

THE HAGUE CONVENTION ON INTERNATIONAL
PARENTAL KIDNAPPING: STILL THE BEST HOPE FOR
CHILDREN?

Katherine Jenkins[†]

Addressing whether the Hague Convention is still the best solution to international parental kidnapping and what can be done to improve the response of the Convention, especially in regard to domestic violence.

I. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.....	626
A. The Issue of International Parental Child Kidnapping ...	626
B. Introduction to Hague Convention: Philosophy & Purpose.. ..	627
C. The Hague Convention.....	628
D. Related Legislation.....	633
E. The Hague Convention Today.....	636
F. Issues	637
II. THE NON-HAGUE CONVENTION PROCESS	646
A. Introduction to Non-Hague Convention Process.....	646
B. Issues with Non-Hague Convention Process.....	648
III. SOLUTIONS.....	651

[†] J.D. Candidate at Benjamin N. Cardozo School of Law, Class of 2023. B.A. in Social Work, Long Island University Post. I would like to thank my faculty advisor, Edward Stein, for his thoughtful feedback and editing.

INTRODUCTION

David Goldman said goodbye to his four-year-old son, Sean, who was bound for a two-week vacation in Brazil with his mother, Bruna.¹ At that moment, David was blissfully unaware of the future, where an international parental kidnapping case and a contentious, five-year litigation battle would mean that he would not lay eyes on his son again, in the United States, until he was nine years old.² The nightmare began once Bruna arrived in Brazil and told David that she no longer wanted to be with him and was keeping Sean with her.³ Even after Bruna died in childbirth a few years later, her family and new husband still retained and fought for custody of Sean.⁴ After a five-year legal ordeal and tireless advocacy, David was reunited with his son on Christmas Eve, following the Brazilian Supreme Court's order to return Sean to David's custody.⁵ Commenting on the case ten years later, Patricia Apy, David's lawyer, remarked:

We talk about child abduction now and most Americans, because of this case, understands what that means. They understand that this is not a custody case gone bad. This is not merely a family dispute or bad matrimonial case. This is an act which has been identified as an aspect of child abuse. Now we look at child abuse completely differently. Sean and David put a human face on something that was very difficult for most Americans to grasp.⁶

Kidnapped children are at a higher risk for long-term psychological problems, such as anxiety, eating disorders, mood swings, sleep disturbances, and aggressive behavior.⁷ As adults, many of these

¹ Scott Stump & Ree Hines, *David and Sean Goldman Look Back on Infamous Abduction Ordeal 10 Years Later*, TODAY (Aug. 8, 2019), <https://www.today.com/news/david-sean-goldman-look-back-infamous-abduction-ordeal-10-years-t160316> [<https://perma.cc/6S64-CNCV>]; Jerry Carino, *Sean Goldman, 10 Years After Reunion With Dad, Fights for Other Abducted Kids*, ASBURY PARK PRESS (Aug. 8, 2019), <https://www.app.com/story/news/local/values/2019/08/08/david-goldman-sean-goldman-international-child-abduction/1941551001/> [<https://perma.cc/3GWM-CPPB>].

² Carino, *supra* note 1; Stump & Hines, *supra* note 1.

³ Carino, *supra* note 1.

⁴ Stump & Hines, *supra* note 1.

⁵ *Id.*

⁶ Carino, *supra* note 1.

⁷ *International Parental Kidnapping*, U.S. DEP'T OF JUST. (May 5, 2021), <https://www.justice.gov/criminal-ceos/international-parental-kidnapping> [<https://perma.cc/UDG2-QEQM>].

victims struggle with identity, relationship, and family issues.⁸ According to the Hague Convention, “[b]eing wrongfully removed from or retained outside of their State of habitual residence has a detrimental impact on a child. . . . Taking a child abruptly from the environment in which he or she has the strongest familial and social ties therefore has serious consequences.”⁹

As if the act of kidnapping is not traumatizing enough, the process of returning a child is often contentious and emotional. A reporter who observed a single day of Hague Convention judicial return proceedings in Ireland noted the “difficulties and heartbreak” involved in international parental kidnapping cases.¹⁰ In particular, she reported on a young, pre-teen boy with an Australian mother and an Irish father, whose father took him on an international vacation but then refused to return to Australia with him.¹¹ Via a Hague Convention proceeding, the mother petitioned for his return.¹² A psychiatrist who interviewed the child asked him which country he would prefer to live in, to which he answered that “he would love both countries to get back together as one big piece of land, then he sobbed, hiding his face in his hands, and said he was not able to pick.”¹³

The Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) is the best legal mechanism to fight and resolve international parental abductions. It provides a route of enforcement that is unavailable to countries that are not signed on to the Hague Convention and provides better outcomes for children and left-behind parents. However, in order to continue to secure the best interests of the children it seeks to protect, the Hague Convention is desperately overdue for revisions—especially in regard

⁸ *Id.*

⁹ *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCH, <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (quoting) [<https://perma.cc/KM63-7NZ4>] (last visited Sept. 11, 2022); *see also* *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 [hereinafter *The Hague Convention*].

¹⁰ Colm Keena, *Abducted by a Parent: Heartbreaking Cases of the Hague Convention*, *THE IRISH TIMES* (Dec. 24, 2018), <https://www.irishtimes.com/news/crime-and-law/courts/high-court/abducted-by-a-parent-heartbreaking-cases-of-the-hague-convention-1.3740959> [<https://perma.cc/6ZZW-DHUI>]. Hague judicial return proceedings are a civil law mechanism, between participating treaty countries, to facilitate the return of children who have been kidnapped internationally.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

to domestic violence—as the Hague Convention has unwittingly become a tool for domestic abusers to assert control over their victims that have fled the country. This paper will address how courts: 1) interpret domestic violence within the context of domestic violence, and 2) set forth pragmatic solutions to solve these issues.

I. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

A. *The Issue of International Parental Child Kidnapping*

While international parental child kidnapping has always existed, it has become more prevalent in recent years.¹⁴ Kidnappings occur for various reasons, but commonly occur “during a heated or emotional marital dispute, in the early stages of separation or divorce, or in the waiting period for a court custody order or agreement.”¹⁵

All international parental child kidnapping situations involve two basic elements: 1) the wrongful taking of a child from their habitual environment, in violation of the custodial parent’s rights; and 2) the taking parent intends to “obtain a right of custody from the authorities of the country to which the child has been taken.”¹⁶ The taking parent takes a child to a different country to establish a custodial decision in their favor, essentially trying “to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about.”¹⁷ By relocating with the child to a different country, the taking parent has an immediate advantage, as they “[have] chosen the forum in which the case is to be decided, a forum which, in principle, [they] regard[] as more favorable to [their] own claims.”¹⁸

¹⁴ *International Parental Child Abduction*, COMM’N ON SEC. & COOP. IN EUR., <https://www.csece.gov/issue/international-parental-child-abduction> [<https://perma.cc/5UWT-GD3Y>] (last visited Sept. 8, 2022).

