⁵

In another Hague case, Erika Gaspar testified similarly that she did not believe she would be adequately protected in Mexico.²⁵⁶ After an incident in which the father came to her house intoxicated and "tried to forcibly kiss her and tore at her blouse," she decided that she needed to get out of the country with her daughter because no matter where she fled in Mexico, he would find her.²⁵⁷ She stated that she never called the police or filed for divorce because "she was a woman and she would lose."²⁵⁸ She did not believe that she would be protected by the Mexican system because the father's family was wealthy and influential and "justice could be bought" in Mexico.²⁵⁹ The court ordered the child's return.²⁶⁰

²⁵² In re Application of Ariel Adan, 437 F.3d 381, 386 (3rd Cir. 2006) (according to Avans, even after she obtained a restraining order and her husband violated it, the police would not enforce it).

²⁵³ Weiner, *Escape*, *supra* note 9, at 626. See also Weiner, *Transnational Litigation*, *supra* note 5, at 780 ("The stories of women who flee (often not found in law reporters or even the court documents) are frequently filled with women's unsuccessful efforts to enlist the State's assistance to end the violence.").

²⁵⁴ *Miltiadous v. Tetervak*, 686 F.Supp.2d 544, 554 (E.D. Penn. 2010).

²⁵⁵ *Id.* at 555. She also testified that one time she did call the police and filed a police report, however, her husband later threatened to "throw her out of [Cyprus]" and frightened her into withdrawing her complaint.

²⁵⁶ In re Hague Child Abduction Application Arguelles v. Gaspar, No. 08-2030-CM, 2008 WL 913325, at *4 (Kan. Dist. Ct. Mar. 17, 2008).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *16.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

The courts often do not consider that escape may be the victim's only viable option because of "the country's shortcomings, her batterer's tenaciousness, or her own limitations."²⁶¹ Rather, they appear to accept that another country's ostensibly "adequate protection renders irrelevant the truth of the woman's concerns about her or the children's safety."²⁶² In *Janakakis-Kostun v. Janakakis*, despite the mother's explicit allegations about the insufficiency of the Greek judicial system and its unwillingness to protect non-Greek citizens and despite her having presented evidence of having been hospitalized with severe neck injuries from her husband's hand, the court opined that she had neither established a grave risk of harm for her child nor that the Greek courts could not adequately protect him.²⁶³ In truth, there may often be a difference between "the law on the books and the law in action."²⁶⁴

Mexico is a prime example. Even with recent legislative enactments, Mexico's civil and criminal codes remain "antiquated and cumbersome and inadequate" to meet the needs of domestic violence victims.²⁶⁵ Furthermore, the serious shortcomings of the Mexican criminal justice system commonly result in little to no protection to victims, allowing their abusers "to batter with impunity."²⁶⁶ Thus, when forced to return to Mexico after being denied any protection under the Convention, "these women face archaic civil laws designed to discourage divorce, criminal codes which punish only the most grievous injuries, and untrained,

²⁶¹ Weiner, *Escape*, *supra* note 9, at 626; *See also* Abbott brief, *supra* note 134, at 19 ("Not surprisingly, victims of domestic violence are more likely to flee with their children 'when the courts and community have failed to take the necessary steps to protect them from abuse or to hold the abuser accountable.'").

²⁶² Weiner, *Transnational Litigation*, *supra* note 5, at 769. Weiner discusses how experts can help establish whether or not a country has an effective system to combat domestic violence but acknowledges that finding and affording such experts is often difficult. *Id.* at 790.

²⁶³ *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. App. 1999).

²⁶⁴ Weiner, *Transnational Litigation*, *supra* note 5, at 785; Adams, *supra* note 14, at 58 ("Countries have implemented various mechanisms to address domestic violence but most are dysfunctional."). In *Walsh v. Walsh*, the mother went to the Irish police station after a particularly bad beating by her husband, and the police told her that "domestic violence was not uncommon in Tramore." *Walsh v. Walsh*, 221 F.3d 204, 210 (1st Cir. 2000).

²⁶⁵ Teran, *supra* note 56, at 63.

²⁶⁶ *Id.* at 67.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

understaffed, and unsympathetic law enforcement.”²⁶⁷ As stated by one scholar, “[a]ny lack of support in the country of ‘habitual residence’ will [often] be exacerbated if the woman is experiencing violence.”²⁶⁸ It is well-recognized that victims are more likely to flee with their children when the courts and community of the foreign country have failed to protect them.²⁶⁹ Yet, U.S. courts repeatedly fail to recognize this situation.²⁷⁰ As stated by one commentator, “[C]ourts are seriously misguided when they assume that the judicial system of the habitual residence will be able to protect the victim.”²⁷¹ This is particularly true of Mexico.

