INTERNATIONAL PARENTAL CHILD ABDUCTION: CONCEPTUALIZING NEW REMEDIES THROUGH APPLICATION OF THE HAGUE CONVENTION

INTRODUCTION

Family law issues that were once exclusively resolved within the national arena are now demanding international application.[1] Marriages and families have been traditionally local in character, but as international relationships and marriages increase, so do international divorces and custody disputes.[2] Family law is laden with cultural values and presumptions about gender roles and what is best for children.[3] In Islamic law, for instance, fathers and mothers have different preordained roles in their children's lives than in Western cultures.[4] In Mexico, mothers are the presumptive best caretakers for young children.[5] In addition to cultural standards infiltrating family law is the infusion of nationalism, which may create a subconscious presumption in favor of the decision-maker's home country.[6]

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1. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 2 (1999).

2. *See id.*

3. Thomas Foley, Note, *Extending Comity to Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 258 (2003).

> The legal institutions of various cultures around the world define the best interests of a child differently. The religious and social values of a society dictate the answers to legal questions of custody, parental authority, upbringing, permissible social behavior of minors, and degrees of freedom . . . U.S. custody law, which focuses on the needs of the child and each parent's ability and willingness to meet those needs . . . [is distinguished from] custody law in Islamic nations, where social and religious values of Islam answer questions of parental authority and fitness.

Id. (internal citations omitted).

4. *Id.* at 260–61.

> Even though the father has ultimate legal custody of his children, it is lawful that the mother has physical custody during their "years of dependency," which last until the age of seven for boys and nine for girls. After this point, the child starts his or her spiritual upbringing under the guardianship of the father . . .

Id. (internal citations omitted). It is important to note, however, that "[a]part from Burkina Faso, no Muslim nation has ratified or acceded to the Hague Convention." *Id.* at 261. Therefore, specific issues posed to international custody disputes between Western democracies and Islamic nations are beyond the scope of this Note.

5. Whallon v. Lynn, 230 F.3d 450, 456 (1st Cir. 2000). "Mexican law [has a] preference in divorce cases toward placing what is called 'custody' of a child under age seven with the mother." *Id.*

6. *See* Elisa Pérez-Vera, *Explanatory Report*, *in* 3 HAGUE CONFERENCE ON PRIVATE

Familial decisions, such as where to live and raise children, are generally retained in the family unit. Ideas of family autonomy generate state deference in child-rearing decisions, and parents are presumed to represent their child's best interests.[7] When family units break down, however, deciding where children will be raised is a choice wrought with competing interests. Rather than a unified familial interest, each person's interest is conceptualized as being independent once the marital relationship breaks down.

Within the context of deteriorating family relationships is the possibility of parents abducting their own children. Parental abduction is recognized as a much different phenomenon than stranger kidnapping, in that it is often fueled by distinct motivations.[8]

The Hague Convention on the Civil Aspects of Child Abduction (Hague Convention)[9] was drafted in 1980 to combat the perceived

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INTERNATIONAL LAW: ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION 426 (1982) [hereinafter Pérez-Vera Report]. On this point, the Pérez-Vera Report notes:

> It can happen that such a decision is the most just, but we cannot ignor (sic) the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

Id. ¶ 22. The significance of the Pérez-Vera report is described as being an:

> . . . Explanatory Report on a text which is destined to become positive law, that is to say a text which will require to be cited and applied, must fulfil (sic) at least two essential aims. On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options.

Id. ¶ 5.

7. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942) (recognizing the right to family autonomy in the United States).

8. *See* Pérez-Vera Report, *supra* note 6, ¶ 13. The Pérez-Vera Report distinguishes stranger kidnappings as:

> [T]he person who removes the child . . . hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

Id. ¶ 13.

9. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter Hague Convention]. As of August 2004, there are seventy-five Contracting States to the Convention. Status Table of the Hague Convention on the Civil Aspects of International Child Abduction (Aug. 2004), *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited Nov. 5, 2004). *See* Pérez-Vera Report, *supra* note 6, ¶ 37 (noting that the scope of the Convention "is designed to regulate only those situations that come within its scope and which involve two or more Contracting States . . . [T]he applicability of the Convention's benefits will itself depend on the concept of reciprocity which in principle excludes it being extended to nationals of third countries"). In the United States, the implementing legislation is the International Child Abduction

problem of nonprimary caretakers internationally abducting their children.[10] The drafters of the Hague Convention viewed non-primary caretaker abduction as especially harmful to children,[11] and, as a result, undergirding the Hague Convention is the assumption that abducted children are removed from a place that they consider "home," and taken somewhere to which they are not similarly acclimated.[12] The drafters sought to minimize potential harm to the child and to the child's relationship with the primary caregiver.[13] The Hague Convention focuses on protecting children from abduction which, in itself, was viewed as harmful to children[14] and adopted the dual approach of creating a disincentive for would-be abductors, while remedying abductions as swiftly as possible.[15]

The Hague Convention is premised on presumptions about parental abductors that are proving to be inaccurate. In fact, contrary to the non-primary caretaker abductions that were envisioned, the majority of cases having relevance to the Hague Convention today arise when primary caretakers abduct their own children.[16] The well-intentioned Hague Convention, meanwhile, focuses myopically on non-primary caretaker abductions. Although there should not be a primary caretaker exception to

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Remedies Act, 42 U.S.C. §§ 11601–11610 (1994) [hereinafter ICARA].

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

11. *Id.* at 8–9.

12. *See* Pérez-Vera Report, *supra* note 6, ¶ 12 (describing the outcome from a child being abducted internationally, "the child is taken out of the family and social environment in which its life has developed").

13. *See id.*

14. *Id.*

> The struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.

Id. ¶ 24.

15. *See* Press Release, Fourth Special Commission Meeting, Hague Conference on Private International Law, A Child has a Fundamental Right to Maintain Contact with Both Parents (Mar. 2001), *at* http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2264&zoek=press%20release (last visited Nov. 5, 2004) [hereinafter Hague Conference Press Release].

16. *See* BEAUMONT & MCELEAVY, *supra* note 1, at 10.

> Several explanations might be put forward which could help account for this apparently dramatic transformation in the typical profile of an abducting parent from non-custodial father to a custodian who is very often the mother . . . Recent years have seen a more inclusive approach being taken with regard to the roles played by parents in the aftermath of a failed marriage or relationship . . . . It remains to be seen whether the original stereotype might be confirmed in relation to Contracting States which for religious or other reasons embody a principle of patriarchal pre-eminence.

Id. (internal citations omitted).

the Hague Convention's application, unintended effects of the convention must be addressed as application of the Hague Convention produces a negative and disparate impact on women. One example is in the context of career-motivated international relocation. International relocation by families is highly correlated with the husband's career;[17] however, application of the convention may make it impossible for the woman to leave the new country lawfully with her children.[18] A second example of a negative disparate impact affecting women is in the context of victims of domestic violence fleeing internationally with their children, a scenario the convention does not seem to take into account.[19] The combination of highly gender-correlated factors in the application of the current Hague Convention creates a disparate impact that disadvantages women. Primary caretaker abductions do not necessarily cause the same detriment to children.[20] Returning the child to the place from which she was abducted may, in fact, be in the child's *worst* interest where return entails separation from the primary caretaker.[21] Women often abduct for their own safety, and returning the child may be contrary to the child's interest as well as public policy.[22]

It is imperative that the Hague Convention remain current to address today's trends rather than yesterday's presumptions. Because the underlying aim of the convention is to protect children and their most crucial emotional attachments, certain adjustments are needed to best provide for that aim and promote just outcomes upon application of the convention.

In Part I, this Note discusses the pre-convention difficulty in applying the "child's best interests" standard to international disputes. This Note then discusses how the lack of a uniform legal standard prompted the drafters to remove the forum-shopping incentive from parental abduction. In Part II, this Note explains the underlying aims and goals of the

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17. *Annual Transferee Demographic Survey*, 17 RUNZHEIMER REPORTS ON RELOCATION 1–2, May 1998.

18. *See infra* notes 115–31 and accompanying text.

19. *See infra* notes 132–47 and accompanying text.

20. BEAUMONT & MCELEAVY, *supra* note 1, at 11. "It might also be suggested that if the abductor exercises the primary parenting role in the relationship it will, in his or her view, be entirely natural to leave with the children." *Id*.

21. *See id.* at 7–13 (discussing the differences experienced by children depending on whether they are abducted by their primary caretaker or by someone else).

22. *See* Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about domestic Violence Here and Abroad*, 11 J. GENDER SOC. POL'Y & L. 749, 765 (2003). "Published figures indicate that seventy percent of the abductors are now mothers, typically the child's primary caretaker. Often these mothers are victims of domestic violence, and they are fleeing transnationally with their children in order to escape . . ." *Id.* (internal citations omitted).