¹⁵ U.S. DEP’T OF JUST., *supra* note 7.

¹⁶ Elisa Pérez-Vera, *Explanatory Report of the Convention on the Civil Aspects of Child Abduction*, Acts & Documents of the XIVth Session (Volume 1) 426, 428-29 (1982), <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> [<https://perma.cc/7V2K-YG6E>]. The taking parent is the parent that kidnaps the child and transports them across international borders.

¹⁷ *Id.* at 429.

¹⁸ *Id.* (“To conclude, it can firmly be stated that the problem with which the Convention deals—together with all the drama implicit in the fact that it is concerned with the protection of children in international relations—derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual

Recognizing this issue, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the Hague Convention”) was drafted with the awareness that a solution required international collaboration between nations.¹⁹ Through the cooperation of Contracting States, authorities refuse to give legal recognition to invalid custodial rights, thereby attempting to stymie taking parents’ attempts to control jurisdiction and efforts to receive more favorable custody decisions in other countries, facilitating the return of the child to their proper home.²⁰

B. *Introduction to Hague Convention: Philosophy & Purpose*

The Hague Convention established a civil law mechanism to facilitate the prompt return of children who are internationally abducted, as well as enforce the rights of custody and access of the original state from which the child was taken.²¹

The Hague Convention’s philosophy is “inspired by the desire to protect children and should be based upon an interpretation of their true interests.”²² While the Convention makes no express references to the “best interests” standard of the child, the entire purpose of the Convention, the return of wrongfully taken children, is rooted in the best interests standard—as noted in the official explanatory report on the Convention.²³ The Convention treaty begins by affirming these ideals, writing that the Convention members were “firmly convinced that the interests of children are of paramount importance in matters

can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to ‘legalize’ a factual situation which none of the legal systems involved wished to see brought about.”).

¹⁹ *Id.* at 430.

²⁰ Pérez-Vera, *supra* note 16, at 435.

²¹ The Hague Convention, *supra* note 9, art. 1.

²² Pérez-Vera, *supra* note 16, at 431.

²³ *Id.* (“[T]he dispositive part of the Convention contains no explicit reference to the interests of the child. . . . However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be ‘firmly convinced that the interests of the children are of paramount importance in matters relating to their custody’; it is precisely because of this conviction that they drew up the Convention, ‘desiring to protect children internationally from the harmful effects of their wrongful removal or retention.’”). Note that the “best interests standard” is a general legal principle.

relating to their custody” and desirous “to protect children internationally from the harmful effects of their wrongful removal or retention.”²⁴

Furthermore, although the Hague Convention pre-dates the United Nations Council on the Rights of Children, it provides procedures to ensure the same rights enumerated by this Council.²⁵ This is especially apparent in Article 11, which states that “[p]arties shall take measures to combat the illicit transfer and non-return of children abroad,” and encourages parties signed onto this Council to form bilateral or multilateral agreements to further this end.²⁶

Although the Hague Convention provides a civil remedy for the return of illegally taken children, it is not meant to be a substitute for an extradition treaty nor are judicial and administrative officials meant to issue decisions on the merits of custody disputes. The Hague Convention simply “provides a civil remedy designed to preserve the status quo by quickly returning abducted children to the country of their habitual residence and allowing the judicial authorities in that country to address the merits of a custody dispute.”²⁷

C. *The Hague Convention*

The Hague Convention defines the taking of a child to be wrongful when:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which 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.²⁸

²⁴ *Id.*

²⁵ Pérez-Vera, *supra* note 16, at 435.

²⁶ G.A. Res. 44/25, Convention on the Rights of the Child, art. 11 (Nov. 20, 1989).

²⁷ KATARINA C. O'REGAN, CONG. RSCH. SERV., R46553, INTERNATIONAL PARENTAL CHILD ABDUCTION (IPCA): FOREIGN POLICY RESPONSES AND IMPLICATIONS 5 (2020); see also Brian S. Kenworthy, *The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children's Rights Aspects of the Hague Convention on International Child Abduction*, 12 IND. INT'L & COMP. L. REV. 329, 332 (2002) (calling the Hague Convention “primarily jurisdictional in nature”).

²⁸ The Hague Convention, *supra* note 9, art. 3.

The Hague Convention is an autonomous entity, so it does not have the power to address wrongful takings of children unilaterally.²⁹ To further that end, the Hague Convention invites countries [referred to as Hague Convention countries] to sign onto the Convention to more efficiently assist the return of abducted children.³⁰ Once countries sign on to the treaty, they are required to designate a Central Authority to perform the duties enumerated by the Convention and pass legislation to further this end, if necessary.³¹ These Central Authorities are then required to cooperate with each other and act “expeditiously” to return wrongfully-taken children.³²

The Hague Convention outlines the measures each Contracting State must take to facilitate the return of children. These tasks include: 1) locating the kidnapped child; 2) beginning judicial or administrative proceedings for the purpose of returning the child; 3) providing legal aid and advice when necessary; and 4) informing each other about the status and operations of the Convention.³³ Aside from outlining these basic duties, the Hague Convention allows signatories a significant amount of flexibility and discretion for how they perform and design their individual processes.³⁴

The process of the Hague Convention is as follows: any person or institution, believing that a child has been kidnapped to another country, can file an application to the Central Authority of the child’s habitual residence or any other Central Authority.³⁵ Of course, it is not always known exactly where a child is taken, so Contracting States are required to coordinate and communicate as to the whereabouts of the child to ensure that the application is filed in the correct Hague Convention country.³⁶ The Central Authority of the state where the child was taken from then transmits the return petition to the Central Authority of the state where the child was taken to.³⁷ This Central

²⁹ Pérez-Vera, *supra* note 16, at 430.

³⁰ *Id.* at 429.

³¹ The Central Authorities are the governmental bodies, established by each individual Hague Convention Country, to undertake the duties of the Hague Convention. *Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (10-17 October 2017)*, HAGUE CONF. ON PRIV. INT’L L., <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf> [<https://perma.cc/8MD6-TGNJ>] (last visited Sept. 8, 2022).

³² The Hague Convention, *supra* note 9, art. 11.

³³ *Id.* art. 7.

³⁴ Pérez-Vera, *supra* note 16, at 438.

³⁵ The Hague Convention, *supra* note 9, art. 8.

³⁶ *Id.* art. 9.

³⁷ *Id.* art. 7.

