

The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*

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The 1980 Hague Child Abduction Convention,¹ as currently applied, imposes unnecessary hardships on domestic violence victims and their children. These difficult cases require better solutions, and this article suggests how they can be accomplished. Courts need only return to the original structure and purposes of the Convention and inform themselves about the realities of abusive relationships.

The Abduction Convention was written to remove the advantages of self-help in child custody cases. Its primary goal was to defeat an abductor's hoped-for advantages, whether practical or legal. Its solution for most cases was to restore the status quo ante as expeditiously as possible by returning the child to its habitual residence. The courts of that place, it was believed, would be in the best position to deal with the merits of any custody dispute.

This aspect of the Convention has been well understood and, if anything, perhaps too well implemented. Without doubt, it works well in a great number of cases. It was never intended, however, to apply to all cases.

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1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. no. 11,670, 1343 U.N.T.S. 89 [hereafter Hague Child Abduction Convention].

Several fact patterns were left outside the remedy, and the Convention's Rapporteur, Professor Pérez-Vera, explained why:

[T]wo objects of the Convention—[to deter abductions and] to secure the immediate reintegration of the child into the habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child.' However, even when viewing [the Convention] from this perspective, it has to be admitted that *the removal of the child can sometimes be justified* by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.²

In other words, although the basic scheme of the Convention leaves the hearing on an individual child's best interests to the courts of the habitual residence, its exceptions are intended as a deviation from this norm. Each defense to return, as Professor Pérez-Vera indicates, addresses a concrete factual situation in which an individual child's best interests are, indeed, *meant* to control the outcome of the Hague proceeding.

The Convention's authorized exceptions are precise: as discussed below, they encompass return petitions from those who have not actually been serving as the children's primary caretakers, petitions from those whose custody would entail unacceptable risks for the child, and petitions from those with whom a mature child does not wish to live. In all likelihood, these petitioners will (or should) ultimately fail in their quests for custody, and it is not difficult to understand why the drafters chose a different rule for them. Return is not required in these cases and, if it is denied, petitioners who continue to press their custody requests will be heard in the courts of the children's new home.³

Professor Pérez-Vera explained that the Convention aims to remedy a child's "traumatic loss of contact with the parent who has been in charge

2. Elisa Pérez-Vera, *Explanatory Report*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 426, 432 at ¶ 25 (1982) (emphasis added), available at <http://www.hcch.net/e/conventions/exp128e.html>.

3. Because the Convention does not regulate subsequent litigation on the merits of custody or access, there are no firm statistics that reveal whether these actions take place or what their outcomes are. Although Lowe and Perry report, for example, that 6 to 12% of the return petitions filed in 1996 for cases involving England and Wales on one hand and the United States on the other were dropped, the causes and whether access is later sought are unknown. See generally Nigel V. Lowe, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: an English Viewpoint*, 33 N.Y.U. J. INT'L L. & POL. 179, 202–03 (2000) (discussing Nigel Lowe & Alison Perry, *International Child Abduction—The English Experience*, 48 INT'L & COMP. L.Q. 127, 143–46 (1999)).

of his upbringing.”⁴ In some cases, however, there are what she called objective, justifiable reasons for the child’s removal.⁵ The first, most general of these exceptions to the return obligation concerns situations in which the child has *not* suffered a loss of its primary caregiver. Most notably, the Convention provides no obligation to return a child to its former habitual residence if the abductor is the child’s custodian, and the person left behind holds only access rights.⁶ Similarly, even if the person left behind holds a theoretical right to custody, if he or she has not actually been exercising custody, the child will remain with the de facto custodian – the abductor.⁷ In these cases, too, courts in the new country (the refuge State) are expected to hear and decide the petitioner’s requests—whether for access or for custody.

Next, even if the petitioner holds a custody right and was actually exercising custody, there is no blanket guarantee that the child will be returned. Instead, the drafters hammered out several exceptions. They are the result of a major drafting compromise.⁸ Some delegations feared that the traditional public policy defense to treaty obligations would provide a potentially expansive loophole. But others identified dangers that would result from an inflexible return obligation. In the end, there was no public policy clause, but specific, enumerated defenses were adopted, including several that are particularly relevant to domestic violence cases:⁹

- the return petition is filed one year or more after the wrongful act and the child is settled in its new environment (Article 12);
- there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b));
- a child who has attained an age and maturity that make it appropriate to take account of its views objects to return (Article 13, ¶ 2); and
- the return is not permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms (Article 20).

4. Pérez-Vera, *supra* note 2, ¶ 24 at p. 432.

5. *Id.* at ¶ 25.

6. *See* Hague Child Abduction Convention, art. 21.

7. *See id.* arts. 3(b), 13(a). *See also* Article 12 (protecting some de facto situations that arise after abduction), discussed below at notes 30-31 and accompanying text.

8. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT’L & COMP. L.Q. 537, 550-51 (1981).

9. Additional exceptions to the return obligation set forth in Article 13(a) are of less frequent relevance to domestic violence cases: the petitioner was not actually exercising his or her custody rights at the time of the removal or retention, or the petitioner consented to the removal or retention or acquiesced in it.

Widespread inattention to this history has caused much of the difficulty we now see in domestic violence cases. Those who had opposed any exceptions continued to caution judges about the dangers of loopholes that might eviscerate the Convention. Simultaneously, some courts expanded the Convention's definition of custody rights. The consequence is that many petitioners now obtain return orders although it is very unlikely that their children's best interests could be served by an award of custody to them—a situation the drafters sought to avoid. This unfortunate development stems in part from judicial opinions that have emphasized the perceived virtues of returning children as a matter of discretion even if valid defenses exist.¹⁰ In the context of abuse, a judge in one legal system may assert, for example, that it would be offensive to another legal system to suggest that it might not be able to protect a domestic violence victim or a child who has suffered abuse.¹¹ No proof of the judicial system's adequacy is required; indeed—to the contrary—the victim is asked to carry the burden of establishing its inadequacies.