Convention and how they are applied. Part III provides analysis of the Hague gender-based disparate impact that results from the convention. Tension exists between keeping the Hague Convention intact and making changes to alleviate its negative impact on women. Part III also presents two proposals. The first proposal evaluates habitual residence from a holistic view of the child's life rather than from the time immediately preceding the abduction. The second proposal excepts international abductions in an attempt to escape domestic violence from operation of the summary return mechanism. Finally, this Note reiterates the pressing need to reform the Hague Convention in order to actualize the important goal of protecting children while not hurting women.

I. PRE-CONVENTION APPLICATION OF THE "CHILD'S BEST INTERESTS"

Prior to the Hague Convention, no uniform international legal standard existed for resolving cases of alleged wrongful removal[23] and internationally dispossessed parents frequently faced insurmountable hurdles to having their children returned.[24] International law was ill-equipped to deal with parental child abduction, leaving many dispossessed parents without a remedy.[25] The legal standard often employed was

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23. Hague Convention, *supra* note 9, pmbl. The Hague Convention provides a legal standard for wrongful removal as follows:

> The removal or the retention of a child is to be considered wrongful where: a) It is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id. art. 3. *See also* 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986). "Generally speaking, 'wrongful removal' refers to the taking of a child from the person who was actually exercising custody of the child. 'Wrongful retention' refers to the act of keeping the child without the consent of the person who was actually exercising custody." *Id.*

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

> First, the child had to be located; then, faced with a "legal kidnapping," courts were in most instances unwilling to take any action without first investigating what was in the individual child's best interests. This inevitably led to lengthy, drawn-out proceedings and, although their aim was to find the most appropriate solution for the child, the greater the period of time which elapsed the less likely that the child would in fact benefit from being returned.

Id. (internal citations omitted).

25. *See* Pérez-Vera Report, *supra* note 6, ¶ 68. The report notes:

> [I]n terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. [T]he possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child.

Id.

referred to as the "child's best interest,"[26] which is arguably tied to subjective, culturally biased judgments.[27] No global consensus exists, as notions differ regarding the degree of autonomy and self-determination a child should be afforded.[28] Further, the differing ways of conceptualizing children's rights evoke disparate responses.[29] As a result, the child's best interest approach is the subject of much criticism.[30]

The drafters of the Hague Convention felt the subjective child's best interest approach offered forum-shopping incentives to abductors.[31] The perceived problem arose when an abductor wrongfully removed a child to a different forum and, once there, attained the court's jurisdiction to adjudicate the custody dispute. The drafters viewed such jurisdiction as false in that the child had no ties to the country other than as an abduction destination.[32] Further, where jurisdiction is "false," the child's best interest approach, infused with cultural bias, often resulted in the resolution of the custody dispute in favor of the abducting parent.[33] "[C]ourts tended to rule that the child's country of habitual residence was altered by the abduction, making the country to which the child had been abducted the child's habitual residence."[34] The drafters sought to set a uniform standard that

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26. *See id.* ¶ 22. "[I]t must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child." *Id.*

27. *Id.*

28. *See id.* ¶ 24, *citing* the Parliamentary Assembly of the Council of Europe, 31st Ordinary Session, Recommendation 874 on a European Charter on the Rights of the Child (Oct. 4, 1979), *at* http://assembly.coe.int/Documents/AdoptedText/ta79/BREC874.pdf (last visited Nov. 5, 2004). "Children must no longer be regarded as parents' property, but must be recognised [sic] as individuals with their own rights and needs." *Id.* at 3.

29. *See* Pérez-Vera Report, *supra* note 6, ¶ 21.

30. *See id.*

> [T]he legal standard "the best interests of the child" is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word "ultimate" gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the "interests" of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age.

Id. (internal citations omitted).

31. *See* Pérez-Vera Report, *supra* note 6, ¶ 14 (describing wrongfully disposed parent's disadvantage, even when proceedings were initiated in a timely fashion). "[T]he abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable [sic] to his own claims." *Id.*

32. Pérez-Vera Report, *supra* note 6, ¶ 11.

33. *See supra* note 3 and accompanying text.

34. Laura C. Clemens, Note, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT'L L. & COM. 151, 155 (2003).

would be in the children's collective best interests by removing this forum-shopping incentive for abductors. Thus, the subjective case-by-case analysis of the child's best interest standard largely abrogated.[35] Replacing the manipulable "child's best interest" standard is the Hague Convention's inflexible denial of jurisdiction in the abducted-to country to so much as hear the merits of the underlying custody dispute, unless one of the very narrow exceptions applies.

II. THE HAGUE CONVENTION AND ITS APPLICATION

A. The Goals of the Hague Convention

International child abduction, for purposes of private international law, is defined as the "unilateral removal or retention of children by parents, guardians or close family members."[36] It is a distinctly different problem than kidnapping by a stranger,[37] and perceived abductors were typically non-custodial/non-primary caretaker parents.[38] The stereotypical scenario envisioned at the time the Hague Convention was ratified paints a picture of an estranged father removing his child to another country, with the mother and child terribly distraught until the *status quo ante* is restored.[39] Undergirding the convention is the assumption that the abducted child removed from a place that she considers "home," and taken somewhere that she is not similarly acclimated.[40]

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35. *See* BEAUMONT & MCELEAVY, *supra* note 1, at 13 (noting the conceptual change from the individual child's best interests, to the best interests of children as a whole).

36. Saniya O'Brien, *The Trials and Tribulations of Implementing the Hague Convention on International Child Abduction: Improving Dispute Resolution and Enforcement of Parental Rights in International Arena*, 35 GEO. WASH. INT'L L. REV. 197, 197 (2003) (internal citation to BEAUMONT & MCELEAVY, *supra* note 1, at 1).

37. *Id.*

38. BEAUMONT & MCELEAVY, *supra* note 1, at 3. "When work began on the Child Abduction Convention it was commonly perceived that parental abductions were perpetrated by fathers dissatisfied with an access award they had or were about to receive in a divorce settlement." *Id.*

39. *Id.* at 9.

> Indeed, it has been recognized by Adair Dyer, former Deputy Secretary General of the Hague Conference, that in the 1970s when the Convention was being prepared the paradigm case was that of the father who became so frustrated with being denied access to his child or children after the court had granted sole custody to the mother, that he stole the child, went abroad, and then underground.

Id. (internal citations omitted).

40. *See* Pérez-Vera Report, *supra* note 6, ¶ 12 (describing the outcome from a child being abducted internationally). "[T]he child is taken out of the family and social environment in which its life has developed." *Id.*

The two related goals of the Hague Convention were to create disincentives to international parental child abduction and to return in a timely manner children who were wrongfully removed.[41] The drafters sought to remove the forum-shopping incentive from would-be abductors by denying jurisdiction to hear the custody dispute in the abducted-to forum.[42] Therefore, the Hague Convention specifically aims at remedying wrongful removals, and does not allow contracting States to hear the merits of the underlying custody dispute.[43] The drafters thought removing the great differences in international legal systems was essential.[44] Courts generally strive toward uniform global interpretation and application of the treaty and often look internationally for guiding precedent.[45] The convention, therefore, strives to promote a uniform international standard of denying jurisdiction in abducted-to states in order to dissuade potential abductors and quickly remedy abductions that have already occurred.

Seeking to protect children from the harmful effects of abduction, the drafters conceptualized a convention that would not only deter potential abductors, but would also provide an efficient remedy for past abductions.[46] The drafters determined "[t]he principle underpinning the convention is that a child is legally entitled to be in contact with both parents."[47] The corollary of the child's rights are the parents' rights. Frequently, one parent has custody rights while the other has legally enforceable access rights.[48] Although the Hague Convention ultimately

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41. *See id.* ¶ 11 (recognizing "that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child").

42. *See id.* ¶ 16.

> [S]ince one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences.

Id.

43. *See id.* ¶ 19. "[T]he Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal . . ." *Id.*

44. *Id.* ¶ 22.

45. *See* Walsh v. Walsh, 221 F.3d 204, 221–22 (1st Cir. 2000) (holding in dictum "[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").

46. Pérez-Vera Report, *supra* note 6, ¶ 17 (stating that while the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions").

47. *See* Hague Conference Press Release, *supra* note 15.