Authority must then launch a judicial or administrative proceeding, in which the State where the child was taken to evaluate the elements of the petitioning parent or institution's Hague Convention application, with the ultimate goal of returning the child to his or her rightful environment (or "habitual residence"), via a return order.³⁸

To receive such a return order from the Contracting State in which the abducted child resides, the petitioning parent must establish a prima facie case of wrongful removal by showing: 1) that the child was a habitual resident of the country from which he or she was taken, 2) that the parent had valid custody rights over the child, and 3) that the child was wrongfully removed from his or her habitual residence, in breach of the petitioning parent's custodial rights.³⁹ Provided the case meets other requirements, including, that he or she is less than sixteen years old, or that the taking parent has not sufficiently alleged an affirmative defense to the return order, that child must be returned.

Judges conducting these judicial or administrative proceedings must consider the elements of a prima facie case of wrongful taking, including the custodial rights of the respective parents, whether these rights were in effect at the time of the taking, and whether the child was a habitual resident of the originating state.⁴⁰ Both "rights of custody" and "rights of access" are considered under the scope of the convention.⁴¹ Rights of custody generally refers to a parent who has complete custody of the child and can therefore choose the child's place of residence.⁴² Rights of access refers to a parent who has the right to take the child from his or her habitual residence for a limited amount of time, after which the parent must return the child to their primary custodian.⁴³ Given that the Hague Convention repeatedly emphasizes quick resolutions when it comes to judicial or administrative proceedings, if the proceedings are taking longer than six weeks, the applicant or Central Authority has the right to request an explanation for this delay.⁴⁴

A taking parent is able to contest the return order by declaring an affirmative defense. If the evaluating court finds this affirmative

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* art. 3.

⁴¹ The Hague Convention, *supra* note 9, art. 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* art. 11.

defense to be valid, it is not required to return the child. Two of the most common affirmative defenses are found in Article 13:

- a) the 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, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.⁴⁵

Article 13(a) turns on a straightforward factual analysis, that is, whether a parent was actually exercising their custodial rights at the time of removal. Article 13(b), however, is more nuanced, and judicial and administrative authorities are therefore given discretion to interpret it as they wish.⁴⁶ Although Hague Convention countries have this discretion, the Hague Convention urges them to apply these exceptions very sparingly, in order not to hinder the return of illegally taken children.⁴⁷

Nonetheless, Hague Convention countries have developed their own jurisprudence interpreting these defenses, with some interpreting these defenses more narrowly than others. For example, the United States has narrowly interpreted the Article 13(b) defense, focusing almost entirely on the “grave risk of harm” phrase and de-emphasizing the “intolerable situation” phrase, upholding this affirmative defense in very limited circumstances.⁴⁸ In *Walsh v. Walsh*, the father perpetrated repeated and serious violence against his wife and older children, with the younger children often present.⁴⁹ The abuse was so shocking that the court found it sufficient to constitute a grave risk of harm, satisfying the affirmative defense of Article 13(b).⁵⁰ In *Friedrich v. Friedrich*, the court went into further detail and explicitly outlined two situations where a grave risk of harm would likely exist: 1)

⁴⁵ *Id.* art. 13.

⁴⁶ Pérez-Vera, *supra* note 16, at 433 (acknowledging that 13(b) will sometimes overtake the overall purpose of the Convention, writing “the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation”).

⁴⁷ *Id.* at 434.

⁴⁸ Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2619 (2020).

⁴⁹ *Walsh v. Walsh*, 221 F.3d 204, 209-11 (1st Cir. 2000).

⁵⁰ *Id.* at 219.

when the child is being returned to a zone of war, famine, or disease, or 2) in cases of severe abuse or neglect.⁵¹ However, “U.S. Courts have held that the defense is not satisfied in cases of poverty, unfavorable living conditions, or limited educational opportunities.”⁵² For example, in *Bernal v. Gonzalez*, the court rejected a father’s 13(b) defense on the grounds that returning the children to Mexico would expose them to drug cartel violence, and therefore, serious physical and psychological harm.⁵³ The court concluded that this argument failed to sufficiently prove an imminent and grave risk of harm.⁵⁴ Overall, United States jurisprudence is hesitant to grant this defense, and only does so in the most shocking and serious of domestic abuse cases, as in *Walsh*.⁵⁵

Another valid affirmative defense to a return order is found in the “Child’s Objection Clause,” which allows the refusal of a return when a judicial or administrative authority “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.”⁵⁶ Since the Convention is focused on the best interests and overall welfare of the child, this is only logical, as it allows older children to voice their own beliefs about what constitutes their best interest to the court.⁵⁷ The final affirmative defense is outlined in Article 12 and allows the refusal of a return when it “is demonstrated that the child is now settled in its new environment.”⁵⁸

The Hague Convention was unanimously adopted by the states present at the conference in 1980.⁵⁹ The Convention entered into force

⁵¹ *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *see also* Cleary, *supra* note 48, at 2633.

⁵² Cleary, *supra* note 48, at 2633.

⁵³ *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 921 (W.D. Tex. 2012) (The father testified that he observed dead bodies floating in the river by the family home, and the brother [not subject to Convention because of age] testified that he witnessed a man pointing a gun at his car once. The Court stated that “[t]he ongoing violence in the Republic of Mexico is a serious concern; however, the general cartel violence in Mexico, and specifically the testimonial evidence, *supra*, does not constitute the clear and convincing evidence necessary to trigger the grave risk of harm exception.”).

⁵⁴ *Id.*

⁵⁵ *See* *Walsh v. Walsh*, 221 F.3d 204, 209-11 (1st Cir. 2000).

⁵⁶ The Hague Convention, *supra* note 9, art. 13.

⁵⁷ Pérez-Vera, *supra* note 16, at 433.

⁵⁸ The Hague Convention, *supra* note 9, art. 12.

⁵⁹ Pérez-Vera, *supra* note 16, at 426 (the conference participants at the Hague Convention included: Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg,

in 1983 once France, Portugal, and Canada ratified the treaty.⁶⁰ As of 2019, there were one hundred one countries signed onto the Hague Convention.⁶¹ Guyana and Barbados are the most recent signatories, having joined in 2019.⁶²

D. Related Legislation

Some countries have passed their own laws, meant to supplement the Hague Convention proceedings and bolster the return of international abductees. The United States, for example, passed both the International Parental Kidnapping Crime Act (“IPKCA”)⁶³ and the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (“Goldman Act”),⁶⁴ with this goal in mind.

First, IPKCA made international parental kidnapping a federal offense.⁶⁵ IPKCA does not include any remedies for the return of a child, but instead is solely focused on prosecuting and sentencing taking parents—threatening a fine or a maximum prison sentence of three years.⁶⁶ The IPKCA allows the taking parents to assert three

Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia).