Nothing in the Convention requires such assumptions,¹² and they have been challenged at last. American and Australian courts alike concluded in 2001 that judges who presume the habitual residence can protect the victims of violence abdicate their judicial responsibilities. As a federal judge in Michigan put it, a court's power to order a return as a matter of discretion after a defense has been established “does not equate to license; even where the Court has discretion, it must not exercise that discretion before it considers the relevant facts.”¹³ This reasoning also appeared in a

10. *See, e.g.,* *W. v. W. (Abduction: Acquiescence)* [1993] 2 F.L.R. 211 (Waite, J.) (Eng.) for a statement of the English position.

11. *See, e.g.,* *Murray v. Director of Family Service* ACT (1993) F.L.C. 92-416 at 80,259 (Austl.) (“It would be presumptuous and offensive in the extreme for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts”); *Re Slamen* (1991) Outer House Cases (23 Aug. 1991) (Court of Session: Outer House) (Scot.); *A. v. Central Authority for New Zealand* [1996] 2 N.Z.L.R. 517 (N.Z.). *But see* *Cooper v. Casey* (1995) F.L.C. 92-575 (Austl.) (expressing concern about the failure of authorities in the habitual residence to take “direct responsibility” for the welfare of a child who has been returned under the Convention). *See also* Justice Joseph Kay, “The Hague Convention—Order or Chaos,” Paper Presented at the Third World Conference on Children's Rights (Bath, Sept. 2001), available at <http://www.lawrights.asn.au/docs/kay2001.pdf> (noting particular problems under the Convention for the victims of domestic violence). The Australian delegation to the Fourth Meeting of the Special Commission to Review the Operation of the Hague Child Abduction Convention raised similar concerns that are summarized in Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 55 & note 97 (2003).

12. The very fact that defenses were authorized for these situations indicates that the drafters believed they lie outside the area in which returns should be ordered as a matter of course. As a practical matter, the supposed presumption vitiates this design for victims and their children.

13. *Rajmakers-Eghaghe v. Haro*, 131 F.Supp.2d 953, 957-58 (E.D. Mich. 2001) (Gadola, J.).

decision of the High Court of Australia as it set aside two return orders from the Full Court of the Australian Family Court.¹⁴

The High Court also refused to follow the Convention case law that asserts a need to interpret the Article 13(b) exceptions to return “narrowly.”¹⁵ Finding this approach “unhelpful,”¹⁶ Chief Justice Gleeson remarked, “[W]here there is no serious question of construction involved, such a statement may be misunderstood as meaning that the provisions are to be applied grudgingly.”¹⁷ His point is well taken. Examples of grudging application abound in the cases, and some have been reified into new legal tests that go far beyond anything the Convention requires.

The English courts have been leaders in providing a narrow (perhaps grudging) interpretation of Article 13(b) and have imposed a requirement of clear and convincing evidence.¹⁸ They have also created summary proceedings for Hague cases that rarely permit oral testimony, even when serious defenses are raised.¹⁹ Further, as Professor Lowe reports, in England

14. *See* DP v. Commonwealth Central Authority and JLM v. Director-General, NSW Dept of Community Services, 206 C.L.R. 401 (2001) (Austl.).

15. Chief Justice Gleeson’s opinion discusses the Australian regulation that restates Article 13(b). Although his language does not appear in the majority opinion, it expresses views that are echoed in the other opinions in the case. *See* DP v. Commonwealth Central Authority, 206 C.L.R. 401 (2001) (Austl.). For U.S. cases reading a reference in ICARA to the Convention’s “narrow defenses” as requiring that the authorized defenses must also be read “narrowly,” *see* Danaipour v. McLarey, 286 F.3d 1, 13-14 (1st Cir. 2002); March v. Levine, 249 F.3d 462, 471 (6th Cir. 2001); Walsh v. Walsh, 221 F.3d 204, 217-19 (1st Cir. 2000); Gonzalez Locicero v. Nazor Lurashi, 321 F.Supp.2d 295 (D. Puerto Rico 2004). Justice Gleeson’s concerns are fully applicable to this U.S. gloss. Canadian cases that assert the same doctrine rely on a doubtful reading of obiter dictum in a Canadian Supreme Court opinion. *See, e.g.,* C. (J.R.) v. C. (L.C.M.) (2003), 2003 A.C.W.S.J. 27467 at ¶ 41, 127 A.C.W.S. (3d) 485 at ¶ 41 (N.L., Tr. Div.) (Can.) and sources cited. The case also asserts a second reason to provide “a rather limited scope for the operation of any exception to ordering return”—to deter abduction. *Id.*

16. *Id.* at 407, ¶ 9.

17. *Id.*

18. This doctrine developed in the English case law and has been followed elsewhere. *See* Re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 F.L.R. 1145 (CA) (Ward, L.J.) (Eng.) (summarizing the history). In the United States, it is implementing legislation that imposes a clear and convincing burden of proof standard to the exceptions set forth in Articles 13(b) and 20. *See* provisions codified by the International Child Abduction Remedies Act (ICARA) at 42 U.S.C. § 11603(e)(2) (2000).

19. If children’s wishes must be ascertained, social services personnel conduct the interviews and the court is almost never directly involved. *Id.* English procedures are summary, and oral testimony is therefore rarely accepted from any source. In a non-Hague abduction case, a trial judge issued a stinging indictment of related English doctrines that restrict the judge’s ability to making findings if the written testimony that is permitted contains factual disputes, even if one party’s assertions are so improbable as to be preposterous. *See* Re H (child abduction: mother’s asylum) [2003] E.W.H.C. 1820 (Fam.), [2003] 2 F.L.R. 1005 at ¶¶ [24] – [26] (Eng.). In what was, accordingly, an unusual English Hague case, the mother was permitted to testify concerning her husband’s abuse and there was considerable evidence of other incidents, including a photograph of “quite horrifying marks on [her] back.” The trial court applied Article 13(b)

“it is hard to establish any of the exceptions provided for by Articles 12 and 13”—a fact that permits harsh results in abuse cases.²⁰ Professor Lowe’s examples of cases in which returns were ordered include those in which young children were separated from their caregiving mothers, ones

to refuse the child’s return to South Africa because of this violence to the mother and its conclusion that the 2½-year-old child could not be parted from her. Justice Butler-Sloss denied leave to appeal. Although she deferred to the trial judge, she was clearly displeased that oral evidence had been allowed and remarked that on the papers Article 13(b) “might or might not apply but it would on balance be right to send the child back.” *Re M (Abduction: Leave to Appeal)* [1999] 2 F.L.R. 550, [1999] FAM. LAW 521 (CA Civ. Div.) (Eng.). See note 20 *infra* for a case in which an English judge protested the harsh consequences of the controlling appellate case law.