48. Pérez-Vera Report, *supra* note 6, ¶ 26.

> [T]he rule concerning access rights also reflects the concern to provide children with family

adopted access rights for non-custodial parents, it was noted that there is a school of thought that thinks it is not in the child's best interest to remain in contact with both parents when they are separated.[49]

B. How the Hague Convention Functions

The drafters of the Hague Convention sought to remedy a specific type of parental abduction, specifically abduction by the non-custodial parent.[50] The international case law has demonstrated that, in actuality, it is frequently the primary caretaker who is the abductor.[51] The case law portrays a different story than what was originally anticipated. It is frequently the primary caretaker (and often the mother) who wants: to return to her country of origin after a failed marriage; to escape an abusive situation; or to simply be close to her family while raising her children.[52] Therefore, a great number of the abductions falling under the convention are far removed from those hypothesized by its drafters.

The Preamble of the Hague Convention makes the child's right gainst being removed paramount.[53] Included in this right are protections against being uprooted and replanted in a foreign country.[54]

> relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. . . . [A]ccess rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

Id.

49. *Id.*

> However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact.

Id.

50. *See supra* note 16 and accompanying text.

51. BEAUMONT & MCELEAVY, *supra* note 1, at 9. "[I]n an overwhelming number of cases the abductor was vested with custody right over the child." *Id.*

52. *See id.* at 3–4; *see also* Kerri Smetzer Mast, Note, *The Application of the Fundamental Principles Exception of the Hague Convention on the Civil Aspects of International Child Abduction*, 17 EMORY INT'L L. REV. 241, 245–46 (2003); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 277–78 (2002) (considering solutions and implications of altering remedy of return in recognition of the actual demographics of abductors being primary caretakers).

53. Hague Convention, *supra* note 9, pmbl. The Preamble of the Hague Convention states:

> The struggle against the great increase in child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests

The drafters sought to protect children from abduction by eliminating forum-shopping incentives and restoring their pre-abduction status.[55] To accomplish these aims, the drafters limited jurisdiction in countries to which abductors travel,[56] allowing jurisdiction in the abducted-to country solely to adjudicate whether there was a wrongful removal.[57] The abducted-to country does not have jurisdiction to hear the merits of the underlying custody dispute before determining whether the child was wrongfully removed from the alleged abducted-from country.[58] If the child was wrongfully removed and the abduction is not subject to the limited exceptions, the abducted-to country's court orders the child sent back to the abducted-from country; this process is known as the summary return mechanism.[59] If the abduction is *not* wrongful, the summary return mechanism does *not* apply and jurisdiction is *not* denied by the Hague Convention.[60]

C. Elements to Evaluate when Determining if the Summary Return Mechanism Applies

In an action under the Hague Convention, the first step is to determine whether the child was wrongfully removed.[61] In evaluating whether removal or retention of a child is wrongful,[62] courts look to whether the

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of the child.

Id. *See also* Pérez-Vera Report, *supra* note 6, ¶ 25 (noting that the child's best interest approach has not been disregarded, as "the two objectives of the Convention—the one preventative, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child'").

54. *See id*. ¶ 24.

> The 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.

Id. (internal citations omitted).

55. *See id.* ¶ 16. "The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State.'" *Id*. (internal citations omitted).

56. *Id.*

57. *Id.*

58. *See id.*

59. Hague Convention, *supra* note 9, art. 3 (providing when a removal or retention is to be considered wrongful).

60. *Id.*

61. *Id*. art. 3 (defining wrongful removal or retention).

62. *See* Toren v. Toren, 191 F.3d 23 (1st Cir. 1999) (holding that wrongful removal was not

allegedly abducted child is an habitual resident of the abducted-from country.[63] An individual can only have one country of habitual residence at a time.[64] Courts look to the time period immediately preceding the removal or retention to evaluate the child's habitual residency and to determine whether the removal or retention was wrongful.[65]

The Hague Convention provides limited and specific exceptions to the summary return mechanism that function as affirmative defenses for the alleged abductor.[66] A child is not required to be returned to the abducted-from country if: (1) the person seeking the return of the child under the Hague Convention was not exercising custody rights at the time of the abduction;[67] (2) the person seeking the return of the child consented;[68] (3) the child is put in grave risk of exposure to physical or psychological harm or otherwise placed in an intolerable situation;[69] or (4) returning the child would be contrary to fundamental freedoms.[70] Summary return may

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found under the Convention because the mother was abroad, as allowed by their custody agreement). The court noted that, "the language and structure of Article 3 of the Hague Convention clearly indicate that there must be an initial determination as to whether there has been a removal or retention before any inquiry can be made into whether such removal or retention was wrongful." *Id*. at 27.

63. Pérez-Vera Report, *supra* note 6, ¶ 66. The Report describes "habitual residence" as "a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." *Id*. *See also* Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) (recognizing "'[h]abitual residence' is not defined in the language of the Hague Convention or by ICARA, and the text of the Convention directs courts to only one point in time in determining habitual residence: the point in time "immediately before the removal or retention") (citing Hague Convention, *supra* note 9, art. 3). In contrast, the court in *Delvoye v. Lee* found that "[t]he determination of a person's habitual residence is a mixed question of fact and law." Delvoye v. Lee, 329 F.3d 330, 332 (3d Cir. 2003). The court further asserted that, "in practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian." *Id.* at 333 (citing BEAUMONT & MCELEAVY, *supra* note 1, at 91). *See also* Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (setting a habitual residence standard). *But see* Paz v. De Paz, 47 Fed. Appx. 22 (2d Cir. 2002). "Parental intent is an important and in some cases dispositive factor in determining the habitual residence of a child." *Id.* at 23.

64. *See* Pérez-Vera Report, *supra* note 6, ¶ 66.

65. *See supra* note 63 and accompanying text.

66. Hague Convention, *supra* note 9, art. 13.

67. *See id*. art. 13(a) (stating "[t]he person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention").

68. *Id.* Article 13 also states that summary return is unavailable if the person "had consented to or subsequently acquiesced in the removal or retention . . ." *Id*.

69. Pérez-Vera Report, *supra* note 6, ¶ 29. The adoption of this text caused a serious breach in the consensus that had prevailed up to this point in the Hague Conference proceedings.

> Actually . . . the text . . . had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State.

Id. ¶ 32.

70. Hague Convention, *supra* note 9, art. 20.

likewise be refused if the child has attained an age and maturity that makes it appropriate to take the child's views into account.[71]

The exceptions to the summary return mechanism were purposely designed by the drafters to be very narrow so as not to undermine the effectiveness of the convention.[72] After a wrongful removal or retention is proven, the court determines whether an exception to the summary return mechanism applies.[73] The following describes the major exceptions to the summary return mechanism.

1. Exception One: The Parent Seeking Return of the Child Was Not Exercising Custody Rights

Once the court determines the child's habitual residence is the abducted-from country, it determines whether the child's removal was wrongful. The first step is to assess the parent's custody rights prior to the abduction.[74] If there is an existing court order defining the custody rights of the parents, the evaluating court abides by it.[75] In the absence of such an order, the court will look to the law of the abducted-from country to determine parental custody rights.[76] If custody rights did not exist or they

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71. *See id*. art. 13(b) (stating, "the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views").

72. *See* Pérez-Vera Report, *supra* note 6, ¶ 34.

> [The exceptions] are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition.

Id.

73. *See infra* notes 74–97.

74. *See* Pérez-Vera Report, *supra* note 6, ¶ 28.

> [T]he situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect . . . or else the subsequent behaviour [sic] of the dispossessed parent shows his acceptance of the new situation thus brought about . . .

Id.

75. Fawcett v. McRoberts, 326 F.3d 491, 499 (4th Cir. 2003). "The 'Residence Order' contained in the decree [gave the father] the exclusive power to determine [the child's] residence, thereby necessarily depriving [the mother] of that same right." *Id*. *See also* Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). "[Mother] argues that the existence of a *ne exeat* clause in the divorce agreement does not transform [father's] visitation rights into custodial rights under the Convention. We agree." *Id.* at 948. A *ne exeat* clause is defined as a "writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court." BLACK'S LAW DICTIONARY 1031 (6th ed. 1990).

76. *See* Shealy v. Shealy, 295 F.3d 1117 (10th Cir. 2002). "The Convention is very clear that the law of the country in which the child was habitually resident governs decisions as to whether custody rights existed at the time of removal." *Id*. at 1124. *See also* Pérez-Vera Report, *supra* note 6, ¶ 68

were not being exercised, then the removal of the child is not deemed wrongful.[77]

Courts are wary, however, of evaluating whether custody rights were being exercised.[78] The abductor has the burden to prove that custody rights either did not exist or were not being exercised by the dispossessed parent. If the abductor is unable to meet this burden, the abduction is deemed a wrongful removal. Once a wrongful removal is found, the summary return mechanism requires that the child be returned to their country of habitual residence unless another exception applies.[79]

2. Exception Two: The Parent Seeking Return of the Child Consented

If the now dispossessed parent consented at the time of the child's removal, the abducting parent may use that consent as a defense to having to return the child.[80] The burden of proof on the issue of consent is on the abducting party.[81] If the court finds that there was in fact consent at the time of the child's removal, then the child's habitual residency is deemed irrelevant and the child will not be ordered returned.[82] Technically, if the

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(explaining the broad interpretation given to the law defining custody rights as necessary to protect parents without a formal custody decree).