⁶⁰ Hague International Child Abduction Convention, 51 Fed. Reg. 10494, 10496 (Mar. 26, 1986).

⁶¹ *Status Table: 28 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, THE HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (these countries are: Albania, Andorra, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Nicaragua, North Macedonia, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Kitts and Nevis, San Marino, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Zambia and Zimbabwe) [<https://perma.cc/FX3X-ME7C>] (last visited Sept. 8, 2022).

⁶² *Id.*

⁶³ International Parental Kidnapping, 18 U.S.C. § 1204 (1993).

⁶⁴ 22 U.S.C. § 9122 (2014) (referred to in this Note as the Goldman Act).

⁶⁵ 18 U.S.C. § 1204 (1993).

⁶⁶ U.S. DEP'T OF JUST., *supra* note 7; 18 U.S.C. § 1204(a).

affirmative defenses that: 1) the defendant was acting within the bounds of a judicial custody or visitation order; 2) the defendant was fleeing domestic violence; and 3) the defendant had the child through a valid judicial order but failed to return the child due to circumstances beyond their control, as long as the taking parent made reasonable attempts to notify the left-behind parent and return the child as soon as possible.⁶⁷

The Goldman Act was passed to strengthen the United States Department of State's ability to respond to international child abductions.⁶⁸ The Goldman Act derived its name from the tragic case of David Goldman and his son, Sean, who were mentioned in the opening paragraph.⁶⁹ Not only did David's legal battle for his child draw the public's awareness to international parental kidnapping, but it also alerted the United States government to a troubling trend at that time, where the return rate of children taken to the Hague Convention was only around fifty percent.⁷⁰ The Goldman Act was passed in direct response to these statistics.⁷¹ The purpose of the Goldman Act was as follows: 1) to protect children; 2) provide assistance for left-behind parents; 3) bring about the quick resolution of cases; 4) protect the custodial rights of parents; and 5) increase coordination between United States agencies by forming a working group composed of officials from the Department of State, the Department of Homeland Security, and the Department of Justice.⁷² The Goldman Act also requires the Secretary of State to submit a detailed annual report of international abduction cases, including a list of countries in "a pattern of noncompliance in cases of child abduction."⁷³ It demands that each U.S. diplomatic and consular mission abroad designate at least one senior official to direct the resolution of child abduction and access cases.⁷⁴ Furthermore, the Goldman Act is directed towards "oppos[ing] institutional or other systematic failure of foreign governments to fulfill their obligations pursuant to the Hague Abduction

⁶⁷ 18 USC § 1204(c).

⁶⁸ 22 U.S.C. § 9122.

⁶⁹ *Id.* § 1922(2)(a)(1).

⁷⁰ *Id.* § 1922.

⁷¹ *The Goldman Act to Return Abducted Children: Assessing the Compliant Report and Required Action: Hearing Before the Subcomm. on Afr., Glob. Health, Glob. Hum. Rts. & Int'l Organizations, & the Comm. on Foreign Affairs*, 114th Cong. 1 (2015) (testimony of Christopher H. Smith).

⁷² 22 U.S.C. § 9122.

⁷³ 22 U.S.C. § 9111(f)(1) (2021).

⁷⁴ 22 U.S.C. § 9112(1)(B) (2014).

Convention or bilateral procedures, as applicable, to resolve abduction and access cases.”⁷⁵ To further this goal, the Goldman Act authorizes the Secretary of State to take decisive actions against a Hague Convention government that has demonstrated repeated noncompliance with the Hague Convention.⁷⁶ These include: 1) a demarche (a formal request to foreign officials); 2) an official public statement detailing unresolved cases; 3) a public condemnation, a delay or cancellation of working; 4) official or state visits; and 5) even the withdrawal, limitation, or suspension of foreign aid and assistance.⁷⁷ Finally, the Goldman Act seeks to provide training to countries that either have a large number of open abduction cases or have demonstrated a pattern of noncompliance.⁷⁸

Despite the passage of the IKCPA Act and the Goldman Act, the Hague Convention remains the preferred method for parents seeking to recover a child, and these laws are not meant to infringe upon the Convention.⁷⁹ This is shown in the text of the IPKCA itself, which states “[t]his section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction” and that the Convention should still be the first resort for parents in these situations.⁸⁰ This sentiment was reiterated upon the signing of the IPKCA when President Bill Clinton stated that:

H.R. 3378 [IPKCA] recognizes that the international community has created a mechanism to promote the resolution of international parental kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects Congress’ awareness that the Hague Convention resulted in the return of many children and Congress’ desire to ensure that the creation of a federal child abduction felony offense does not and

⁷⁵ 22 U.S.C. § 9122(a)(1) (2014).

⁷⁶ 22 U.S.C. §§ 9121(b)(1)(A), 9122 (note that these procedures are also available against countries that have repeatedly failed to address international child kidnapping cases).

⁷⁷ 22 U.S.C. § 9122(d).

⁷⁸ 22 U.S.C. § 9141(a) (2014).

⁷⁹ *A Law Enforcement Guide on International Parental Kidnapping*, U.S. DEP’T OF JUST. 52 (July 2018), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250606.pdf> [<https://perma.cc/T9KZ-48HU>].

⁸⁰ International Parental Kidnapping, 18 U.S.C. § 1204(d) (2003).

should not interfere with the Convention's continued successful operation.⁸¹

In the first case to prosecute a taking parent under the IPKCA, the Supreme Court discussed the legislative history of the bill.⁸² The Court noted that the civil mechanism of the Hague Convention was the preferred route for resolving the difficult and complex problem of international child abductions.⁸³ The IKCPA Act and the Goldman Act are both demonstrative of how a country can supplement and further the aim of the Hague Convention.

E. *The Hague Convention Today*

According to the latest study on the Hague Convention proceedings, in 2015, there were 2,652 incoming applications, of which 2,270 were return applications, which are applications requesting the complete return of the child.⁸⁴ The remaining 382 were access applications, which are applications requesting only access to the child.⁸⁵ Out of the return applications in 2015, the return rate was 45%.⁸⁶ 17% of these were voluntary returns and 28% were judicial returns.⁸⁷ Roughly half (43%) of the returns were decided judicially.⁸⁸ 12% resulted in judicial refusal, where the judge refuses to return the child according to the limited exceptions laid out in the Convention, and 14% were withdrawn.⁸⁹ The United States received the highest number of return applications, accounting for 14% of the total number.⁹⁰ England and Wales followed, with 12%.⁹¹

⁸¹ Presidential Statement on Signing the International Parental Child Kidnapping Act of 1993, WEEKLY COMP. OF PRES. DOC. 2493-94 (Dec. 2, 1993).

⁸² *United States v. Amer*, 110 F.3d 873, 882 (2d Cir. 1997).