20. Lowe, *supra* note 3, at 189 (reporting a judicial refusal to return in only 5% of the applications for return filed in England in 1996). In a judgment that describes a truly astonishing array of violent, coercive and illegal conduct by the petitioning father, an English trial judge recently expressed his frustration with the restraints imposed by that country’s case law on his ability to make findings on disputed written evidence in summary proceedings, his inability to order appropriate psychological assessments, and his consequent inability to find that an Article 13(b) defense was made out. He was, instead, left to direct what he called “a raft of . . . measures” to protect the mother and child upon their return. In doing so, the judge noted, “I am concerned that the Law may be failing those cases where the allegations are of oppressive conduct because the Authorities do not permit the Judge at 1st Instance to give any proper consideration to the long-term psychological effects on a wife and child who have lived in traumatic, violent circumstances and are being returned to the country of origin—even if to a separate household.” See *W v. W (a child) (abduction: conditions for return)* [2004] E.W.H.C. 1247 (Fam.), [2004] All E.R. (D) 58 (Jun) (Baron, J.) (Eng.); see also note 39 *infra*. Unfortunately, the court missed an opportunity when it applied an interpretation of Article 13 that recognizes only a child’s objections to the country of habitual residence, not objections to custody by the petitioning parent. Compare this author’s analysis, which is set forth *infra* in notes 23-27 and the accompanying text. A recent English Court of Appeal case that displays some of the current deficits of Convention practice in abuse cases nevertheless recognizes that a child’s fear of abuse is relevant. See *Re J* [2004] E.W.C.A. Civ 428, [2004] 1 F.C.R. 737 (CA Civ. Div.) (Eng.). The case involved a woman’s second abduction of her children from Croatia to England. The trial judge found that the father had blatantly violated the undertakings he had given at the time of the previous return, but nevertheless ordered that the children be returned again despite what the Court of Appeal called their mother’s “overwhelming point . . . that where a volatile, violent father has once been trusted by an English judge and has proved himself unworthy of that trust he should not again be given precisely the same opportunity to re-offend.” Although the Court of Appeal suggested this was a case in which the trial judge could have refused return under Article 13(b), it deferred to the trial judge’s decision that the mother had not made out an Article 13(b) defense and seemingly went out of its way to compliment his reasoning. Return was nevertheless avoided because the older son, who had secured counsel, was permitted to appeal in his own right, and the appellate court accepted his objection to return—primarily his well-founded fear that, if he and his brother were returned a second time, his father would again abuse them and their mother and remove them from her care—and their father dropped his request for the return of the younger son. The appellate court was troubled that the mother had not taken certain steps to bring her son’s fears to the court’s attention, and wondered whether her counsel might have feared that, had she done so, she would have been seen as attempting to influence her child. The court sought to reassure future parents that the judiciary is capable of distinguishing children’s independent views from those that have been improperly influenced. Many decisions suggest that the court’s confidence is overly optimistic. See, e.g., *C. (J.R.) v. C. (L.C.M.)* (2003), 2003 A.C.W.S.J. 27467 at ¶¶ 25-38, 127 A.C.W.S. (3d) 485 at ¶¶ 25-38 (N.L., Tr. Div.) (Can.).

in which women were liable to arrest and prosecution in the former habitual residence if they returned with their children, and ones where abductors who returned with their children would be without access to legal representation. Return orders were also entered in a case in which social workers were concerned about the apparent sexual abuse of the petitioner's daughter by the man with whom the petitioner had been living,²¹ and in one in which the petitioner—an abuser who had threatened his wife's life—was already in prison for murdering a man he believed had been intimate with her.²² This last petitioner, who had also served jail time for assaulting a social worker, was sometimes free on furloughs and hoped for an early release if his children were returned. The court rejected his wife's argument that the great risk of harm to her would place their three young children in an intolerable situation if she returned with them.

As these cases reveal, the courts' appropriate concern that the Convention's exceptions not be permitted to swallow the return rule has sometimes developed into an improper disregard for the Convention's intended protections against danger.

Somewhat more complex but equally troubling deviations from the Convention's scheme also appear in cases that consider a child's objection to return. The Convention, of course, permits the wishes of a mature child to defeat an otherwise mandated return order. Yet the cases reveal both instances of inappropriate attention to the wishes of young children²³ and—on the other hand—refusals to consider the custody wishes of older children,²⁴ even in cases of apparent abuse.

21. Lowe, *supra* note 3, at 189-90. The sexual abuse case was *Re S (Abduction: Return into Care)* [1999] 1 F.L.R. 843 (1998) (Eng.).

22. *Re M (Abduction: Intolerable Situation)* [2000] 1 F.L.R. 930 (22 Mar. 2000) (Fam. Div.) (Eng.). See generally Robert S. Pynoos & Spencer Eth, *The Child as Witness to Homicide*, 40 J. SOC. ISSUES 87 (1984) (discussing children's trauma, their needs, and the needs of the criminal justice system). They report the Los Angeles County Sheriff's Homicide Division estimated that in approximately 200 of the 2,000 homicides in its jurisdiction in 1982, a dependent child witnessed the event. *Id.* at 88. In 35% of these witnessed cases the assailant was the other parent; in an additional 30% the perpetrators were other friends or relatives. *Id.* Statistics concerning the incidence of post-separation violence are set forth in note 39 *infra*.

23. Professor Lowe reports a particularly odd inconsistency in the English cases—it is very difficult to establish defenses to return under Articles 12 and 13, yet the courts have sometimes refused returns when children as young as 7 or 8 have raised objections. Lowe, *supra* note 3, at 189-90.

24. Some courts distend the exception by reasoning that the child's objection must be to litigation in the former habitual residence. See, e.g., *Commissioner v. Dormann* (1997) F.L.C. 92-766 (Fam. Ct. Western Australia) (refusing a 13-year-old's objection because it concerned his petitioning father, not the habitual residence); *Re Daniel Thomas Matznick* (1994) Outer House Cases (9 Nov. 1994) (Court of Session: Outer House) (Scot.) (refusing objections of 11- and 9-year-old siblings for similar reasons and also because the defense is only available in "exceptional" cases).