77. *See Shealy*, 295 F.3d at 1117. In *Shealy*, the parties did not dispute that the child was a habitual resident of the alleged abducted-from country, nor was their dispute that the father was exercising custody rights at the time of the child's removal by the mother. Removal was not wrongful under the Hague Convention because the German custody decree had an exception for military necessity, and the mother's military assignment had been transferred to another country. Therefore, the father's rights had not been violated under the convention. That the mother requested a change of assignment, purposefully to be back in the United States and have her custody dispute decided there, did not alter the court's findings. *Id.*

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

> [A]n American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute. The [foreign] court . . . is perfectly capable of taking into account [father's] behavior . . . A decision by an American court to deny return . . . because [father] did not show sufficient attention or concern for [child's] welfare would preclude the [foreign] court from addressing these issues—and the [foreign] court may well resolve them differently.

Id. at 1065.

79. *See* Pérez-Vera Report, *supra* note 6, ¶ 72 (explaining that the exercise of custody rights is evaluated because "the Convention put its emphasis on protecting the right of children to have the stability which is so vital to them respected"). *But see id.* ¶ 73 (noting dissention regarding whether to evaluate if custody rights were being exercised in order to avoid placing a difficult burden on the claimant).

80. Hague Convention, *supra* note 9, art. 13(a).

81. 42 U.S.C. § 11603(e)(2)(B).

82. Hague Convention, *supra* note 9, art. 13(a).

dispossessed parent consents at the time of the child's removal, then it was not wrongful for purposes of the convention.[83]

3. Exception Three: The Child Would Face a Grave Risk of Physical or Psychological Harm

Another exception to the summary return mechanism arises when there is a grave risk[84] that the child's return would expose the child "to physical or psychological harm or otherwise place him in an intolerable situation."[85] Courts have routinely blocked abducting parents from introducing evidence that the child would suffer great harm by being separated from the abducting parent.[86] Taken to its natural end, that policy creates perverse results by not considering evidence such as the child's deep attachment to the primary caretaker, which very well may cause great injury to the child if separated.[87]

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83. *See* Pérez-Vera Report, *supra* note 6, ¶ 115.

84. *See* ICARA, *supra* note 9, § 11603 (e)(2)(A). ICARA provides that a respondent who opposes the return of the child by asserting the article 13(b) exception has the burden of proving this by clear and convincing evidence. *Cf.* Thomson v. Thomson, [1994] S.C.R. 591, 596 (Supreme Court of Canada finding that the harm contemplated by article 13(b) also amounts to an intolerable situation, and further noting that there is disagreement as to whether "the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation"); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000) (focusing on actions that may be taken in the country of the child's habitual residence in order to mitigate the grave risk of harm).

85. *See* Hague Convention, *supra* note 9, art. 13(b); Pérez-Vera Report, *supra* note 6, ¶ 29 (explaining that the child's interest of not being removed is overridden by, "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation").

86. *See, e.g.*, Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995). The abductor was a stay-at-home mother and the children's primary caretaker. She cited studies recognizing potential psychological harm in separating children from their primary caretakers. However, the Court was unwilling to consider evidence that the children would be harmed through separation from their mother and the children were ordered to be sent back to the abducted-from country. *Id*.

87. *See* Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995). "The district court incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk that would expose him to physical or psychological harm or otherwise place him in an intolerable situation." *Id*. at 377. The court noted that the child was six months old; there was a possibility that the baby could be institutionalized during the pendency of the Mexican custody proceedings; and the mother claimed that she had been physically, sexually, and verbally abused by her husband. These factors were not considered by the court. *See also* Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) (setting a high standard for what poses a grave risk).

> First, there is a grave risk of harm when return of a child puts the child in imminent danger *prior* to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, 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.

Id. Accord Thomson v. Thomson, [1994] D.L.R. 253, 286 (defining the degree of harm necessary to qualify under the 13(b) exception as "harm to a degree that also amounts to an intolerable situation").

When evaluating grave risk, the court considers what steps can be taken in the abducted-from country to mitigate the potentially grave risk of returning the child.[88] In case law, potential mitigating factors in the abducted-from country are called undertakings. The question of grave risk analysis and whether the abducted-from country will be able to provide sufficient undertakings to ensure the child's safety is especially poignant when domestic violence is alleged. There is conflicting precedent controlling whether spousal abuse constitutes grave risk under the convention's exception.[89] This illustrates that courts do not easily find a grave risk exception to the summary return mechanism; it is construed narrowly and fails in most cases.[90]

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

> The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction. Given the strong presumption that a child should be returned, many courts, both here and in other countries, have determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm.

Id. *But see* Danaipour v. McLarey, 286 F.3d 1, 21 (1st Cir. 2002) (holding that sexual abuse allegations were to be decided in the abducted-to country when evaluating whether there is a 13(b) grave risk exception, rather than taking the approach of sending children back to the abducted-from country and allowing sexual abuse allegations to be investigated through that court system).

89. *See Walsh*, 221 F.3d at 220 (finding undertakings would be inadequate, because although Irish courts would issue protective order, the father's history of disobeying court orders would leave the children's grave risk unmitigated).

> First, [the father] has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe. His temper and assaults are not in the least lessened by the presence of his two youngest children . . . Second, [the father] has demonstrated that his violence knows not the bonds between parent and child or husband and wife, which should restrain such behavior. Third, [the father] has gotten into fights with persons much younger than he . . . . Fourth, credible social science literature establishes that serial spousal abusers are also likely to be child abusers. Fifth, both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser.

Id. (internal citations omitted). *But see Nunez-Escudero*, 58 F.3d at 378. In *Nunez-Escudero*, the mother fled Mexico to the United States with her two-month old infant. She submitted evidence that she was physically, sexually, and verbally abused by the infant's father and that the infant's father and paternal grandfather treated her as a prisoner. The district court, considering potential undertakings, including the infant being institutionalized to mitigate potential 13(b) grave risk, found that to be an intolerable situation. The appellate court reversed, reasoning that the district court improperly considered factors applicable only to the mother and father, and incorrectly factored in the potential harm to the infant if separated from his mother. The appellate court remanded to the district court with instructions "not to consider evidence relevant to custody or the child's best interests." *Id*. *See also* Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (declining to find spousal abuse applicable to the 13(b) grave risk analysis).

90. *See, e.g.*, Silverman v. Silverman, 338 F.3d 886, 901 (8th Cir. 2003) (recognizing that although a war zone may constitute a grave risk to having a child returned, the situation Israel in 1996 was not sufficiently dangerous to be considered a war zone). *But see* Danaipour v. McLarey, 286 F.3d

4. Exception Four: Return of the Child Blocked if Contrary to Fundamental Freedoms

Another exception to the summary return mechanism following an affirmative finding of wrongful removal arises when return would be contrary to fundamental freedoms.[91] This exception is the result of a compromise regarding a public policy exception.[92] The dissention stemming from the adoption of this provision highlights what may be considered the conflicting aims of the convention in that this provision provides denial of jurisdiction to the child's habitual residence.[93] This exception has never been successfully argued.[94]

5. Exception Five: Summary Return May be Denied when a Child is Found to have Sufficient Maturity and Objects to Being Returned

A final exception to the summary return mechanism is based upon the child's own objection, so long as the child is found to be of sufficient age and maturity.[95] The Hague Convention applies only to children under the age of sixteen, which gives context to the approximate age and maturity the drafters considered.[96] This provision leaves significant room for

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1, 16 (1st Cir. 2002) (finding sexual abuse of a child to constitute a grave risk). "The Article 13(b) exceptions are narrow, and should be construed narrowly by the courts." *Id.*

91. Hague Convention, *supra* note 9, art. 20 (elaborating upon when return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms").

92. *See* Pérez-Vera Report, *supra* note 6, ¶ 31 (finally agreeing that "'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed.'").

93. *See id.* ¶ 32.

> [The debate over the fundamental freedoms exception] reflected two partly different concepts concerning the Convention's objects as regards the return of the child . . . [Until now, the text] had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State . . .

Id.