⁸³ *Id.*

⁸⁴ Nigel Lowe & Victoria Stephens, *Part I — A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report – provisional edition, pending the completion of the French version*, HAGUE CONF. ON PRIV. INT'L L. & INT'L CTR. FOR MISSING & EXPLOITED CHILD. 3 (Feb. 2018), <https://as-sets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> [<https://perma.cc/A8D6-ZN77>].

⁸⁵ *Id.*

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 3, 6.

⁹¹ Lowe & Stephens, *supra* note 84 at 6.

Overall, there has been a slight increase in applications to the Hague Convention. Compared to the 2,652 in 2015, there were 2,321 in 2008 and 1,479 in 2003.⁹² The report cautions that these numbers may not account for all child abductions but only those routed through Central Authorities.⁹³ The statistics did not count abductions within countries and other international abductions that may have been solved through different mechanisms.⁹⁴

F. *Issues*

Although the Hague Convention has facilitated the timely return of thousands of children to their homes, it is due for improvements. One heavily criticized aspect of the Convention is its failure to mention or acknowledge how parents and children fleeing domestic violence can often be an underlying reason for international parental kidnapping.⁹⁵ This failure was partially influenced by the stereotypical belief pervasive at the time of the Convention that most taking parents were non-custodial fathers.⁹⁶ Furthermore, the Convention was written in the 1980s, years before domestic violence was seriously acknowledged as a serious crisis.⁹⁷

In many domestic violence situations, taking parents (mostly mothers according to the statistics) are faced with an impossible choice: stay with their abusers and risk physical or emotional harm, or flee the country with their children and potentially face civil consequences under the Hague Convention.⁹⁸ Unfortunately, the Hague Convention return proceedings can be wielded by abusers in order to get their children, and usually their spouse or partner, back within their control.⁹⁹ Studies have found that, in domestic violence situations, “the Convention is now often used against mothers who are the

⁹² *Id.* at 5 (noting “a 3% increase in return applications and a 3% decrease in access applications”).

⁹³ *Id.*

⁹⁴ *Id.* (such as the Inter-American Convention on the International Return of Children or negotiations between non-contracting states to the Hague Convention).

⁹⁵ See O'REGAN, *supra* note 27, at 7.

⁹⁶ *Id.*

⁹⁷ *Id.* at 4, 8.

⁹⁸ Sawako Yamaguchi & Taryn Lindhorst, *Domestic Violence and the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Japan and U.S. Policy*, 17 J. INT'L WOMEN'S STUD. 16, 19 (July 2016). See Lowe and Stephens, *supra* note 84, at 3.

⁹⁹ *Id.* (noting that the Convention can be utilized as “a legal option for the abusive spouse to use to continue to exert control over the victim”).

primary custodians of their children,” which is concerning, as there is an overlap between mothers abducting their children and intent to escape from domestic violence situations.¹⁰⁰ Decades out from the Hague Convention, it has become obvious that the Convention’s failure to acknowledge domestic violence has posed issues for both Hague Convention and non-Hague Convention countries.

Non-Hague Convention countries have cited issues with domestic violence as a reason for not signing on to the Convention.¹⁰¹ In 2016, the government of India declined to ratify the Hague Convention, “in a decision made by the Women and Child Development (“WCD”) Minister, Maneka Gandhi, and agreed to by the Ministry of External Affairs.”¹⁰² Both Indian activist organizations and other Hague Convention countries, like the United States and the United Kingdom, pressured India to sign on to the Convention.¹⁰³ It seemed likely the country was going to do so.¹⁰⁴ However, the Indian government declined and defended the decision by citing to the fact that many Indian women abroad who returned home with their children were fleeing abusive marriages and domestic violence.¹⁰⁵ Gandhi stated that she initially supported adoption of the Convention but changed her mind after talking to women who were in these types of situations—what Convention opponents labeled not as “parental abductions,” but “flights to safety.”¹⁰⁶ This decision demonstrates how the Hague Convention’s failure to address domestic violence is worrisome even for non-Hague Convention countries.

Furthermore, the Hague Convention’s failure to mention domestic violence is problematic for countries within the Hague Convention. Since the Hague Convention does not address domestic violence, there is no guidance to Convention countries on how to mesh the two. This leaves them to navigate this complicated issue with only limited

¹⁰⁰ *Id.* at 32.

¹⁰¹ See O'REGAN, *supra* note 27, at 7.

¹⁰² *India: Decision Not to Sign Hague Treaty on Child Abduction*, LIBR. OF CONG. (Jan. 23, 2017), <https://www.loc.gov/item/global-legal-monitor/2017-01-23/india-decision-not-to-sign-hague-treaty-on-child-abduction/> [https://perma.cc/8M8P-2MWT].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

guidance and gives “little legal scaffolding” to courts and administrations confronted with this issue.¹⁰⁷

The primary way a taking parent fleeing from domestic violence could avoid the return of a child through the Hague Convention would be by asserting an affirmative defense.¹⁰⁸ Article 13(b) allows for authorities to refuse the return of a child if “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”¹⁰⁹ Realistically, this affirmative defense could encompass domestic violence situations. However, courts have been reticent to do this, lest they grant so many exceptions that it would lead to “swallowing the rule.”¹¹⁰

United States courts, for instance, have debated whether incidences of domestic violence rise to the level of “grave risk” or “intolerable situation.”¹¹¹ In *Whallon v. Lynn*, the United States Court of Appeals for the First Circuit found that the father’s conduct, which included verbal abuse and a physical altercation with the mother, did not rise to the level of “grave risk” required to sustain an Article 13(b) exception.¹¹² Also in the First Circuit, the court dismissed a father’s Hague Convention petition and accepted the mother’s Article 13(b) defense.¹¹³ However, this situation was undoubtedly more extreme than *Whallon*, as the father inflicted routine and extremely abuse on the mother.¹¹⁴ One of their children, a witness to many of these incidences, was subsequently diagnosed with Post Traumatic Stress

¹⁰⁷ Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 599 (2000); see also JEFFREY L. EDLESON, TARYN LINDHORST, GITA MEGROTA, WILLIAM VESNESKI, LUZ LOPEZ & SUDHA SHETTY, MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES 3 (2010).

¹⁰⁸ See generally *Walsh v. Walsh*, 221 F.3d 204, 204 (1st Cir. 2000); *Monasky v. Taglieri*, 140 S. Ct. 719, 729 (2020).

¹⁰⁹ *Monasky*, 140 S. Ct. at 729 (In addressing the definition of “habitual residence” and whether imposing a categorical actual agreement would protect those in domestic violence situations, the Supreme Court noted that, “[t]he Hague Convention, we add, has a mechanism for guarding children from the harms of domestic violence: Article 13(b).”).