Demonstrating their faith in other countries’ legal systems, many U.S. courts often effectuate return by issuing an order to the country of habitual residence to make a “safe harbor” for the child prior to return.²⁷² Called “undertakings,” these are preconditions of return imposed by the court or verbal assurances promised by the left-behind parent to make safety precautions as a condition of the child’s return.²⁷³ Though issued by the returning court, they require enforcement in the country of habitual residence to be effective.²⁷⁴ As articulated by the First Circuit, “[a] potential grave risk of harm can, at times, be mitigated sufficiently by the

²⁶⁷ Teran, *supra* note 56, at 70.

²⁶⁸ Kaye, *supra* note 10, at 194.

²⁶⁹ Abbott brief, *supra* note 37, at 19, 23; *See also* Final Report, *supra* note 2, at ix (saying that the most of the mothers in the study were unable to access helpful resources in the foreign country despite repeated their attempts to do so both formally and informally, so they left to seek safety and support of family members in the U.S.).

²⁷⁰ The Kentucky Court of Appeals stated in *Janakakis-Kostun v. Janakakis*, “In Gia’s case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different from those this Court has heard many times before from defendants in proceedings in Kentucky.” *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 851 (KY App. Ct. 1999).

²⁷¹ Bruch, *supra* note 19, at 544 (“Of course every legal system is imperfect in this regard.”).

²⁷² Silberman, *Global Jurisprudence*, *supra* note 119, at 1076. However, “[i]f handing over custody of a child to an abusive parent [even with undertakings] creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over, however severely the law of the parent’s country might punish such behavior.” *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (citing *Van de Sande*, 431 F.3d at 571).

²⁷³ Final Report, *supra* note 2, at 36.

²⁷⁴ Silberman, *Global Jurisprudence*, *supra* note 119, at 1076; Weiner, *Escape*, *supra* note 9, at 676; Hoegger, *supra* note 31, at 188.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

acceptance of undertakings and sufficient guarantees of performance of those undertakings.”²⁷⁵

Undertakings may include restraining orders, temporary custody arrangements, arrangements for transportation and lodging, provisions for care of the child, and other safety considerations about where and how a child is to be returned.²⁷⁶ For example, the district court in *Walsh v. Walsh* ordered the following undertaking:

John is to provide for the transportation and escort of the children back to Ireland. Once the children reach Ireland, John is to provide adequate housing, clothing, medical care and serve as a parental figure for the children. If John cannot provide adequate housing and provisions then he must provide the Court a detailed description of how the Social Services authorities in Ireland will make these provisions. In either event, the Court is to be informed specifically what provisions are in place before the children will be ordered returned to Ireland.

If Jackie determines to return to Ireland with the children, she must do so at her own expense. If she does return to Ireland, however, 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.²⁷⁷

Courts often view undertakings as a way to best achieve the goals of the Convention while simultaneously protecting children from exposure to harm.²⁷⁸ Undertakings allow a court to consider “the full panoply of arrangements that might allow the children to be returned.”²⁷⁹ The State Department has said:

[U]ndertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.²⁸⁰

The USCA supports the limited use of undertakings when they are appropriate in scope, do not hinder an expeditious return, and do not address the merits of a custody dispute.²⁸¹ Despite the courts' endorsement of undertakings, many scholars have argued that undertakings are “illegal,

²⁷⁵ *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).

²⁷⁶ Hoegger, *supra* note 31, at 183.

²⁷⁷ *Walsh v. Walsh*, 31 F.Supp.2d 200, 207 (D. Mass. 2008).

²⁷⁸ *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).

²⁷⁹ *Blondin v. Dubois*, 189 F.3d 240, 242 (2nd Cir. 1999).

²⁸⁰ *Danaipour v. McLarey*, 286 F.3d 1, 22 (1st Cir. 2002).