94. Mast, *supra* note 52, at 253.

95. *See supra* note 71; *see also* Pérez-Vera Report, *supra* note 6, ¶ 30. "[T]he Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive . . ." *Id.*

96. *See* Pérez-Vera Report, *supra* note 6, ¶ 30.

> [This] provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example fifteen years of age, should be returned against its will.

judicial discretion as to whether a child's views will be considered and how much weight those views will be given.[97]

III. ANALYSIS

The type of international abduction the Hague Convention was drafted to address is very different from the current abductions to which the convention is being applied. That discrepancy has led to the convention applying unjustly in certain situations. In order to retain the utility of the Hague Convention, the proposed adjustments are grounded in the tenets of the convention and attempt to change as little as possible while still effecting these necessary changes. The first proposal predominantly addresses the gendered correlation of international relocation for career prospects, as well as the counterintuitive application of the convention should the accompanying spouse want to return "home" with her children. The second proposal focuses on domestic violence and the need to include an exception to the convention's summary return mechanism for domestic violence victims fleeing internationally with their children.

A. The Hague Conventions Approach to International Abduction is Based on False Presumptions

The Hague Convention must remain current to address today's trends rather than yesterday's presumptions. The problem envisioned in 1980 was non-primary caretakers abducting their children; however, it is primary caretakers who are the statistical majority of parental abductors.[98]

Id. *See also* England v. England, 234 F.3d 268 (5th Cir. 2000) (construing the age and maturity of a child).

> [I]f the age and maturity exception . . . is to have any meaning at all, it must be available for a child who is less than 16 years old . . . I would conclude . . . a 13 year old [has attained sufficient age] to take account of her views . . . [nor was there any evidence that she was immature for her age]. To the contrary, . . . [the child] was an average student academically, maintaining the school grade level commensurate with her age, and that she was engaged in a variety of sports and extracurricular activities . . . . [She] was of sufficient age and maturity that the court could give recognition to this objection.

Id. at 274–75 (dissenting opinion) (citations omitted).

97. Pérez-Vera Report, *supra* note 6, ¶ 30 (noting the Drafters considered having a minimum age at which the child's views would be considered, but that idea failed for being too arbitrary). *See also England*, 234 F.3d at 272 (ordering thirteen year-old returned to habitual residence over her protests). *But see England*, 234 F.3d at 273–74 (dissenting opinion) (stating "[The child] has clearly objected to being returned to Australia and she is old enough [thirteen] and mature enough for the Court to take account of her views." (citations omitted)).

98. *See supra* notes 38, 39, 51, and 52 and accompanying text.

One type of parental kidnapping is a non-primary caretaker[99] abducting the child for fear of not having custody rights. This type of abduction is generally thought to be motivated by shopping for a forum that would provide a more favorable award of custody.[100] Although not malevolent in the same way as stranger kidnapping, parental abduction may at times be fueled by a bare desire to harm the child's other parent, or to gain the upper-hand against the dispossessed parent.[101] From the child's point-of-view, in non-primary caretaker abduction, the consequences may be especially severe as a child's relationship with the primary caretaker is likely the most important and comforting relationship. Indeed, "home" for the child is most likely definable as being with the primary caretaker.

The perceived problem of non-primary caretakers abducting their children does not represent the statistical majority of parents who remove their children to another country.[102] In fact, the majority of parents abducting their children internationally, thereby coming within the Hague Convention's jurisdiction, are primary caretakers.[103] The motivations of primary caretakers are frequently different from non-primary caretakers. Fear of having a custody dispute resolved disfavorably likely plays less of a role in their decision to abduct the child. Further, a child's experience of being abducted by a primary caretaker is likely qualitatively different and less harmful.[104] Nonetheless, the Hague Convention does not currently recognize these distinctions and its strict workings are not altered to reflect the parent's relationship with the child.[105] This group of abductors was simply not considered in drafting the Hague Convention.

The Preamble to the convention defines its purpose as "desiring to protect children internationally from the harmful effects of their wrongful removal or retention . . . ."[106] The focus appears to be protecting children

99. Non-primary caretakers are typically fathers.

100. *See* Pérez-Vera Report, *supra* note 6, ¶ 7.

101. *See id.* ¶ 15 (describing wrongfully dispossessed parent's disadvantage, prior to the Convention even when proceedings were initiated in a timely fashion).

102. *See* BEAUMONT & MCELEAVY, *supra* note 1, at 3. *See also* Mast, *supra* note 52, at 245–46; Weiner, *supra* note 52, at 277–79 (considering solutions and implications of altering remedy of return in recognition of the actual demographics of abductors being primary caretakers).

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

104. *See id.* at 13. "[I]t might also be the case that for the children themselves the necessity of being returned is lessened. Emotionally their relationship with the abductor might be strong and possibly worthy of greater protection than that with the dispossessed custodian." *Id*.

105. Hague Convention, *supra* note 9.

106. Hague Convention, *supra* note 9, pmbl., art. 1. Article 1 states that "the objects of the present convention are: a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access are effectively respected in other Contracting States." *Id.* art. 1.

from harmful effects as distinct from wrongful removal *per se*.[107] Children's needs for protection vary greatly depending on their relationship with their abductor.[108] For instance, if abducted by their primary caretaker, it may be reasonable to conclude that they may not suffer any harmful effects.[109] Other factors that may be predictive as to whether an abduction is harmful to the child are: the relationship the child had with the dispossessed parent, how integrated the child was in the country of habitual residence (friends, school, etc.), the contacts the child has in the abducted-to state (how much time the child has spent there), and cultural factors (such as how different are the two countries in terms of, for example, language and religion).[110]

Another factor is to consider the primary caretaker's autonomy interest in raising the child. Although an automatic allowance for the primary caretaker to move wherever they want and for whatever reason would be unsound, so is the current presumption in favor of the non-primary caretaker. Whereas the Hague Convention sought to remove the forum shopping advantage from the non-primary caretaker abductor, non-primary caretakers are now vested with a great deal of power over the abducting parent.[111] The drafters formulated the convention to be strict and swift; unfortunately leaving the primary caretakers, who are generally women, in the untenable position of being without their children or returning to the country from which they escaped.[112] For many women, it is not a choice but a mandate, based on an emotional connection that forces them to be

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107. Article 1 of the convention, where wrongful removal is the sole focus, does not make this distinction. *See supra* note 106 and accompanying text.

108. *See* BEAUMONT & MCELVEAY, *supra* note 1, at 7–13 (discussing the differences experienced by children depending on whether they are abducted by their primary caretaker or someone else).

109. See *infra* note 160 and accompanying text for the proposition that it is not harmful to remove children from a situation involving domestic violence when they will continue to be with their primary caretaker as compared with remaining in contact with both parents.

110. The Hague Convention, on the other hand, does not consider the quality of contacts the child had in the abducted-from and abducted-to states.

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

> To the extent that domestic violence was considered at all by policy makers, fathers were sometimes thought to abduct their children as a way of abusing the children's mothers. Against this backdrop, the Hague Convention's quick 'right of return' remedy and its limited defenses made perfect sense. However, the Hague Convention framework makes far less sense as a remedy for abductions by primary caretakers, often mothers, who take their children with them when they flee from domestic violence.

Id.

112. *See* Weiner, *supra* note 22, at 750. "[Battered women's] relationships with their children may be more important than their own safety. Asking these battered women to safeguard themselves at the expense of their relationship with their children, or at the expense of their children's well-being, may be asking the impossible." *Id*. (internal citations omitted).

with their child.[113] The power imbalance now existing must be retooled in order to better protect women and children.

Although the terms primary and non-primary caretaker appear gender-neutral, in reality they are not. The great majority of primary caretakers are women, whereas the great majority of non-primary caretakers are men.[114] These gender-correlated relationships, in conjunction with the different social realities affecting women, combine to highlight the disconnect between the problem the Hague Convention sought to remedy, and the situations to which it is currently being applied.

B. Women, as Primary Caretakers, are Disadvantaged by the Hague Convention

1. Gendered Effects in Employment

One example of how the Hague Convention disadvantages women is in the context of international career relocation. The division of labor within families, as well as the wage gap in paid labor, continues to be largely divided along gender lines.[115] These two forces combine such that international family relocation in pursuance of career opportunity is more likely to be for the father's career than for the mother's.[116] Although a growing number of families are dual-income, if one parent stays home to raise the children it is still most likely the mother.[117] Even when both parents work, commonly the mother earns much less than the father.[118]

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113. *Id.*

114. *See* Gender Issues Research Center, *Child Support Facts*, *at* http://www.gendercenter.org/support.htm (last visited Feb. 2, 2005) (noting that in the United States, in 1998, 85.1% of custodial parents were women).