¹¹⁰ *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007).

¹¹¹ See *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000); *Walsh*, 221 F.3d at 204, 218-19, 221.

¹¹² *Whallon*, 230 F.3d at 460.

¹¹³ *Walsh*, 221 F.3d at 221.

¹¹⁴ *Id.* at 209-11.

Disorder.¹¹⁵ The court found that the lower court had “inappropriately discounted the grave risk of physical and psychological harm to children in cases of spouse abuse [and] it failed to credit [the father’s] generalized pattern of violence, including violence directed at his own children.”¹¹⁶ While United States jurisprudence does recognize domestic violence within the context of 13(b), it tends to do so only in these extreme situations.

The United States courts do allow the return of children, even in domestic violence cases, when there are undertakings in their home countries.¹¹⁷ Undertakings are ameliorative measures put in place by the country where the child was taken from.¹¹⁸ They can include restraining orders against the abuser or social services for the victim and children.¹¹⁹ Undertakings are utilized when the courts find that serious allegations of domestic violence and conditions are necessary for the children’s protection, but they believe that these undertakings can be enforced by the country to which the children return.¹²⁰ In *Walsh*, the court acknowledged the value of undertakings, writing:

A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficiently guarantees of performance of those undertakings . . . [t]he 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.¹²¹

Given this interpretation, it is easy to see how United States courts have found this to be a comfortable middle ground. In *Blondin v. Dubois*, the court acknowledged that the return of the children to a

¹¹⁵ *Id.* at 211.

¹¹⁶ *Id.* at 219.

¹¹⁷ *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (defining undertakings as “enforceable conditions of return designed to mitigate the risk of harm occasioned by the child’s repatriation”).

¹¹⁸ *Id.*

¹¹⁹ Cleary, *supra* note 48, at 2634-35.

¹²⁰ Cleary, *supra* note 48, at 2635.

¹²¹ *Walsh*, 230 F.3d at 219.

domestic violence situation would constitute a “grave risk” of harm, but it still remanded the case to the district court, “for further consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm, pending a custody award in due course.”¹²² A return with undertakings achieves the main goal of the Hague Convention, the return of children, while also protecting them from a “grave risk of harm.”¹²³

However, although United States courts value undertakings, the Supreme Court recently ruled that in cases of grave harm, courts are not required to evaluate the full panoply of ameliorative measures (undertakings) before declining return.¹²⁴ Doing so “improperly elevat[es] return above the Convention’s other objectives. The Convention does not pursue return exclusively or at all costs.”¹²⁵ The Supreme Court concluded that courts may reasonably “decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings.”¹²⁶

In conclusion, although Article 13(b) defenses regarding domestic violence instances have been asserted in the United States courts, the fact that the Hague Convention provides limited guidance on the topic leaves the United States courts struggling to apply it. This is an imperfect situation, as there remains a concern that courts will sometimes be too focused on the rules to fairly evaluate the facts of the case. This is seen in *Mendez Lynch v. Mendez Lynch*, where the court stated “[e]ven if an exception is established, the Court has discretion to order the return of a child if return would further the aims of the Hague Convention.”¹²⁷

Like the United States, the United Kingdom has also struggled to integrate domestic violence into the Article 13(b) defense.¹²⁸ Generally, the United Kingdom also adheres to a strict interpretation of the Convention, which is likely influenced by the belief that the Convention is, above all else, a mechanism to return children, as well as the

¹²² *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999).

¹²³ *Id.* at 242.

¹²⁴ *Golan v. Saada*, 142 S. Ct. 1880, 1887 (2022).

¹²⁵ *Id.* at 1893 (internal quotations and citations omitted).

¹²⁶ *Id.* at 1887.

¹²⁷ *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1358 (M.D. Fla. 2002).

¹²⁸ See generally Kenworthy, *supra* note 27.

belief that children's best interests are generally best served by enforcing the return order.¹²⁹

Oftentimes, Hague Convention cases involving domestic abuse allegations center on factual disputes between parties. United Kingdom courts strongly believe that these factual disputes are best resolved in the country of origin, which leads to them often favoring return.¹³⁰ This idea was acknowledged in *Re D (A Child) (Abduction: Rights of Custody)*, where the judge wrote:

The whole object of the [Hague] Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed.¹³¹

This was reiterated in *BF (Children) (Abduction: Child's Objection)*, when the court wrote, "crucial decisions about the welfare of the children concerned are to be taken in the country of their habitual residence, and courts hearing applications for summary return under the Convention must refrain from conducting any welfare enquiry into the application for summary return has been resolved."¹³²

¹²⁹ See *In Re H and Others (Minors)* [1998] AC 72, [81C] ("The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of a child to the State of his habitual residence.")

¹³⁰ *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 (UK) (In a situation where the taking parent alleged domestic violence, the Court returned the children and said the factual dispute regarding the domestic violence was better resolved in the country where the children were taken from. Indirectly, the court rejected common critiques of the Hague Convention as applied to children, which were that "courts are too ready to ignore these claims, too reluctant to acknowledge the harm done to children by witnessing violence between their parents, and too willing to accept that the victim, if she is victim, will be adequately protected in the courts of the requesting country." The court seems to have an entrenched skepticism of domestic violence claims made by women/mothers, which might've informed its ultimate decision to return the children to the origin country to resolve factual disputes.)

¹³¹ *D v. D* [2006] UKHL 51, [2007] 1 AC (HL) 48.

¹³² See also *DT v. LBT* [2010] EWHC 3177 (Fam.) (Eng.) (The court describes one of the principles of the Hague Convention relevant to this case as: "[t]he issue for a court hearing a summons under the convention is not 'what is best for the child?' but 'who should decide what is best for the child?'" The decision should be

Another reason that the United Kingdom generally favors return is that, like the United States, there is a reliance on undertakings as conditions of return. In *M (A Child) (Abduction: Intolerable Situation)*, the court denied a mother's Article 13(b) defense, alleging domestic violence, and ordered the return of a child because it was believed that Norway, the origin country, could offer the child sufficient protections against the alleged domestic violence perpetrated by the father.¹³³ In *DT v. LBT (Abduction: Domestic Violence)*, the court outlines this belief in the form of two principles applied: 1) "the court cannot refuse to return a child on the basis of a grave risk of harm if it is demonstrated that the authorities in that state have made adequate and effective arrangements to protect the child after return," and 2) "[a] situation that might otherwise be intolerable can be alleviated by the provision of appropriate undertakings."¹³⁴

However, return is not automatic simply because the origin country establishes undertakings. In *DT v. LBT*, the judge cited insufficient undertakings as the reason for declining the return order.¹³⁵ Similarly, courts are not likely to return children when past undertakings have failed to adequately protect children.¹³⁶ The court in *LS v. AS*, came to this conclusion.¹³⁷ The court found that although Hungary, the origin country, had previously established undertakings to address the domestic violence perpetrated by the father, they were insufficient, and the abuse continued.¹³⁸ As a result, the court concludes that the mother's only option for escape was by fleeing the country.¹³⁹ The judge writes of the mother:

Though she has plainly tried to separate on many occasions from the father in the past the mother has, in the complex dynamic of victim and perpetrator, consistently been dragged back into his orbit. The clear inference I draw is that only by leaving Hungary could she finally free herself from this long

taken in the state of habitual residence unless one of the specific exceptions applies and return is not then ordered.").