The Convention intends that a mature child will be permitted to dictate the return question because of his or her views on the merits—for example, an objection to being placed in the care of the petitioning parent. As Professor Pérez-Vera explains, “the Convention gives children the possibility of interpreting their own interests” and distinguishes the case of older children from that of immature children, who—in contrast—should not “choose between two parents.”²⁵

This aspect of the drafters’ scheme is often disregarded. A nine-and-a-half-year-old girl’s strong objections to return in the above case of apparent sexual abuse were, for example, unavailing. The child was ordered returned to her mother (who said that she had separated from the suspected abuser) on the assumption that the mother and daughter would be placed in an evaluation center run by Swedish social services. If the mother refused to participate, the social services planned to institute proceedings to place the child in foster care pending resolution of the abuse investigation. The English court that heard the return petition disregarded the child’s objections and failed to address whether the prospect of foster care might either constitute an intolerable situation or place the child at risk of psychological harm.²⁶ This willingness to place a child in institutional care despite his or her wishes to be cared for by the abductor is echoed in other cases. It is a distortion of the Convention’s exception for mature minors that is particularly inappropriate in cases involving child abuse or domestic violence, where children may be wise beyond their years.

Some U.S. courts, in similar enthusiasm for returning children under virtually all circumstances, have developed new doctrines that are unsupported by the Convention and are likely to impose unjustifiable hardships.

25. Pérez-Vera, *supra* note 2, ¶ 30. An English case demonstrates the wisdom of this defense in the abuse context. See *SR (A Minor) (Abduction)* [1992] F.C.R. 101, [1992] 1 F.L.R. 105 (*sub nom.* *Re R*) (honoring vehement objections of a 14½-year-old girl who alleged physical and sexual abuse, where it appeared she might commit suicide if returned). See generally Rania Nanos, Note, *The Views of a Child: Emerging Interpretation and Significance of the Child’s Objection Defense Under the Hague Child Abduction Convention*, 22 *BROOK. J. INT’L L.* 437 (1996), collecting the early cases.

26. See *Re S (Abduction: Return into Care)* [1999] 1 Fam. 843 (Fam. Div. 1998) (Eng.). *But see Re C (Minors)*, No. CA 281 of 1990, W.G. 272, High Court of Justice (London Fam. Div.) (11 April 1990) (Eng.), in which children faced lengthy group or foster care if they were returned to Norway. Their mother had been institutionalized for the sixth time in 5 years for alcohol abuse, and Norwegian social services planned to place the children in a group home for a year before reevaluating the situation and (if the mother had not improved) placing them in foster care. Their father had promised the children that he would not allow them to be institutionalized. When social services personnel told him they were without authority to place the children with him, and a judge told him informally that it would probably be a year until a court would hear (and in all likelihood, grant) his request for custody, he abducted them. The English court found that institutionalizing the children would seriously harm them emotionally and would place them in an intolerable situation; it therefore refused their return.

In *Blondin II*,²⁷ for example, the federal appellate court imposed a second test for a court to apply *after* it has found that a return would place the child in grave danger of harm under Article 13(b). This new inquiry is a search for any possible way to return the child to its country of habitual residence while avoiding the proven danger—solutions that may range from return in the abductor’s care to return into foster care.

Sometimes, however, the very return in the abductor’s care that is expected to ameliorate danger to a child exposes *the abductor* to danger. Nothing in the Convention suggests such a trade-off. But Australian and English courts have nonetheless returned children in the care of mothers who were under death threat, assuming that these women and their children would find refuge and safety in battered women’s shelters pending resolution of their custody disputes.²⁸ Further, as noted above, some courts are willing to return children to foster care, believing that this can protect them from dangers that would result if they were returned to the petitioning parent’s care. Either of these orders—into hiding or into foster care—victimizes the child. Under any fair reading of Article 13(b), they also impose a grave risk of psychological harm or place the child in an intolerable situation.²⁹

27. *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir.1999); there are four reported decisions in the case, of which this, the second, is known as *Blondin II*. As the reasoning and the sources cited in this article imply, this author disagrees with *Blondin II* and with the analysis of the *Blondin* decisions set forth in 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, 344-55 (2002) [hereafter *Weiner-Navigating*], and Silberman, *supra* note 11, at 53 to the extent that these authors reject the trial court’s reliance on the grave dangers to the children of renewed trauma, should they be returned. The children had been diagnosed with Post-Traumatic Stress Disorder (PTSD) stemming from their father’s violent behavior, and the court concluded that a return would inevitably re-traumatize them. Post-Traumatic Stress Disorder is a severe condition with potentially profound life-long effects that is appropriately considered under Article 13(b) if, on the facts of the case, a child suffers from the condition, and there is a grave risk that a return would re-traumatize him or her—*i.e.*, cause psychological harm or place the child in an intolerable situation. Judicial developments under the Child Abduction Convention are too often incompatible with contemporary knowledge concerning the impact of domestic violence on children. *See generally* Barbara J. Hart’s Collected Writings—in particular those indexed as “Children of Domestic Violence: Risks and remedies,” “Parental Abduction and Domestic Violence,” and “Assessing Whether Batterers Will Kill”—which are available at the website of the National Center on Domestic and Sexual Violence, www.ncdsv.org/publications_legal.html (last visited Sept. 12, 2004); Symposium on domestic violence, 11 J. GENDER, SOC. POL’Y & L. 237, 567-748 (2003) (articles concerning domestic violence in civil custody cases). Government publications concerning domestic violence and child abuse and links to related websites are available at <http://www.ojp.usdoj.gov>, under the headings “Violence Against Women” and “Family Violence,” and at <http://ojjdp.ncjrs.org/search/topiclist.asp>.

28. *See Murray v. Director of Family Service ACT* (1993) F.L.C. 92-416 (Austl.); *Re M* (Abduction: Intolerable Situation) [2000] 1 F.L.R. 930 (22 March 2000) (Fam. Div.) (Eng.).