115. *See generally* Philip N. Cohen, *The Gender Division of Labor: "Keeping House" and Occupational Segregation in the United States*, 18 GENDER & SOC'Y 239 (2004) (discussing gender segregation, inequality, and divisions of labor in the paid labor market and in the home).

116. *See* Regina M. Watkins et al., *The Juxtaposition of Career and Family: A Dilemma for Professional Women*, ADVANCING WOMEN IN LEADERSHIP JOURNAL (Winter 1998), *at* http://www.advancingwomen.com/awl/winter98/awlv2_watkins5.html (last visited Oct. 26, 2004).

> Few women have the luxury of relocating in order to attain job advancement. Ninety percent of women reported they would relocate only if their husbands secured employment. Seventy-five percent of men would relocate for a better job with or without the spouse's employment. In fact, our society 'discourages family change for the sake of a wife's career.'

Id.

117. *See, e.g.*, U.S. Census Bureau Press Release, *"Stay-at-Home" Parents Top 5 Million, Census Bureau Reports*, Nov. 30, 2004, *at* http://www.census.gov/Press-Release/www/releases/archives/families_households/003118.html (last visited Feb. 5, 2005) (reporting "5.4 million moms and 98,000 dads" are stay-at-home parents).

118. *See, e.g.*, Marie Drolet, *The Male-female Wage Gap*, 2 PERSP. ON LAB. & INCOME 12 (2001), *at* http://www.statcan.ca/english/studies/75-001/01201/hi-fs_200112_01_a.html (last visited Feb. 5,

Further, women continue to shoulder more of the child-rearing responsibilities in dual-income families and frequently work fewer paid hours than men.[119] Therefore, if a family is going to relocate internationally on account of career incentives, it is more likely to be for his career than for hers.[120]

Career opportunities, including those requiring international relocation, are frequently open-ended as opposed to having a set duration.[121] When a family relocates internationally, however, the open-ended aspect of the move means that the child's habitual residency, as proscribed by the convention, will be changed.[122] The inquiry into the child's habitual residence is not affected by the mother's reluctance to relocate.[123] At the junction of deciding whether to move, the Hague Convention applies in a counterintuitive way. If a woman chooses to keep her family intact and move with her husband, and later decides to return "home" with her children, the act of returning home is considered international child abduction.[124] However, her willingness to move was likely conditioned upon the continuance of her marriage.[125] In the event of marital discord, a

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2005). "In 1997, the average annual earnings of women working full-year, full-time [in Canada] were 73% of men's." *Id*.

119. U.S. Dep't of Labor, *Workers are on the Job More Hours over the Course of the Year*, ISSUES IN LABOR STATISTICS (Feb. 1997) (reporting the average annual work hours to be 1,905 for men, and 1,526 for women).

120. Kathryn Tyler, *Don't Fence Her In—Considering Women for International Postings*, HR MAGAZINE, March, 2001, at 70, 73. "Women are only fourteen percent of the expatriates working for U.S. companies" and only fifty percent of married male expatriates are in dual-career marriages." *Id*. *See also Annual Transferee Demographic Survey*, 17 RUNZHEIMER REPORTS ON RELOCATION, May 1998, at 1–2 (noting that a "typical transferee profile remains a white male, aged 35 to 45 years, with two children" and referring to women as atypical transferees); Jarod Roch, *Dealing with Expatriate Relocation*, NEW STRAITS TIMES (Malaysia), Apr. 3, 2001 (noting "69 percent of expatriates are married . . . Of those spouses, 49 percent were employed before an assignment and only 11 percent were employed during an assignment").

121. *See* Global Relocation Trends, *2003/2004 Survey Report*, May 2004, http://www.gmacglobal relocation.com/2003survey (last visited Feb. 7, 2005). "[I]n all of our past surveys, assignments of one year or less in duration constituted only 13% of the total number of assignments. This year, by contrast, 70% of international assignments were scheduled for one year or less in duration." *Id*. at 5.

122. Hague Convention, *supra* note 9, art. 3(a).

123. *See, e.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (holding that the four-year-old child's habitual residence had moved from the United States to Australia as he was there close to six months before removal by his mother back to the United States because his mother had been reluctant to move to Australia, but had hoped to save her failing marriage). *But see id*. at 227 (dissenting opinion pointing out that in determining where the four year old is a habitual resident, the court should consider not only the period immediately preceding removal, but the child's life as a whole because, "it has immediate impact on the child's place of residence, and ultimately and realistically it will impact upon the final custody determination").

124. *See, e.g., id.*

125. International relocation for one spouse's work in and of itself appears to cause significant stress in jobs. *See* Roch, *supra* note 120. "The most common reason listed for assignment failure is the

woman who moved internationally solely because her soon-to-be ex-spouse's job relocated would likely want to return to her home.[126] Through application of the Convention, her children's habitual residence becomes the foreign country.[127] The woman's decision to move with her children's father and keep her family together may permanently erase her choice of raising her children in her country.[128]

From a policy standpoint, this is a perverse effect. It essentially encourages the woman to split up the family now, rather than run the risk of not being able to take her children back to her home country if the marriage fails.[129] If a woman is in a rocky marriage and wants to maintain

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lack of partner satisfaction (twenty-seven percent) that directly ties to work." *Id*.

126. *See, e.g.*, England v. England, 234 F.3d 268 (5th Cir. 2000). The parents in the case, U.S. citizens, raised their children in Texas until the father's job relocated them to Australia. *Id.* After living there for two years, the whole family visited Texas. *Id.* The mother and two children (now ages fourteen and four) took an extended vacation in Texas. The mother soon after filed for divorce, and the father petitioned to have the wrongfully removed children returned. The mother argued that there was a grave risk to the older child's emotional health as she had endured "turbulent history in orphanages and foster care . . . [and] would face a grave risk of psychological harm if separated from her mother or forced to move so soon after re-settling in Texas." *Id.* at 270. The court denied that there was a grave risk to her emotional well-being, stressing that the emotional harm from being separated from her mother was not to be considered. *Id*. at 271–72.

127. For example, in *England*, the court determined the children's habitual residences were in Australia and ordered them sent back. *Id*. The mother argued that as their primary caretaker, the children would be injured by being separated from her; the court didn't find separation from their abductor to be a valid concern. *Id*. at 271–72.

128. *Feder*, 63 F.3d at 230–31 (dissenting opinion).

> While it may be that Mr. Feder had, and Mrs. Feder did not have, a settled purpose to reside in Sydney, it is significant that [child] stayed with his mother in [the United States] until she left, traveling to Sydney only when she did. This indicates some correspondence between the purposes of mother and child. While it is virtually impossible to ascertain the settled purpose of such a young child, it is more closely aligned here to that of the mother. That is not meant to indicate that the mother's purpose should necessarily predominate, but rather that the facts of this matter support that conclusion . . . [W]e must be mindful of the consequence . . . the child will be taken from his mother's home . . . where he has spent virtually all of his years, in contrast to the time spent with his father in Australia . . . [T]he best interests of the child . . . should not be ignored in these preliminary proceedings. Such tugging and shuttling can only be detrimental.

Id.

129. Of course, the Hague Convention would not pose an impediment to a parent who had a child custody decree and permission from the host country's court to remove the children. The convention would have no application in that situation. The Hague Convention would be a prohibition in the absence of an explicit custody decree, unless one of the above noted exceptions applied. However, parents trying to return "home" with their children have a high likelihood of being forbidden by the court or facing other substantial legal hurdles. *See, e.g.*, Leonie Lamont, *Judges Clash on Mother's Right to Leave*, SYDNEY MORNING HERALD, Sept. 7–8, 2002, at 10 (reporting a decision of the High Court in Australia in which an Indian family moved to Australia and the mother lost the battle to return with her children to India). "'The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting,' Justice Kirby said." *Id*.

her ability to raise her child in her own country, she should refuse to move. If the marriage was doomed to fail, the loss of family unity was not caused by the Hague Convention. If, however, the marriage would have improved with time, the convention could serve as the catalyst to an unnecessary dissolution.[130] If one of the parents agrees to move conditioned solely upon the continuation of the marriage, these perverse consequences, which would have the effect of trapping her, should not follow.

Evaluating habitual residence from the period immediately preceding the alleged abduction has problematic implications for families who relocate internationally due to a career opportunity for one parent. The second parent's willingness to relocate may have the dramatic consequence of trapping that parent in the foreign country if that parent is unwilling to leave the children. It would be more just to evaluate the child's habitual residence with an inquiry into the child's life as a whole. Determining a child's habitual residence could still consider where the child has lived for the last six months; however, that would only be one of many factors. Other factors would include where children have spent the majority of their life and where they have social connections. A more holistic evaluation of habitual residence could take into account parental intentions and would not disadvantage women as the existing habitual resident evaluation does.[131] Likewise, giving women a choice between their country and their child carries with it a substantial risk of harm to the child. Two distinct possibilities are that the child's custodial parent will return to their country of origin without the child, or the child will be raised by their custodial parent with that parent feeling like a hostage in the country. The child returning to live in a country the child is familiar with and acclimated to is not the harm the Hague Convention sought to deter.