¹³³ *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 (Fam. Div.) (Eng.); see also *E (Children)* [2011] UKSC 27 (UK) (In intolerable situations, the situation the child would face "depend[ed] crucially on the protective measures which could be put in place.").

¹³⁴ *DT v. LBT* [2010] EWHC 3177 (Fam.) (Eng.).

¹³⁵ *Id.*

¹³⁶ See *LS v. AS* [2014] EWHC 1626 (Fam.) (UK).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

standing abuse from which she had been unable to protect either herself or her children.¹⁴⁰

Unlike the United States, the United Kingdom seems more likely to consider the taken children's objections in these cases.¹⁴¹ In *LS v. AS*, the judge declined the father's Hague Convention return request, emphasizing that his decision was heavily influenced by the children's objection to the return.¹⁴² The judge stated that children's wishes should be especially considered in this situation because: 1) the children clearly expressed their objection to a return; 2) the father's domestic violence was a demonstrated pattern; 3) the children had distinct memories of the father's violence; and 4) one of the children had experienced physical abuse from his father.¹⁴³ The judge concluded, "[i]t is a voluble and eloquent critique of their past lives that the children have emphasised the last few months as the happiest of times."¹⁴⁴

As demonstrated by both United States and the United Kingdom case law, the Hague Convention's failure to mention domestic violence forces Convention countries to grapple with the issue of domestic violence as it relates to the Article 13(b) defense.¹⁴⁵ Ultimately, their interpretations may be harmful to children.¹⁴⁶ For example, both the United States and United Kingdom rely on undertakings to justify returns.¹⁴⁷ While undertakings may, on paper, look complete and effective, they can be undermined by any number of factors, including ineffective law enforcement or a general failure to implement civil law.¹⁴⁸

¹⁴⁰ *Id.*

¹⁴¹ See also Kenworthy, *supra* note 27, at 363 ("The U.S. approach to the child's objection exception is troubling in that the courts tend to pay little attention to it. 'The U.K. approach is more progressive and is consistent with the children's rights premise. Although not dispositive, the U.K. courts are increasingly analyzing and considering the child's views in accordance with the child's degree of maturity and age-principles recognized by both the Hague Convention and the UN Convention.'").

¹⁴² *LS v. AS* [2014] EWHC 1626 (Fam.) (UK) (noting that the children witnessed the domestic violence, and one child experienced physical abuse).

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 25.

¹⁴⁵ See generally Kenworthy, *supra* note 27.

¹⁴⁶ See generally *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999) (noting that an undertaking-free return of the children would likely result in harm to the children).

¹⁴⁷ See generally *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 (Fam. Div.) (Eng.); *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007).

¹⁴⁸ *Weiner*, *supra* note 107, at 624; see generally Roxanne Hoegger, *What If She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKLEY WOMEN'S L.J. 181 (2003).

Furthermore, many Hague Convention countries have inadequate laws and remedies to address domestic violence or fail to enforce on-the-books domestic violence laws altogether.¹⁴⁹ In the Czech Republic, a regional court affirmed the lower court's decision that a domestic violence victim did not qualify as a "particularly vulnerable victim," despite the fact that she had been physically attacked, choked, and threatened at knifepoint by her partner.¹⁵⁰ A university study conducted in July 2020 found that the Czech government failed to respond to the increase in domestic violence calls during the COVID-19 lockdown.¹⁵¹ During the same time, the government adjourned domestic violence proceedings but continued to hear other less serious cases.¹⁵²

In addition, merely having domestic violence laws and initiatives does not guarantee that victims are protected. Colombia has many such laws, yet domestic violence victims often remain unprotected while these laws go unenforced.¹⁵³ These examples demonstrate how Hague Convention countries, despite their best efforts, can fail to address domestic violence. This has troubling implications for undertakings, which require strict enforcement. Realistically, undertakings are no guarantee of safety and could lead to children being sent back to a dangerous situation.

Another critique of the Hague Convention is that it does not sufficiently take into account the best interests of individual children.¹⁵⁴ The ultimate goal of the Convention is to "maintain children's best overall interests by deterring international abductions."¹⁵⁵ However, there is a concern that this overall interest overrides children's individual interests and creates a tension between the two.¹⁵⁶ This tension

¹⁴⁹ Weiner, *supra* note 107, at 624; *see also* 2020 Country Reports on Human Rights Practices, U.S. DEP'T OF STATE (Mar. 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/> [<https://perma.cc/4LXU-NGA3>].

¹⁵⁰ U.S. DEP'T OF STATE, *supra* note 149.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at Colombia, Section 6.

¹⁵⁴ Anastacia M. Greene, *Seen and Not Heard?: Children's Objections Under The Hague Convention on International Child Abduction*, 13 U. MIAMI INT'L & COMP. L. REV. 105, 107-08 (2005).

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.*; *see also* Cleary, *supra* note 48, at 2627 (noting that there is a disparity between two objectives—the general deterrence of international kidnapping and the consideration of a child's best interests, and confusion whereby "some courts believe that the Convention's primary goals are to ensure an abducted child's prompt return to his or her state of habitual residence and prevent parties from forum shopping in international custody disputes, while other courts believe that the Convention's goal

is especially present in the “Child Abduction Clause,” which allows for a judicial or administrative authority “to 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.”¹⁵⁷ The issue has been compounded by the fact that judges are given wide discretion in interpreting this clause, which leads to a disparate application by country.¹⁵⁸ There is much debate as to how seriously judges should consider a child’s objection, with some critics calling for a more expansive reading of the clause and others calling for a stricter reading.¹⁵⁹ On the one hand, international child abductions are nuanced, so, understandably, judges must be given a reasonable amount of discretion in making decisions. However, for this same reason, more guidance of analytic frameworks and factors to consider may be necessary to help judges “to navigate a winding thick forest of legal, emotional, psychological and sociological issues.”¹⁶⁰

II. THE NON-HAGUE CONVENTION PROCESS

A. *Introduction to Non-Hague Convention Process*

Outside the Hague Convention, there are few legal remedies to address international kidnappings. The Hague Convention does not apply to negotiations between two non-Hague Convention signatory countries or negotiations between a non-Convention country and a Convention country.¹⁶¹ As a result, left-behind parents are forced to navigate the return of children alone, which is often more complicated and less successful.¹⁶²

is to protect the safety and well-being of the child in question”); *see also* O’REGAN, *supra* note 27, at 6 n.30 (“Some observers question whether an automatic preference for the return of the child fulfills a ‘best interest’ standard.”).