29. Indeed, the Canadian courts sometimes recognize the Article 13(b) intolerable-situation defense when extreme domestic violence has been established and have also expressed “skep-

Next, the text of the Convention and the intention of its drafters are violated by courts that impose returns when a petition is filed a year or more after the wrongful event, and the children are settled in a new environment. The drafters considered it unwise to require that children in this situation, even those who had been hidden by an abductor, be uprooted for a custody trial. Instead they decided that it was best for them to remain in their current, settled surroundings pending a local decision on the merits. Indeed, because of the likely harm to children from removing their custody from an established primary caregiver, the Convention's drafters believed that custody on the merits would ultimately be awarded to many or most of these abductors.

The cases reveal that their drafting decision has been defeated by two interrelated distortions. The first occurs when courts treat the Article 12 requirement that a petition be filed within one year as a statute of limitations that may be tolled until the petitioner learns of the child's location. The other is seen when courts find the Article 12 defense satisfied, but then order a "discretionary" return.

Although the impulse for these interpretations is understandable, their deviations from the Convention's scheme are mistaken at best, both as to tolling provisions³⁰ and as to discretionary returns.³¹ Indeed, these distortions

ticism about the use of undertakings, safe harbor orders, and mirror orders as means of protecting children when ordering return." Judge Jacques Chamberland, *Article 13(1)(b) and Domestic Violence: The Canadian Situation*, 5 THE JUDGES' NEWSLETTER 17, 24 (Spring 2003) (discussing the relevant cases), available at <http://www.hcch.net/doc/spring2003.pdf>.

30. Compare *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004) (applying the tolling doctrine) with *Re C (Abduction: Settlement)* [2004] E.W.H.C. 1245 at ¶¶ 39-41 (Fam.) (28 May 2004) (Singer, J.) (Eng.) (articulating the deficiencies in the doctrine and refusing to apply it). *Accord*, *AC v. PC*, HCMP 1238/2004 (14 June 2004) (Hong Kong), available at http://www.judiciary.gov.hk/en/legal_ref/judgments.htm, click text at "Judgments (English)," then click "Go To", then enter case type (HCMP), no. (1238) and year (2004); *Anderson v. Acree*, 250 F.Supp.2d 872 (S.D. Ohio 2002). For an unusual case in which a return petition for a 13-year-old child was delayed because the receiving Central Authority failed to act, and the child's return to the household in which he had spent his first 12 years would surely cause him no trauma, see *Gonzalez Locicero v. Nazor Lurashi*, 321 F.Supp.2d 295 (D. Puerto Rico 2004). The court ordered return—an example of hard cases making bad law. Convention drafters had debated the problem of locating secreted children and had voted to forgo return orders of even these children. Custody, of course, is not automatically given to the abductor in a "one year and settled" case; although influenced by the likely outcome on the merits, the Convention's choice remains exclusively one of venue. As a result, children who have already suffered one major disruption will suffer a second, comparable upheaval only if the left-behind parent wins custody on the merits in the courts of the refuge state. See note 31 *infra*.

31. Justice Joseph Kay has pointed out that the defense established by Article 12 (in contrast to those of Article 13) is absolute as drafted and does not permit even discretionary returns under the Convention if a year has passed and the children are settled in their new environment. See *State Central Authority v. Ayob* (1997) F.L.C. 92-746 (Kay, J.) (Austl.) (obiter). His analysis is consistent with Professor Pérez-Vera's report. As she put it, "it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the

run the risk of turning the Convention into an engine of injustice, particularly in abuse cases. Abductors may go underground for many reasons, but hiding with children is a difficult way of life at best. It would not be surprising if this path is chosen most frequently by domestic violence victims who see it as their only option. To the extent that this is so, the courts that ignore the Convention's provision are compounding the harms the drafters sought to avoid when they set specific limits on the return obligation. The drafters may not have considered the implications of their decision to preserve the children's geographic stability during custody litigation for cases in which the abductor is not a victim but rather an abuser. Their rule nevertheless contains a silver lining: evidence of inadequate parenting (albeit not of domestic violence) that is likely to influence the custody decision may be more readily available in the new location than in a place the children left more than a year before.

Access cases provide the other setting in which return orders (even discretionary ones) are not permitted under the Convention. As in the case of delayed petitions for the return of children who have become settled, litigation is left to the courts of the refuge state. This drafting decision, too, has been distorted—in this case, by courts which hold that *ne exeat* orders (travel restrictions) confer custody rights on the visiting parent.³² A fair reading of the legislative history and of the import of travel restrictions is to the contrary.³³ *Ne exeat* orders guarantee convenient access by permit-

Convention." Pérez-Vera, *supra* note 2, ¶ 107. She also notes that (by requiring that the children be settled) an inflexible time limit was not imposed on the Convention's reach. Finally, she discusses the "one year and settled" defense—not with the Article 13 defenses, but rather with Article 18 (which authorizes the application of non-Convention law) and suggests (again) that this may provide the legal basis for return orders in Article 12 cases. *Id.* ¶¶ 109, 112. See also an excellent recent English judgment that considers the relevant authorities and agrees with Justice Kay's analysis. *Re C (Abduction: Settlement)* [2004] E.W.H.C. 1245 at ¶¶ 15-42 (Fam.) (Singer, J.) (Eng.).

32. For an early case holding that such a restraint confers a custody right for Convention purposes, see *C v. C* (minor: abduction: rights of custody abroad) [1989] All E.R. 465, [1989] 1 W.L.R. 654, [1989] 1 F.L.R. 403 (CA Civ. Div.) (Butler-Sloss, L.J.) (Eng.). For a recent example, see *Furnes v. Reeves*, 362 F.3d 702, 717-18 (11th Cir. 2004) (citing cases from Australia, South Africa, and Israel that agree and cases from Canada and France that do not). The *Furnes* decision is contrary to the decisions of three other federal Circuit Courts of Appeal. See note 34 *infra*.