²⁸¹ Final Report, *supra* note 2, at 37.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

dangerous, unfair, and inefficient” and that the undertakings remedy is “inherently flawed” in cases of domestic violence.²⁸² Yet, other scholars have advocated for the increased use of undertakings as a potentially feasible option for better dealing with domestic violence cases.²⁸³

When imposing undertakings, courts do not consider the ability or the willingness of the country upon which they impose the undertakings to enforce them. For example, in *Simcox v. Simcox*, another well-known Hague case, the court ordered return of two minor children to their violent father in Mexico with specific undertakings and never once considered the inadequacies of the Mexican system.²⁸⁴ In the case, the mother appealed from the district court decision ordering her to return to Mexico with two of her four children.²⁸⁵ The court stated that although “there was no clear picture of exactly what life was like in the Simcox household,” it found it “clear that Mr. Simcox was both verbally and physically violent with his wife and children.”²⁸⁶ The children testified to the following: that the father regularly called the mother “a f---ing bitch [and] and c---“ in the presence of the children, that he would grab the mother’s jaw and pull her hair, that once while driving he banged her head against the passenger window, and that she often had to intervene by placing herself between him and the children.²⁸⁷ The children also testified that they saw their father strike their mother on numerous occasions.²⁸⁸ The mother admitted that she never sought medical attention, either for her own injuries or for those of her children, and she never reported the abuse to any Mexican government officials.²⁸⁹ Despite the

²⁸² Hoegger, *supra* note 31, at 183; Weiner, *Escape*, *supra* note 9, at 677 (Weiner notes that the text of the Convention does not mention undertakings.).

²⁸³ Weiner, *Escape*, *supra* note 9, at 677. Weiner argues that the Convention would have to authorize undertakings to make them a widespread solution. She also recognizes that undertakings are a reasonable solution “only when the jurisdiction to which to child is to be returned adequately protects domestic violence victims.” *Id.* at 681.

²⁸⁴ *Simcox v. Simcox*, 511 F.3d 594, 598 (6th Cir. 2007).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 598-99.

²⁸⁷ *Id.* at 599.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

district court's acknowledgement of the serious abuse to both the mother and the children at the hands of the father, it still ordered the return of the children.²⁹⁰ Expressing great, unjustifiable faith in the Mexican system, the court conditioned return on certain "undertakings," supposedly designed to ameliorate the risk of harm to them upon their return to Mexico.²⁹¹ The appellate court took issue with the nature of the undertakings ordered simply because the district court had ordered the mother, not just the children back to Mexico.²⁹² Nevertheless, it upheld the decision to return the children.²⁹³

Certainly undertakings pose serious challenges of safety and enforcement.²⁹⁴ Judges do not seem to understand that a victim is in the most danger at the time when she attempts to separate from her abuser because that is when the abuser is most likely to go to extremes to maintain control.²⁹⁵ Furthermore, there is the lingering, unanswerable question as to what happens if the left-behind parent simply violates the undertakings order.²⁹⁶ Research suggests that violent parents almost never comply with undertakings; they do not follow through on their promises of good behavior.²⁹⁷ Courts have concluded that undertakings are most effective when the goal is simply to preserve the status quo as it existed pre-abduction, but clearly that should not be the goal in cases where evidence suggests that the status quo included domestic abuse.²⁹⁸

²⁹⁰ *Id.* The court ordered return even after hearing numerous testimony about Mr. Simcox's violent tendencies, including testimony from one of Mr. Simcox's friends comparing his control over his wife with the Nazi's treatment of the Jews. *Id.* at 600.

²⁹¹ *Id.*

²⁹² *Id.* at 610.

²⁹³ *Id.*

²⁹⁴ Hoegger, *supra* note 31, at 196; Kaye, *supra* note 10, at 201 (stating that courts are frequently requiring undertakings, but they cannot enforce them and neither can the courts in the countries of habitual residence).

²⁹⁵ Hoegger, *supra* note 29, at 197; See Bruch, *supra* note 19, at 541. Bruch says that undertakings are "naive at best" and that they "turn a blind eye to justice." "[W]omen are at an even higher risk of being murdered following separation than they are while sharing their households with violent men." See also Jaffe, *supra* note 51, at 59.

²⁹⁶ Hoegger, *supra* note 31, at 199 (Numerous studies support this.). See *Simcox v. Simcox*, 511 F.3d 594, 606 (6th Cir. 2007) (quoting a paper by Paul R. Beaumont & Peter B. McElevy) ("[T]here is currently no remedy for the violation of an undertaking. Contrary statements by some courts are simply wrong.").

²⁹⁷ Abbott brief, *supra* note 37, at 22 (discussing a study on the efficacy of undertakings).