2. Domestic Violence

A second way in which the Hague Convention produces a disparate impact on women results from the prevalence of domestic abuse, and the fact that the statistical majority of victims of domestic violence are

130. This assertion necessarily implies knowledge of the Hague Convention. However, if the law is applying in a way that would be wholly unexpected by most, it may be unfair and/or unreasonable.

131. Lamont, *supra* note 129 (discussing decision to not let a custodial mother return to India with her child). "[I]t is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts . . . Inconvenience to the husband is minimized. But the effect on the wife may be profound." *Id.*

women.[132] The situation of victims of domestic violence who abduct their children in order to escape abuse is not expressly provided for in the Hague Convention,[133] which is problematic considering how frequently mothers abduct their children to escape domestic violence.[134] Whether the child will be ordered to return depends on judicial discretion, and cases involving domestic violence have come out both ways.[135] This situation is especially appalling because a woman may escape domestic violence only to have her child sent back.[136] This divide in the case law of the Hague Convention signals the need for a change in approach.

If domestic violence was considered by the drafters, their conceptualization likely involved the abuser, rather than the victim, abducting the child.[137] That supposition correlates with the presumption of non-custodial parents abducting their children, as non-custodial parents are predominately fathers,[138] and the perpetrators of abuse are usually men.[139] In light of the underlying logic of the convention, abduction by an abusive parent would be precisely what the Hague Convention sought to discourage and remedy.[140] The swift application of the summary return mechanism would, if this presumption was a reflection of reality, be an

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132. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 (1991). Although limited to the United States in scope, the article recognizes the mass-impact of domestic violence.

> Up to one half of all American women—and approximately two thirds of women who are separated or divorced—report having experienced physical assault in their relationships. However, litigation and judicial decisionmaking in cases of severe violence reflect implicit or explicit assumptions that domestic violence is rare or exceptional.

Id. at 3.

133. Compare with the International Parental Kidnapping Act of 1993, 18 U.S.C. § 1204(c)(2) (2000), which includes an explicit affirmative defense for persons fleeing domestic violence.

134. Weiner, *supra* note 22, at 765. "Published figures indicate that seventy percent of the abductors are now mothers, typically the child's primary caretaker. Often these mothers are victims of domestic violence, and they are fleeing transnationally with their children in order to escape . . ." *Id.* (internal citations omitted)

135. *See supra* note 89.

136. As well as being sent back herself if she is unwilling to allow her child to return without her child.

137. *See generally* Weiner, *supra* note 111. "Domestic violence between the abductor and the left-behind parent was not usually part of the paradigm, probably because domestic violence was not as highly visible a political issue in the late 1970s and the early 1980s as it is today." *Id*. at 605.

138. *See* Child Support Facts, *supra* note 114.

139. District of Columbia Coalition Against Domestic Violence, *Domestic Violence Statistics*, *at* http://www.dccadv.org/statistics.htm (last visited Feb. 2, 2005), *citing* A Report of the Violence against Women Research Strategic Planning Workshop sponsored by the National Institute of Justice in cooperation with the U.S. Department of Health and Human Services (1995). "[Approximately] 90-95% of domestic violence victims are women." *Id*. *citing* Bureau of Justice Statistics Selected Findings: Violence Between Intimates (1994).

140. Weiner, *supra* note 111, at 599.

appropriate means to protect the child from the harm perpetuated either directly by the abuser or indirectly from the loss of contact with the child's mother and familiar surroundings.[141] Current abductions instigated by domestic violence are juxtaposed, however, because it is the victim who abducts rather than the perpetrator.

The Hague Convention operates in a climate where a statistical majority of custodial mothers abduct, and a high percentage of them are escaping domestic violence.[142] It is indefensible that, under the convention, an abused parent may flee with the child from the abusive parent, only to have the summary return mechanism deliver the child back to the abuser.[143] Within the context of escaping domestic abuse, the policy concern of not wanting to reward culpable behavior has the opposite effect in application.[144] In the majority of cases, the dispossessed parent is culpable of abuse, and the fleeing parent is the victim.[145] But the summary return mechanism would send the child back to the abusive parent, an outcome contrary to the intent of the drafters and the goal underlying the summary return mechanism. That the mechanism should work in favor of the abusive parent cannot be tolerated.

The convention should not have the effect of encouraging women to stay with their abusers. It is widely documented that the most dangerous period in relationships characterized by violence is the time of initial separation.[146] If a woman's life is threatened or lost at the hands of her abuser, the period closest to separation is when it will most likely occur.[147] Physical distance may help her stay safe. Furthermore, women need support and encouragement to help them leave their batterers, followed by protection from the law, rather than unintended negative consequences of its application.

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141. *Id.*

142. *See supra* notes 132 and 134.

143. *See* Weiner, *supra* note 22 and accompanying text.

144. *Id.* at 769. "The Hague Convention . . . traps countless numbers of women and children in abusive relationships . . . These are also victims who do flee, but then return with their children after their batterer succeeds on his Hague Convention application." *Id.* "[It's] purpose is to dissuade abduction, and the number of women who have been dissuaded by the . . . Convention from leaving an abusive relationship will never be known definitively. When a victim of violence is dissuaded, the . . . Convention perpetuates violence, harms women and children, and contributes to gender subordination generally." *Id.* at 799.

145. *Id.* at 757.

146. *See* Mahoney, *supra* note 132, at 5–6.

147. *See id.*

C. Proposals

1. Wage Gap Proposal

International relocation continues to be a gendered occurrence, in that the great majority of relocations in pursuance of one's career are largely a male phenomenon.[148] Additionally, although the trend may be changing, the international assignments have tended to be on a long-term basis.[149] Long-term international relocation, meanwhile, implicates significant consequences in terms of the Hague Convention in that the child's habitual residence may well be seen as the country to which the family moved on account of the husband's job.[150] Therefore, if the accompanying spouse changes her mind after the international relocation and attempts to return "home" with her child, it will likely be child abduction for purposes of the convention.[151] One of the most problematic aspects of these convention mechanics is that it encourages families to break up hastily rather than accompany the father on his international career opportunity. Although most families do not spend their days reading international conventions, a law with such drastic consequences should not apply in counterintuitive ways. For women who choose to uproot their families and accompany their spouse on his international relocation assignment, having their child's habitual residence change to the new country results in something more akin to a mousetrap than appropriate international policy in regard to the mother.

This Note proposes to change the meaning of habitual residence under the convention. The new presumption would be that the child's habitual residence is where the child has spent the majority of her life. This presumption, however, may be rebutted by evidence to the contrary. An illustrative rather than exhaustive list of considerations that may rebut the presumption may include: (1) a showing that the majority of the child's friends, family, and social support are in the other country; (2) although the child spent more time in one country, they have spent the majority of their time that they can remember in the other country; and (3) the child's cultural, language, or religious identity is based in the other country. This is a more holistic and less mechanical determination of habitual residence that helps make individualized determinations to fit the needs of the

148. *See supra* note 120 and accompanying text.
149. *See supra* note 121 and accompanying text.
150. *See supra* notes 122–23 and accompanying text.
151. *See supra* notes 126–28 and accompanying text.

particular situation. Keeping in mind that the big picture idea of the convention is protecting children from harm,[152] determining harm to a child in a particular case could best be accomplished by considering the child's life as a whole. This solution would be effective not only to remedy gender disparity in relation to international career relocation and child abduction, but in other cases with the same scenario of being abducted to a place the child actually has experienced as "home."

The most unpalatable aspect of this proposal is that it grays what was a black letter rule. This change would likewise increase judicial discretion in determining whether the presumption of habitual residency has been rebutted. The issue of judicial discretion, meanwhile, harkens back to issues the drafters had confronted with the child's best interest test.[153] While these are all valid concerns, the benefits of this change outweigh the downside, particularly because judicial discretion would be explicitly limited by a rebuttable presumption and with illustrations for judicial guidance. Additionally, while there is great benefit in having a black letter rule, especially for the judicial ease with which it may be applied and for the fact that it discourages litigation, a parent's right to raise her child in her own country, individualized justice, and decisions tailored to the needs of individual families are concerns that must trump judicial efficiency and decreased litigation.