33. Some commentators assert that a single remark during a discussion at the first diplomatic conference on the Convention and the brief responses of two others support the proposition that a travel restriction confers a right of custody. See, e.g., Silberman, *supra* note 11, at 46-48. But see Weiner-*Navigating*, *supra* note 27. Adair Dyer, Esq., the member of the Permanent Bureau staff who shepherded the Convention through its drafting and its first two decades, makes no such claim, and the matter is not even mentioned in Professor Pérez-Vera's Report. Further, members of the U.S. delegation to the drafting sessions had just published a strong criticism of *ne exeat* orders, yet nothing in their notes or recollections indicates any substantive discussion of the issue. Had it taken place, the delegation would surely have questioned the wisdom of a return remedy. See Brigitte M. Bodenheimer, *Equal Rights, Visitation, and the Right to Move*, 1 FAM. ADVOC. 18 (Summer 1978) (at the time, Lawrence Stotter, Esq., was the journal's editor). (The pivotal roles of Professor Bodenheimer and Mr. Stotter in Convention history are noted in

ting the noncustodial parent to say something about where the child may *not* live—perhaps not out of a local jurisdiction or perhaps not abroad, depending on their terms. They do not, however, permit the noncustodial parent to designate affirmatively in which house or on which street or even in which locale a child *will* live—the express power to determine the child’s residence that Article 5 states constitutes a right of custody for Convention purposes.³⁴ In states that confound these custody and access issues, noncustodial parents can force the return of a child although access rights are all that the parent wants or can reasonably expect. And the custodial parent and child must now return for litigation that was never thought sufficiently important to require that disruption. Further, return carries with it a danger that custody will be transferred to the petitioner in order to punish the abductor, not because the new custodial arrangement would serve the children’s interests. This harmful practice, which had already arisen in U.S. interstate cases before the Convention was drafted,³⁵ was alluded to by Professor Pérez-Vera:

A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the *substitution* of the holders of one type or right by those who held the other.³⁶

This example is relevant in two ways to my discussion of domestic violence cases. First, it demonstrates how the Convention can be distorted when courts ignore its underlying scheme. Secondly, it contributes to the

Adair Dyer, *To Celebrate a Score of Years*, 33 N.Y.U. J. INT’L L. & POL. 1, 10-11 (2000).) The author of this article clearly recalls her discussion with Professor Bodenheimer while the Convention was being drafted concerning the proposed definition for custody rights. They agreed that it captured the important distinction between custody and access rights. Although both were fully aware of the use of *ne exeat* orders by some courts and both opposed this practice on policy grounds, the proposed definition did not suggest to either of them that it would include such orders. Mr. Stotter’s recollections, as refreshed by his notes, are also that no consideration of *ne exeat* orders took place. Telephone conversation between the author and Lawrence Stotter (Oct. 15, 2003). See also notes 35 and 36 *infra* and accompanying text.

34. See *Croll v. Croll*, 229 F.3d 133, 138-43 (2d Cir. 2000), *Gonzalez v. Gutierrez*, 311 F.3d 942, 949-52 (9th Cir. 2002), *Fawcett v. McRoberts*, 326 F.3d 491, 498-500 (4th Cir. 2003). Applying the analysis this author finds persuasive, these courts agree that *ne exeat* orders protect access but confer no custodial rights on the visiting parent. *But see Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004).

35. Punitive orders were identified and criticized by Professor Brigitte Bodenheimer, the Reporter of a U.S. uniform state law that was drafted to discourage abductions, who later served on the U.S. delegation that participated in the drafting of the Child Abduction Convention. See Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978, 1003-09 (1977) (terming the use of punitive orders an “acute difficulty” and “major obstacle to interstate harmony”).

36. Pérez-Vera, *supra* note 2, at ¶ 65 (emphasis added).

hardships custodial parents in general, and domestic violence victims in particular, now face in Convention cases that are unsupported by policy goals. Specifically, return may be sought for improper motives such as control, intimidation, or financial advantage, and this danger increases whenever a return order is available to a petitioner whose claim to custody on the merits is extremely weak. In cases of domestic violence, this result is particularly grave.

Judges who believe that abuse or domestic violence has taken place and are concerned about the safety of the children or the abductor often believe that they can ameliorate these dangers through undertakings.³⁷ They have, for example, obtained promises of separate housing and promises that the petitioner will not contact the endangered parent or child until the courts of the habitual residence have had an opportunity to take protective steps.

These orders, which constitute another departure from the Convention as drafted, are naive at best.³⁸ At worst, they turn a blind eye to injustice. The incidence and severity of domestic violence increase at the time of separation,³⁹ and women are at an even higher risk of being murdered following

37. For the history of undertakings in this context, see PAUL R. BEAUMONT & PETER E. McELEVAY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 156-72 (1999) (cautioning on p. 156 that “[t]he essential issue is to ensure that . . . the safety of the returning child and the abductor can be guaranteed”).

38. The judgment in *Re Daniel Thomas Matznick* (1994) Outer House Cases (9 Nov. 1994) (Court of Session: Outer House) (Scot.), for example, reveals a judge who accepted the testimony of the abuser in virtually every respect despite ample eye-witness testimony of numerous assaults on the abductor and the children from the wife, the children, both spouses’ families and a neighbor. The wife argued both that the children had been abused by their father and that they were also psychologically harmed by witnessing his abuse of her. The judge was favorably impressed by the man’s calm demeanor, apparently unaware that abusers typically demonstrate this behavior during custody proceedings. See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 122-23 (2002). He was also unaware that interviewed children often fail to report transgressions by adults that they have witnessed. See, e.g., Margaret S. Steward, Kay Bussey, Gail S. Goodman & Karen J. Saywitz, *Implications of Developmental Research for Interviewing Children*, 17 *CHILD ABUSE & NEGLECT* 25, 27, 30 (1993); Gail S. Goodman & Mindy S. Rosenberg, “The Child Witness to Family Violence: Clinical and Legal Considerations” in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 97, 113 (Daniel Jay Sonkin, ed. 1987):

In summary, child witnesses are likely to evidence predictable accuracies and inaccuracies in their reports. The gist . . . is likely to be correct, although they may be confused about specific details. . . . [T]he maladaptive strategies seem to minimize the violence witnessed rather than exaggerate it. This principle is consistent with the general finding that children’s errors are mainly those of omission rather than commission. Inaccuracies result in large part from inappropriate interviewing.