²⁹⁸ *Van de Sande v. Van de Sande*, 431 F.3d 567, 572 (7th Cir. 2005).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

The Australian Law Reform Commission has expressly noted that the undertakings remedy allows the Convention to be “misused by men as a means of exercising continuing power over their partners’ for if the father discontinues proceedings once the woman and children have returned. . . ‘[t]he woman is then in an invidious position, usually in a refuge, without income and unable to leave.’”²⁹⁹ One court acknowledged that “[w]here a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all.”³⁰⁰ All in all, undertakings appear to set “a very low bar for batterers and an extremely high bar for victims.”³⁰¹

Not everyone believes that the Convention framework should be expanded to provide a remedy for domestic violence victims. Although evidence indicates that courts are continuing to narrowly interpret the grave risk defense, nevertheless, some commentators have argued that the exception has been “interpreted so broadly and so liberally” as to render the Convention “increasingly ineffective.”³⁰² The critics maintain that Article 13(b) was only “clearly intended as a humanitarian provision: to prevent the return of abducted children to abusive or dangerous family, social, or national environments (such as a return to an abusive parent or a war-torn country).”³⁰³ Indeed, a review of the drafters’ original deliberations on the grave risk exception reveals that it was not intended to be used by defendants as “a vehicle to litigate (or relitigate) the child’s best interests.”³⁰⁴ For example, the “intolerable situation” described in Article 13(b) was not intended to include return to a home where money is in short supply or where opportunities

²⁹⁹ Kaye, *supra* note 10, at 201.

³⁰⁰ *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007).

³⁰¹ *Id.*

³⁰² Skoler, *supra* note 22, at 559.

³⁰³ *Id.*

³⁰⁴ PUBLIC NOTICE 957, *supra* note 113, at 10510.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

are more limited.³⁰⁵ Instead, an example of an “intolerable situation” is one in which “a custodial parent sexually abuses the child.”³⁰⁶ As the court in *Friedrich II* held, “[t]here is harm when returning the child to a country of war, famine, or disease, or when it’s a case of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”³⁰⁷ However, what the advocates for extremely limited exceptions to return do not seem to realize is that there is grave harm in returning a child to a home of domestic violence.³⁰⁸

Currently, courts’ very limited applications and perceptions of the grave risk defense, such as that expressed in *Friedrich II*, unequivocally hamper the ways in which domestic violence victims can defend their actions. With courts’ continued dependence on undertakings as a remedy and their need to abide by the Convention’s mandate of “narrow” exceptions, “[a]t best, Article 13(b) [currently] 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.”³⁰⁹ A domestic violence victim’s successful invocation of the exception will often hinge on the “sympathy of the particular judge.”³¹⁰ Thus, while some “[i]ndividual judges have made admirable attempts to

³⁰⁵ *Id.* Indeed, “if that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living.” *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010).

³⁰⁶ PUBLIC NOTICE 957, *supra* note 113, at 10510.

³⁰⁷ *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).

³⁰⁸ Abbott brief, *supra* note 37, at 29 (“Most commonly, courts fail to recognize abuse of a child’s mother as indicative of grave risk of ‘physical and psychological harm’ to the child or an ‘intolerable situation’ under Article 13(b).”).

³⁰⁹ *Weiner, Escape*, *supra* note 9, at 662.

³¹⁰ *Id.* at 674. *See also* *Weiner, Transnational Litigation*, *supra* note 5, at 793 (arguing that judges adjudicating Hague proceedings should be trained specifically on domestic violence). For court decisions involving specific instances of spousal abuse that compelled findings that the grave risk of harm affirmative defense applied, *see, e.g.*, *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (reversing order of return where the father had

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

ameliorate the Convention's injurious impact on domestic violence victims," overall the efforts are too haphazard.³¹¹ The problem is that rulings are "highly variable" and unpredictable.³¹² Indeed, even the Sixth Circuit has acknowledged that the "difficult question" is what precise level of harm triggers the Article 13(b) exception, admitting that "[t]here is no clear answer."³¹³ Right now, the Convention's indeterminable position on domestic violence and where it fits under the umbrella of return exceptions is working against the Convention's goal of promoting global jurisprudence and is instead working to cultivate global confusion.

VI. Original Intention of the Convention vs. Contemporary Reality

When the drafters designed the Convention, they did not take domestic violence into account, and they considered abduction as always being detrimental to a child. The preamble to the Convention expressly declares: "[T]he interest of children are of paramount importance in matters relating to their custody."³¹⁴ As further explained in the official Convention report:

[T]he presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.³¹⁵

"beat[en] his wife severely and repeatedly in [the children's] presence," and also threatened to kill them); *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000) (reversing order of return where father was psychologically abusive and had severely beaten the children's mother in their presence); *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394, 398-400 (E.D.N.Y. 2005) (refusing return where father frequently hit the children, threatened to kill his son, and severely abused their mother in their presence); *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456, 459-60 (D.Md.1999) (refusing return where child had been belt-whipped, punched, and kicked, and where the child's mother had been subjected to more serious attacks, including choking her and breaking her nose).

³¹¹ Weiner, *Transnational Litigation*, *supra* note 5, at 799.