2. Domestic Violence Proposal

Although the Hague Convention's existing exceptions to the summary return mechanism are inadequate in situations of escaping domestic violence, the goals of the convention may be employed to seek a solution for victims of domestic violence who internationally abduct their children. The existing exceptions to the summary return mechanism are based upon the underlying principles of the convention. Using the principles that support the existing exceptions facilitates the conceptualization of a remedy consistent with the goals of the Hague Convention.

First are the exceptions that consider the custody rights of dispossessed parents, and whether these rights were being exercised at the time of abduction, to determine whether removal was wrongful.[154] The underlying reason for considering custody rights is to protect the child's relationship

152. *See* Hague Convention, *supra* note 9, pmbl.

153. *See supra* notes 24–31 and accompanying text (discussing the inherently problematic "child's best interest" analysis in an international context).

154. *See supra* notes 74–79 and accompanying text (regarding wrongful removal).

with both parents.[155] This relationship, however, which deserves protection from the child's point-of-view, presumes no harm to the child.[156] If the relationship is in fact harmful, preserving the relationship undermines the convention's objective of protecting children. Statistically, there is a high degree of correlation between men who batter their partner and men who abuse their children, and regardless of whether the child is the target of abuse, witnessing domestic violence is in any case abusive to children.[157] The child may be harmed in a variety of ways, such as by having a parent who is constantly frightened, or engaging in a pattern of learned helplessness, or by being exposed to a person who has exhibited a propensity for violence and a demonstrated inability to control behavior.[158] For all of the foregoing reasons, protecting a child's relationship with both parents is undermined when one parent is an abuser. Therefore, protection of custody rights of both spouses may not be a justifiable goal of the Hague Convention and does not respond to the needs of an abused spouse.

The second group of exceptions, the grave risk exception and the fundamental freedoms exception, may be distilled to the notion of excepting the summary return mechanism where it would harm the child to be returned to its habitual residence.[159] Relating back to the first set of exceptions, returning the child to a place where it was subject to the wrath of the abuser, does not protect the child.[160] Rather, it exposes the child to direct harm from the abuser or, if sufficient undertakings are taken in the habitual residence, subjects the child to the emotional damage of revisiting the place where harm was experienced.

The third type of exception, based on a child's own wishes, highlights the crucial distinction between children and mere property. Unlike property, children have an autonomous self-interest which, at different times in their life, may either coalesce with the interests of a parent or be contrary to the parents' interests.[161] Recognition that children possess an autonomous interest does not support, for example, sending an objecting child to live with an abusive parent.[162] Taken generally, however, this

155. *See* Hague Conference Press Release, *supra* note 15.
156. *See supra* note 14 and accompanying text.
157. *See infra* note 160 and accompanying text.
158. *See id.*
159. *See supra* notes 84–94 and accompanying text.
160. *See generally* Stephen Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 JUV. & FAM. CT. J. 1 (1999) (noting effects traced to witnessing abuse, including "internalizing" effects such as depression, anxiety, and withdrawal, as well as "externalizing" effects such as aggression, "acting out" behaviors and delinquency).
161. *See supra* notes 106–10.
162. Lamentably, case law is divided on this issue. *See supra* note 89.

exception recognizes children's individual interests, regardless of whether they are able to articulate those interests and advocate for themselves. In order to respect the goals supporting this exception, regardless of whether a child is able to advocate for itself, its interest in being free from abusive parents should trump any rights asserted by the parents.

The goal of preventing harm to children must be furthered rather than impeded in cases where women abduct their children internationally to escape abuse.[163] One concern about fashioning a policy to achieve those

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163. *See* Weiner, *supra* note 111, at 616 (arguing certain factors must be found before the convention is changed).

> A change in the law becomes necessary only if 1) the harm to children from abduction differs depending upon the gender of the abductor and the reason for the abduction, and/or 2) women who flee with their children to escape domestic violence have their safety or their children's safety unreasonably compromised by [the convention], or otherwise suffer unfairly from [the convention's] application to their situation. This article suggests that both of these conclusions have validity.

Id. This commentator proposed several potential revisions of the Hague Convention. *See id.* at 674–703. Relying on undertakings in the country of habitual residence is one option. This approach calls for the summary return mechanism to take effect upon agreement to take sufficient undertakings to ensure the safety of the child and mother. Weiner suggests that there are potential shortcomings to this approach, including: financial hardship on the mother; the undertakings may not offer sufficient protection against the abuser; returning the child is not always the appropriate remedy; the lack of power equality between victim and abuser may obviate a court's determination of which undertakings are necessary; and undertakings would only be appropriate in a jurisdiction that adequately responds to domestic violence—which not all do.

A second option is to ratify the Protection Convention, which provides emergency jurisdiction in abducted-to fora in cases of domestic violence. Problems here include the fact that only two countries have ratified the Protection Convention; it does not alter the summary return mechanism and is therefore problematic for similar reasons as the undertakings approach—specifically in jurisdictions without adequate assistance to victims of domestic violence; the Protection Convention allows the child's habitual residence to be determined based on whether that country is able to manage the case and assure safety; the Protection Convention also advocates alternative dispute resolution, which does not work well in domestic violence situations because of the power imbalance and fear; and the court has complete discretion over whether to find the situation urgent and thereby take jurisdiction.

A third option is to add a new defense to the Hague Convention's exceptions for victims of domestic violence. Weiner notes this possibility as the broadest proposal and pointed out several problems, including: lengthening what are supposed to be summary proceedings; requiring courts to explore facts normally reserved for a custody determination; the definition of domestic violence may be too narrow to encompass the full range of abuse suffered; adding a new domestic violence exception may spark additional exceptions; it may be unfair to consider this justification but not others; adding this defense requires a theoretical basis inconsistent with the convention, in that consistency would demand a determination on the merits to be in the country of habitual residence and this option may encourage more parental abductions; and opens the door to fraud (noting some of these concerns are legitimate while others may be easily addressed).

Finally, there is the option of suspending the summary return mechanism and allowing the victim to adjudicate the dispute on the merits in the country of their own habitual residence, essentially litigating in one country's courts instead of another. The author favors this approach, finding the main disadvantages to be that some women should not be subject to the foreign court's jurisdiction at all if they had been held there against their will, and that this option lengthens the time before a child is returned, if that is to happen at all. *Id*.

ends is undermining what is good about the Hague Convention with overly broad exceptions. It is imperative, however, that there is a balance in applying the strict standards established by the convention and accommodating cases where that procedure is clearly inappropriate. The prevalence of domestic violence and the severity of the associated consequences justifies an exception to the application of the summary return mechanism.

There are various ways to effect that change within the framework of the convention. The one proposed here is to allow an exception for victims of domestic violence, fleeing internationally with their children, from the summary return mechanism. Procedurally, domestic violence would be evaluated in a hearing on whether the allegations were substantiated before the merits of the custody disagreement would be heard. This solution is appealing for several reasons. First and foremost, this proposal would protect victims of domestic violence from the additional pain and turbulence of having their children be subject to the summary return mechanism. Second, children would likely remain with their primary caretaker. Third, the convention would send a message of support to victims of domestic violence.

The main foreseeable downfall of expanding the exceptions is that it may lessen the deterrent effect and the predictability that the convention arguably has. The other argument that some would proffer is the potential for claiming domestic violence when there in fact was not any. These concerns, however, are substantially outweighed by the international need to protect victims of domestic violence and their children. And this change would add only an additional narrow exception, not a gaping hole that would run the risk of enveloping the current convention.

CONCLUSION

The benefit of the summary return mechanism of the Hague Convention is its predictability. Being able to forecast the result can, in and of itself, be a deterrent to abduction. Certainly, the convention should remain intact as applied to non-primary caretaker abductors, toward whom the convention was originally directed.

The difficulty is in incorporating sufficient flexibility into the convention so that the underlying goal of protecting children is realized in a variety of international parental abductions. The convention should remain just and effective; as such, some changes are needed to alleviate the disparate gender impacts of the convention. Two examples in which gender is highly correlated to unjust and unwise application of the

convention are career-based international relocation of families, and where international escape from domestic violence is involved.

This Note first proposes that habitual residence should be evaluated based upon the child's entire life, rather than the period immediately preceding the abduction. This proposal has multiple benefits in that it encourages families to relocate together; removes the disparate impact on stay-at-home parents; and is more likely to deem the child's habitual residence as the place to which the child is most attached. The second proposal in this Note advocates adding an additional exception to the convention for those fleeing domestic violence. This proposal is especially appealing from a policy standpoint because it supports victims of domestic violence and renders their abusers powerless.

These relatively minor changes would allow the Hague Convention to remain current while not undermining its original goals of reducing forum-shopping, protecting the interests of both parents, and most importantly, reducing harm to children.

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