39. See Marianne W. Zawitz, *Violence between Intimates*, U.S. Dept. of Justice, Bureau of Justice Statistics, NCJ 149259 (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vbi.pdf> (“Divorced or separated women had higher rates of violence by intimates (16 per 1,000 persons) than women who never married (7 per 1,000) or married women (1.5 per 1,000).”).

See also PATRICIA TJADEN & NANCY THOENNES, *EXTENT NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY*

separation than they are while sharing their households with violent men.⁴⁰

An understanding of abusive relationships makes the reason clear. Abusers often seek, above all, to have control over their partners.⁴¹ It

37, U.S. Dept. of Justice, National Institute of Justice, NCJ 181867 (2000) available at <http://ncjrs.org/pdffiles1/nij/181867.pdf>

[M]arried women who lived apart from their husbands were nearly four times more likely to report that their husbands had raped, physically assaulted, and/or stalked them than were women who lived with their husbands (20 percent and 5.4 percent). Similarly, married men who lived apart from their wives were nearly three times more likely to report that their wives had victimized them than were men who lived with their wives (7.0 percent and 2.4 percent). These findings suggest that termination of a relationship poses an increased risk of intimate partner violence for both women and men. . . . [I]t is unclear whether the separation triggered the violence or the violence triggered the separation.

As to nonlethal post-separation violence, Fleury et al. report that 36% of women with abusive partners who left a U.S. shelter for women were assaulted by a male ex-partner during the following 2-year period. Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000). The study also found that batterers who began their assaults later in the couple's relationship were significantly more likely to batter after it ended and that frequency of threats was a stronger predictor of battering than frequency of prior violence. *Id.* at 1374-76. Their finding that women who lived in different cities from their batterers were significantly less likely to be assaulted raises important policy questions for those who would restrict the relocation of custodial parents. *Id.* (*n.b.*, the study was restricted to women who planned to remain in the community, and most relocations were made by their former partners; no reasons are reported for the parties' places of residence); see generally Carol S. Bruch, Brief of Amici Curiae Herma Hill Kay et al., Marriage of LaMusga, Calif. S. Ct. (No. 107355) (2003), available at <http://www.law.ucdavis.edu> at Prof. Bruch's faculty page; Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996). DeKeseredy et al. report that 40% of the 75 divorced men who participated in a study by Arendell stated that they had threatened or used violence against their former spouses after separation. Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAVIOR 675, 676 (2004) (citing TERRY ARENDELL, FATHERS AND DIVORCE (1995)). The Arendell study was not restricted to abusers; it involved men with a child from a previous marriage who had been divorced for at least 2 years; the group over-represented fathers who maintained contact with their children. See generally Deborah M. Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 107-08, 111-13 (2004).

40. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 4 (1993) (statistics from Canada (1974-1990), New South Wales, Australia (1968-1986), and Chicago (1965-1990) reveal that women are at increased risk of being murdered by their husbands after marital separation, but husbands are not similarly at risk); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 637 note 231 (2000) [hereafter *Weiner-Escape*] (collecting the authorities). As to lethal post-separation violence, see DeKeseredy et al., *supra* note 39 (reporting Canadian research indicating that separation entails a 6-fold increase in homicide risk for women).

41. Tjaden & Thoennes, *supra* note 39, at iv ("These findings support the theory that violence perpetrated against women by intimates is often part of a systematic pattern of dominance and control."); Deborah Goelman & Roberta Valente, ABA Commission on Domestic Violence, *When Will They Ever Learn? Educating to End Domestic Violence: A Law School Report* 26 (1997), available at http://www.ncdsv.org/publications_legal.html. For abduction cases with vivid facts consistent with this pattern, see *W v. W* (a child) (abduction: conditions for return)

should come as no surprise, then, that the victim's unilateral decision to leave the household or make recourse to the legal system incenses the abuser. Yet many of these men, who are brutal at home, appear calm or even mild-mannered to evaluators and judges.⁴² Their skill in deceiving others is documented in the research literature, and the leading English child-find organization's report that undertakings were violated in two-thirds of the cases and honored in only one-fourth should, therefore, come as no surprise.⁴³

[2004] E.W.H.C. 1247 (Fam.), [2004] All E.R. (D) 58 (Jun) (Baron, J.) (Eng.) (where, *inter alia*, the father had twice hired counsel who had previously represented the mother, apparently prejudicing her legal position in each instance, and had sent her an email attachment that, had she opened it, would have given him access to her email correspondence, including that with counsel); *Re R* (abduction: habitual residence) [2003] E.W.H.C. 1968 (Fam.), [2004] 1 F.L.R. 216 (Eng.). In *Re R* the father refused his wife's request to extend a month-long visit to Australia from Germany by 11 days so that she and the couple's young child could attend the 80th birthday party for an uncle at which the extended family would be assembled. His behavior seems consistent with an earlier assessment of a public health visitor: "I feel this woman is in fear of her life and that of her child because of the violence of her husband and his need to control them." *Id.* ¶ [25]. The court first remarked on what it saw as the father's inappropriate responses to his wife's request and ultimately concluded, "The law requires me on the findings I have made to make the order the father seeks. If . . . I had any discretion I suspect very strongly indeed that I would exercise [it] against the father. . . . The idea that this busy professional father [who works very long hours] is going to take over the day-to-day parenting of an 18-month-old baby [from a person he agrees is a more than adequate mother] seems . . . remote from reality." *Id.* at ¶¶ [14], [63]. The court's reluctant finding that the father's temporary posting to Germany made Germany, not England, the child's habitual residence might have been decided differently under the reasoning the author of this article has advanced elsewhere. *See* Carol S. Bruch, "Temporary or Contingent Changes in Location Under the Hague Child Abduction Convention," in *GEDÄCHTNISSCHRIFT ALEXANDER LÜDERITZ* 43 (H. Schack, ed. 2000).

42. This aspect of their personalities may account, as well, for their original appeal to the women whom they later victimize and for their ability to draw their partners back time and again as they repent their violent attacks. *See generally* DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 121-60 (setting forth ch. 5, "The Abusive Personality") (1995).