³¹² Hoegger, *supra* note 31, at 188.

³¹³ *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007).

³¹⁴ Hague Convention, *supra* note 16, at preamble. The preamble goes on to declare that the signatory States desire "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return."

³¹⁵ Pérez-Vera Report, *supra* note 178, at ¶24 (citing Adair Dyer, *Questionnaire and Report on international child abduction by one parent*, Prel. Doc. No. 1, August 1977, at 21).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

The Convention drafters thus assumed that abduction almost always harms children.³¹⁶ Though various definitions exist, parental abduction most often occurs when three conditions are met:

“(a) an attempt was made to conceal the taking or whereabouts of the child and to prevent contact with the child; or (b) the child was transported out of state, or (c) there was evidence that the abductor had intended to keep the child indefinitely or permanently affect custodial privileges.”³¹⁷ The Convention drafters focused solely on “the grave negative implications” for a child’s wellbeing as caused generally by parental abductions.³¹⁸ As policy makers have done historically, they treated international parental child abductions as “a monolith, despite [the] significant differences between the types of abduction.”³¹⁹ They did not consider domestic violence in their analysis.³²⁰ Despite the Convention’s unduly simplified philosophy of abduction always being detrimental to the child, recent social science literature and research has found that “harm does not befall every abducted child.”³²¹ Indeed, actually “the harm experienced from abducting may be less than the harm encountered from not abducting.”³²²

Currently, the U.S. agencies in charge of implementing the Convention continue to disregard the prevalence of domestic violence in abduction cases. The 2009 House report on the Convention stated the following: “It is the sense of Congress that the United States should set a strong example for other Hague Convention countries in the timely location and return of children wrongly removed from and retained in the United States.”³²³ The U.S. and its judiciary

³¹⁶ Weiner, *Escape*, *supra* note 9, at 616. Weiner describes the drafters’ image of the prototypical abductor as being the non-custodial parent who would kidnap the child and then subject the child to life underground, which would lead to instability and disruption of emotional attachment and perhaps to abuse.

³¹⁷ Final Report, *supra* note 2, at 17.

³¹⁸ *Id.* at 7.

³¹⁹ Weiner, *Escape*, *supra* note 9, at 601.

³²⁰ *Id.* at 605 (pointing out that domestic violence was not highly visible as a political issue in the late 1970s and early 1980s).

³²¹ *Id.* at 622-3. *See generally* at 620-3 for a more complete analysis of the effect abduction may have on children.

³²² *Id.* at 622-3.

³²³ H.R. 3240, *supra* note 103.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

are so preoccupied with being the role models for other Hague signatory countries that they have failed to recognize the flawed objectives of the Convention. Indeed, even in its most recent 2010 report, the State Department did not consider domestic violence as an issue in Convention cases, for it described international parental child abduction as always being “a tragedy which abruptly and brutally breaks the relationship between a child and his or her left-behind parent.”³²⁴

When other signatory countries implement the exceptions to return set forth by the Convention, perhaps taking domestic violence allegations seriously into consideration and trying to squeeze them under an exception, the U.S. immediately brands them as “non-compliant” or as “demonstrating patterns of non-compliance.” Moreover, when the other countries, such as Switzerland at the Fifth Meeting,³²⁵ have proposed more flexible interpretations of the grave risk defense specifically to incorporate domestic violence or when they have endorsed new procedures to help domestic violence victims better establish a defense, the U.S. has unceremoniously rejected their proposals.³²⁶ Disregarding the dynamics of family violence, one of the U.S. delegates at the Fifth Meeting of the Special Commission made the statement that “[r]arely is abduction a sign of love.”³²⁷ The delegate apparently failed to consider a desperate mother fleeing with her child from an abusive partner and an unsympathetic foreign nation. After observing the U.S.’ performance at the Fifth Meeting, Professor Merle Weiner concluded that it was “a failure of U.S. foreign policy.”³²⁸ The U.S. apparently just dug its heels in and appeared “rigid and dogmatic in defense of the status quo.”³²⁹ Under the non-custodial-father-

³²⁴ Dept. Report, *supra* note 122, at 10.

³²⁵ Lowe & Horosova, *supra* note 8, at 88-9. Switzerland is noted for having a high rate of return.

³²⁶ Weiner, *Fifth Meeting*, *supra* note 24, at 283.

³²⁷ *Id.* (citing her own notes from the proceedings). However, as Weiner points out in another article, “[i]n this country, we recognize the importance of removing a child from an abusive household.” The State will remove children, for example, when mothers fail to protect their children from domestic violence. Weiner, *Escape*, *supra* note 9, at 623.