43. *See* Reunite Research Unit, *The Outcomes for Children Returned Following an Abduction* 31 (Sept. 2003) (authored by Marilyn Freeman), available at <http://reunite.org/WEBSITEREPORT.doc>. All but one of the mother abductors returned with or at the same time as the children (although 44.4% of the nine abducting mothers raised domestic violence concerns); none of the abducting fathers returned (and none raised domestic violence as a concern). The study, which was funded by the Foreign and Commonwealth Office of the United Kingdom, concerns 22 cases involving 33 abducted children. Fourteen of these (63%) involved mother-abductors; the remaining 8 abductions were carried out by fathers. In 19 of the 22, the return resulted from Hague proceedings in the refuge state. As to cases in which undertakings were given, 6 out of 6 undertakings to restrain from violence were broken, 5 of 7 promises to provide accommodation and support were broken, 4 of 7 undertakings to refrain from removing the children from the care of the abductor were broken, and 1 of 8 promises not to initiate criminal proceedings was broken. The numerical results do not total 100% because one of the children was not returned, and the undertakings in that case therefore never came into operation. For what may be a case in which a violent father lied, a victim mother did not, and the court believed the liar, *see* *C. (J.R.) v. C. (L.C.M.)* (2003), 2003 A.C.W.S.J. 27467 at ¶¶ 25-39, 127 A.C.W.S.

This failure of undertakings and mirror orders should have been anticipated in abuse cases for a second reason. Abusers flout court orders.⁴⁴ Perhaps, as suggested above, they never intended to obey. Perhaps their disregard for the law is a reaction to what they perceive as an assault on their control. Perhaps it indicates their inability to contain their aggression even when they have been told that further abuse will have serious consequences for them. Whatever the reasons, the statistics on recidivism indicate that courts are seriously misguided when they assume that the judicial system of the habitual residence will be able to protect the victim or—even worse—that a denied return order in abuse cases will offend the state of habitual residence because it suggests that the country's ability to prevent violence is imperfect. Of course every legal system is imperfect in this regard.

There is no way to know how many abductions never take place because would-be-abductors learn that leaving without first resolving custody issues would be futile. But the decrease in garden-variety cases in recent years suggests that they are many, and that the Convention can take much of the credit for this change.⁴⁵ There is also, however, bad news—an increasing

(3d) 485 at ¶¶ 25-39 (N.L., Tr. Div.) (Can.). The father flatly denied violent behavior while the mother did not dispute relatively minor displays of temper on her part. Although the court's conclusion that the daughter, at 9, was not of an age and maturity to have her "very clear" objection to return control is unremarkable, it also found that the evidence concerning the father's alleged violence was "not conclusive either way," that the mother had "put her own spin on things" in their daughter's presence during therapy, and that the child's objection "may not be based upon her own independent assessment of the situation."

44. Professor Weiner reports the American research, concluding, "[B]atterers often violate agreements or court orders designed to stop the batterer's violence . . ." *Weiner-Escape, supra* note 40, at 681 & note 514. A study of recidivism for violent crimes reveals, for example, that violence between intimates is two-and-a-half times more likely to recur than violence directed at a stranger. *Id.* And, in a related situation, another U.S. source reveals that "69 percent of the women [who obtained a restraining order] said their stalker violated the order." *Id.* Reunite, *supra* note 40, reports that 100% of those who offered non-molestation undertakings in domestic violence cases disregarded them following the return. In light of these figures, the opinion in *Re M (Abduction: Intolerable Situation)* [2000] 1 F.L.R. 930 (22 March 2000) (Fam. Div.) (Eng.) is a sobering example of an English court's (a) refusal to hear oral evidence from a woman who feared for her life if she returned to Norway, (b) naive reliance on extensive undertakings from her husband (a convicted murderer who was entitled to furloughs from prison), and (c) imposition of an unrealistic burden on her to establish that no women's refuge in Norway would be available to shelter and protect her and the children. *See supra* note 40 and accompanying text.

45. Some years ago at the Hague, this author reported that her data base of Hague child abduction cases revealed that 70% of abductors were now women, many of whom were returning to their families, and this observation was echoed by personnel from Central Authorities. Lowe and Perry have since provided confirming data. *See Lowe & Perry, supra* note 3, at 130. Professor Lowe reports, however, a striking difference between the gender of abductors to England from the U.S. (79%-83% female) and abductors to the U.S. from England (52%-62% female) (figures from 1996-1999 Central Authority cases). Lowe, *supra* note 3, at 194-95 & Graph 3. Professor Weiner notes a likely negative impact of deterrence—it may also prevent victims of domestic violence from making efforts to escape. Merle H. Weiner, *The Potential*

number of cases in which a primary caretaker abducts the children and then alleges that the left-behind-parent was abusive.

Commentators have speculated that these women simply are not deterred by the Convention's remedy—that their desperation leads them to flee, with legal consequences (criminal and civil) far from their minds.⁴⁶ Their goal is to be safe, and they believe the way to accomplish this is to move far away from the abuser and, in some cases, to hide from him as well. Research on California abduction cases reveals that this is, in fact, often the case.⁴⁷ For many of these victims, the Convention simply does not require reinstating the danger.

Surely the Convention is brilliant when it calls for the resolution of most custody contests in the place of habitual residence. But surely also, its carefully drafted contours and exceptions deserve faithful application. This is, of course, no easy matter. Yet the gratuitous harm now being inflicted on abused family members in the name of the Convention can be greatly alleviated by a simple return to the scheme the drafters provided. That goal is worthy of our attention and our best efforts.

and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad, 11 J. GENDER SOC. POL'Y & L. 749, 769 (2003).

46. See, e.g., *Weiner-Escape*, *supra* note 40, at 623-26.

47. See Janet R. Johnston, Inger Sagatun-Edwards, Martha-Elin Blomquist & Linda K. Girdner, *Early Identification of Risk Factors for Parental Abduction*, *Juvenile Justice Bulletin* 1, 4-5 (March 2001), available at <http://www.ncjrs.org/pdffiles1/ojdp/185026.pdf> (reporting the results of 4 research projects). This is true for many female abductors as well as some male abductors. The authors also report that as a group female abductors are poor and without access to lawyers and mental health professionals who might assist them. Further, perhaps because they often belong to cultural groups that do not turn to the courts to resolve disputes, they often do not even know that moving away with their children is against the law.