³²⁸ Weiner, *Fifth Meeting*, *supra* note 24, at 222.

³²⁹ *Id.*

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

abductor standard, the Convention's expedited return procedure and extremely narrow exceptions made complete sense.³³⁰ However, the Convention remedies no longer fit the current situation, and the U.S. Convention officials must come to realize that they are now defending a pipedream.

As discussed previously, U.S. courts often order the return of the child even after the mother has demonstrated patterns of significant spousal abuse.³³¹ However, these results do not correspond with the original Convention goals.³³² The Convention strives to protect children. A child will not be protected when returned to a country like Mexico that boasts a wholly inadequate infrastructure for dealing with domestic violence. Though the Convention prohibits inquiries into the child's best interest except in extreme circumstances, surely the child's safety and well-being should be allowed to be taken into consideration when courts consider ordering return to a potential abuser. Despite the uncontroverted evidence that now reveals that the vast majority of abductors are primary caretaker, custodial mothers fleeing from domestic violence,³³³ the Convention and the courts that oversee Hague proceedings persist in stigmatizing the abductor. While the Convention officials and enforcers focus on the traumatic, emotional hardships apparently suffered by the left-behind parent, they ignore the years of domestic abuse endured by the victim-abductor. For example, the 2009 House of Representatives report on the Convention devotes a whole section to a discussion of the "substantial psychological, emotional,

³³⁰ Weiner, *Strengthening Article 20*, *supra* note 26, at 702.

³³¹ *See generally* Whallon v. Lynn, 230 F.3d 450, 460 (1st Cir. 2000) (ordering the return of the child to Mexico and holding that the mother's allegations of verbal abuse and physical shoving did not represent the harm contemplated under article 13(b) and that "to conclude otherwise would risk substituting a best interest of the child analysis for the analysis the Convention requires.").

³³² Final Report, *supra* note 2, at 2.

³³³ Weiner, *Fifth Meeting*, *supra* note 24, at 222.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

and financial problems” faced by left-behind parents.³³⁴ The report mentions nothing about domestic violence victims.

Mothers who abduct their children to escape domestic violence are often viewed as selfish and morally repugnant.³³⁵ Indeed, as one scholar put it, “[A] whole category of bad mothering is reserved for women who appear to be placing their own needs or interests ahead of their responsibility to the children.”³³⁶ Yet, “[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.”³³⁷ One study of domestic violence in general found that “the most common reason given by abused women for leaving their partner was fear for their children’s safety, as well as their own.”³³⁸

Under the current system, batterers are in a prime position to exploit the Convention to maintain control over their victims. Because most domestic violence is characterized by the use of violence to control the victim, “[i]t should come as no surprise, then, that the victim’s unilateral decision to leave the household or make recourse to the legal system [usually] incenses the abuser.”³³⁹ Thus, batterers often utilize custody litigation to reassert dominance.³⁴⁰ Indeed, research has proven that batterers are more likely to apply for custody.³⁴¹ As one scholar phrased it, when a couple divorces or separates, “the legal system may become a symbolic

³³⁴ H.R. 3240, *supra* note 65.

³³⁵ Weiner, *Escape*, *supra* note 9, at 622.

³³⁶ Weiner, *Transnational Litigation*, *supra* note 5, at 784 (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 148 (2000)).

³³⁷ Weiner, *Escape*, *supra* note 9, at 632.

³³⁸ Jaffe, *supra* note 51, at 62.

³³⁹ Bruch, *supra* note 19, at 542-3; Abbott brief, *supra* note 35, at 13.

³⁴⁰ Abbott brief, *supra* note 37, at 34.

³⁴¹ Jaffe, *supra* note 51, at 60.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

battleground on which the batterer continues his abuse.”³⁴² In that sense, Hague proceedings are no different from traditional custody disputes in U.S. family courts. Indeed, “[Abusers] frequently use the Convention to intimidate their victims, maintain control over them, or gain financial advantage.”³⁴³

Unfortunately, given the current framework of the Convention and the lack of available remedies for women fleeing domestic violence, the batterer often wins. When a court issues a return order, the mother faces the ominous dilemma of remaining in the state to which she has fled and allowing her children to return without her or risk returning with her children to the country and perpetrator of her abuse.³⁴⁴ The return of the child increases, not decreases, the risk of future violence for the mother since many will ultimately decide to sacrifice their own safety to return with their children.³⁴⁵ The mother is placed in an “invidious position,”³⁴⁶ for the “mere physical proximity of an abuser and his victim increases the likelihood of violence.”³⁴⁷

As scheduled, the first half of the Sixth Meeting of the Special Commission to review the operation of the Convention took place June 1-10, 2011.³⁴⁸ The Meeting succeeded in adopting a number of conclusions and recommendations to improve the Convention.³⁴⁹ Though the Commission noted that “a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority,” it deferred consideration of proposals to promote consistency in dealing with domestic and family violence allegations until Part II of the Meeting

³⁴² Abbott brief, *supra* note 37, at 34.

³⁴³ *Id.* at 36.

³⁴⁴ Weiner, *Escape*, *supra* note 9, at 630.

³⁴⁵ Weiner, *Strengthening Article 20*, *supra* note 26, at 738.

³⁴⁶ Kaye, *supra* note 10, at 197.

³⁴⁷ Weiner, *Escape*, *supra* note 9, at 630.

³⁴⁸ *See* HCCH, *supra* note 30.

³⁴⁹ RECENT RECOMMENDATIONS FROM SPECIAL COMMISSION MEETING [hereinafter Recent Recommendations], available at http://www.hcch.net/upload/wop/concl28sc6_e.pdf (last visited August 1, 2011).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

in January 2012.³⁵⁰ The Commission did, however, affirm its support for promoting greater consistency in the application of the Article 13b grave risk defense.³⁵¹ It also recognized that “regard should be given to the impact on a child of violence committed by one parent against the other.”³⁵²

VI. Recommendations

The delegates to the second-half of the Sixth Meeting should consider adopting an approach to domestic violence somewhat similar to that embraced by the drafters of the UCCJEA.³⁵³ As articulated by Section 101 of the UCCJEA, the Act’s purpose is to “avoid jurisdictional competition and conflict” among the states, to facilitate the enforcement and avoid the relitigation of custody decrees of other states, “to promote cooperation” among the various state courts, and to “deter abductions of children.”³⁵⁴ Specifically, Section 208 of the UCCJEA ensures that abducting parents will not receive a jurisdictional advantage for their unjustifiable conduct.³⁵⁵ The UCCJEA thus shares a similar, albeit domestic rather than international, goal with the Hague Convention. Unlike the current Convention, however, it explicitly allows for judicial consideration of domestic violence allegations. Section 207 of the UCCJEA, addressing inconvenient forums, says that a court may “decline to exercise its jurisdiction at any time” if it finds that it is an inconvenient forum under the circumstances.³⁵⁶ It goes on to state that before making the inconvenient forum determination, the court shall consider “all relevant factors,” including “whether domestic violence has occurred and is likely to continue in the future and

³⁵⁰ *Id.* at ¶ 35-38.

³⁵¹ *Id.* at ¶ 37.

³⁵² *Id.* at ¶ 42.

³⁵³ Uniform Child-Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1999).

³⁵⁴ *Id.* at § 101.

³⁵⁵ *Id.* at § 208.

³⁵⁶ *Id.* at § 207.

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

which State could best protect the parties and the child.”³⁵⁷ The Act’s comment to Section 208 further explains that “[d]omestic 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.”³⁵⁸ Rather, “[a]n inquiry must be made into whether the flight was justified under the circumstances.”³⁵⁹ In other words, the UCCJEA does not condone parents abducting their children across state lines in order to achieve more favorable custody determinations, but neither does it seek to punish those that have done so simply to escape from the horrors of domestic violence.³⁶⁰ The UCCJEA thereby places faith in the ability of judges to ferret out credible allegations of domestic violence from those that are false.³⁶¹

Admittedly, in light of some key differences in the international context, as compared to the purely domestic scheme of the UCCJEA, the Convention delegates will not be able to simply transpose a UCCJEA-like system into the Convention. Cultural perceptions of domestic violence differ from nation to nation, giving rise to varied legal responses. American courts have already voiced their reluctance to delve too deeply into the adequacies of the other nations’ domestic violence systems. Indeed, whatever solution the delegates ultimately adopt to accommodate a domestic violence defense to the remedy of return will have to respect the

³⁵⁷ *Id.*

³⁵⁸ *Id.* at Comment to § 208.

³⁵⁹ *Id.*

³⁶⁰ As stated by one Hague court, “Certainly this Court would agree that no parent should be rewarded for wrongfully abducting a child. However, punishment of the wayward parent should not be the single decisive factor in resolving this matter.” *Steffen v. Severina*, 966 F.Supp. 922, 928 (D. Ariz. 1997).

³⁶¹ In a recent Hague case, the district court expressed frustration at the “lack of credibility of both [parties]” and stated that the “disparities [in their testimonies are] so broad this Court can only speculate on the truth.” *Simcox v. Simcox*, 511 F.3d 594, 598 (6th Cir. 2007). Nevertheless, the Sixth Circuit still found that it was “clear” that Mr. Simcox was indeed both verbally and physically violent with his wife and children. Credibility issues, as with any witness in any case, must be left up to the judge’s discretion. As stated by another court, “The court notes that determining credibility in this case, where both parents obviously care about the child’s welfare and are seeking a ruling in their favor, is a difficult task at best. At worst, it does a disservice to the parties, by tending to discredit one of the parent’s testimony. The court recognizes that each party’s truth is colored by his/her perception. Unfortunately, the court must make such determinations.” *In re the Application of Ponath*, 829 F.Supp. 363, 366 (D. Utah 1993) (quoting *Levesque v. Levesque*, 816 F.Supp. 662, 666 n. 3 (D.Kan.1993)).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

sensitive nature of passing judgment on another nation's domestic violence laws. The delegates must continue to aim towards the reduction of jurisdictional competition, while at the same time safeguarding the victim-abductor and her child.

VIII. Conclusion

The drafters certainly never intended the Convention to be “used as a vehicle” to return children to domestic violence. Yet, as it is currently being implemented, that is precisely what is occurring. The official report of the Convention said that the prompt return must “[give] way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.”³⁶² However, with no readily apparent redress for domestic violence victims and official instructions to employ the existing return exceptions sparingly, judges' hands are tied. They are often left with no choice but to order return, or to order return with futile undertakings. Judges may be unaware that domestic violence exposure creates a grave risk to children.³⁶³ Yet, even if the judges are aware, with the Convention's continued lack of official recognition of domestic violence as a viable defense to the return remedy and the U.S.'s current refusal to advocate for a broader interpretation of the grave risk defense, there is little they can do if they are to comply with the Convention.³⁶⁴ According to one court, “It thus makes sense that ‘the Convention’s purposes [would] not. . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.”³⁶⁵ Indeed, it does not make sense. As critics have observed, “The Convention cannot have it both

³⁶² Pérez-Vera Report, *supra* note 178, at ¶ 29.

³⁶³ Final Report, *supra* note 2, at xii.

³⁶⁴ See *Foster v. Foster*, 654 F.Supp.2d 348, 362 (W.D. Penn. 2009) (after listing the multitude of poor parental attributes of the father and acknowledging that he had been physically abusive on at least two occasions, the court went on to say the following: “It is important to stress, that, under the Hague Convention, I am not charged here with resolving issues germane to a custody dispute. If I were, this would be in basketball parlance, a ‘slam dunk.’ But issues of custody are for the Canadian courts. . . I am constrained to conclude that Respondent has failed to demonstrate [a grave risk of harm].”).

³⁶⁵ *Simcox v. Simcox*, 511 F.3d 594, 604-605 (6th Cir. 2007) (citing Weiner, *Uniformity and Progress*, *supra* note 119, at 352-3).

*This paper is posted by permission of the author, and is not to be duplicated in any form without express permission of the author.

ways—purport to be acting in the interest of children generally and yet give no consideration to the general situation,” which now appears to be that primary caretakers are the ones who abduct their children to escape from domestic violence.³⁶⁶ A recent study conducted on the effectiveness of the Convention concluded, “What is both interesting and not altogether welcome (given that the Convention ought to be working as a deterrent to abduction) is the finding that the number of abductions is increasing.”³⁶⁷ If the Convention is ceasing to work as a deterrent and its original base premise is now largely recognized by the international community as being unsound, surely these are grounds to call for a reworking of the Convention. As Professor Weiner artfully put it, “The Hague Convention was a magnificent solution to one type of social injustice. Time has shown it causes another.”³⁶⁸ At the upcoming second-half meeting of the Sixth Meeting of the Special Commission, changes must be realized. Calling for a reformation of the Convention to recognize an explicit defense for domestic violence victims, to eliminate countries’ abilities to take interpretive liberties, and to foster a renewed global jurisprudence may be the best route to follow.

³⁶⁶ Lowe & Horosova, *supra* note 8, at 70 (quoting Marilyn Freeman, *In the Best Interests of Internationally Abducted Children?—Plural, Singular, Neither or Both*, IFL 77, 82 (2002)). Lowe and Horosova disagree with this proposition because they believe that it is basically wrong for children to be uprooted unilaterally by any parent, though they do acknowledge that the argument is weakened if the left-behind parent is violent and the abductor is escaping to her family abroad.

³⁶⁷ Lowe & Horosova, *supra* note 8, at 100-1 (finding the overall return rate for 2003 to be about 50%).

³⁶⁸ Weiner, *Strengthening Article 20*, *supra* note 26, at 744.