¹⁵⁷ Greene, *supra* note 154, at 109; The Hague Convention, *supra* note 9, art. 13.

¹⁵⁸ Greene, *supra* note 154, at 125; *see also* Pérez-Vera, *supra* note 16, at 460 (discussing judicial discretion in regard Articles 13 and 20 of the Hague Convention).

¹⁵⁹ Greene, *supra* note 154, at 125.

¹⁶⁰ *Id.* at 156.

¹⁶¹ The Hague Convention, *supra* note 9, at Preamble.

¹⁶² *See* United States v. Amer, 110 F.3d 873, 873 (2d Cir. 1997); *see also* Erika A. Schnitzer-Reese, *International Child Abduction to non-Hague Convention Countries: The Need For An International Family Court*, 2 NORTHWESTERN J. INT’L HUM. RTS. 1, 3 (2004).

With some success, the Hague Convention has encouraged Hague and non-Hague Convention countries to negotiate bilateral agreements about international parental child abductions.¹⁶³ In 2000, Canada and the Lebanese Republic signed a bilateral agreement titled, “Agreement between the Government of Canada and the Government of the Lebanese Republic regarding Cooperation on Consular Matters of a Humanitarian Nature,” in which the parties agreed to “take the necessary measures to combat the illicit transfer and non-return of children abroad.”¹⁶⁴ The agreed-upon stipulations are similar to those in the Hague Convention treaty; for example, the parties agree to exchange information and documents related to child abduction cases.¹⁶⁵ Similarly, in 2003, the United States and Egypt signed a “Memorandum of Understanding,” a bilateral agreement with the same goals.¹⁶⁶

However, these agreements have not been very successful. Despite the bilateral agreements, left-behind parents are still struggling to reunify with their children.¹⁶⁷ Jolly Bimbachi’s sons were taken by their father from Canada to Lebanon and remain there to this day.¹⁶⁸ It has been over five years, yet she has only seen them once when she visited Lebanon.¹⁶⁹ She writes, “[m]y rights as their mother have been stripped away, voided, and this has made me feel like they were not just kidnapped by their father, but by the whole country.”¹⁷⁰ The Egypt-United States agreement has also been unsuccessful. Egyptian authorities have repeatedly failed to cooperate with the United States

¹⁶³ *Non-Hague Convention Child Abductions*, THE HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/publications-and-studies/details4/?pid=5215> [<https://perma.cc/UFT8-LSBE>] (last visited Sept. 10, 2022).

¹⁶⁴ Agreement Between the Government of Canada and the Government of the Lebanese Republic Regarding Cooperation on Consular Matters of a Humanitarian Nature, Can.-Leb., Apr. 13, 2000, 2000 Can. T.S. No. E103477.

¹⁶⁵ *Id.*

¹⁶⁶ U.S. Dep’t of State, Report on Compliance with the Hague Convention on the Civil Aspects of Int’l Child Abduction 37 (Apr. 2021), <https://travel.state.gov/content/dam/NEWIPCAAssets/2021%20Annual%20Report%20on%20International%20Child%20Abduction.pdf> [<https://perma.cc/LPB8-P5VY>].

¹⁶⁷ Souad Lazkani, *Canadian Mothers Plead For Their Kids ‘Abducted’ To Lebanon By Their Fathers*, THE 961 FOUND. (Oct. 25, 2020), <https://www.the961.com/canadian-lebanese-kid-abductions-lebanon-cases/> [<https://perma.cc/69PM-7UNW>].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (Bimbachi’s story is only one of many similar ones. Khawla Khalifa, for example, has not seen her two children for over two years, after they were taken to Lebanon by their father. A Lebanese civil court even issued a return order for the two children, yet the children remain in Lebanon.)

Department of State's requests to return adopted children.¹⁷¹ The average amount of time it took for these to be resolved—if they were resolved at all—was four years and eight months, an especially troubling result given the high rate of abductions from the United States to Egypt.¹⁷² While countries have been able to make agreements to return children without the involvement of the Hague Convention, these agreements have been ineffective and fail to facilitate returns.¹⁷³

B. *Issues with Non-Hague Convention Process*

When a child is abducted to a non-Hague Convention country, the left-behind parent's only recourse is to launch a complicated legal process, with no guarantee of success.¹⁷⁴ Unlike the Hague Convention countries, non-Hague Convention countries have no obligation to collaborate with one another to facilitate the return of children.¹⁷⁵ For example, many children are abducted from the United States to India, a non-Hague Convention country.¹⁷⁶ However, Indian authorities have failed to work with the United States State Department to resolve these kidnapping cases, and there is no ability to appeal to the Hague Convention for assistance.¹⁷⁷ Without this, if the country to which a child was taken refuses to return the child, the left-behind parent has no option to secure return. The frustrations involved in negotiations between Hague and non-Hague Convention countries are demonstrated in the *United States v. Amer*, where the father abducted his three children from the United States to Egypt, his country of origin.¹⁷⁸ The couple lived separately; the children residing with their mother, yet there was no legal separation or divorce and no formal custody order in place.¹⁷⁹ In the United States, he was prosecuted under the IPKCA and ordered to return the children to the United States.¹⁸⁰ However, Egypt is a non-Hague Convention state, and therefore is under no obligation to

¹⁷¹ See U.S. Dep't of State, *supra* note 166, at 11.

¹⁷² *Id.* at 37.

¹⁷³ *Id.* at 11.

¹⁷⁴ See *supra* Part II(A): *Introduction to Non-Hague Convention Process*.

¹⁷⁵ *Id.*

¹⁷⁶ U.S. Dep't of State, *supra* note 166, at 39.

¹⁷⁷ *Id.* (Seventy-three percent of requests for the return of abducted children to India remain unresolved for more than a year, and on average, these cases remain unresolved for almost three years.).

¹⁷⁸ *United States v. Amer*, 110 F.3d 873, 876-77 (2d Cir. 1997).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 883.

collaborate with the United States to return the children.¹⁸¹ The country worked directly against the American order when the Egyptian court granted the father full custody of his children.¹⁸² The issue was never resolved, and the children—now adults—remain in Egypt twenty-four years later.¹⁸³

Even when the country where the child was taken to sides with the left-behind parent in custody disputes, there is no guarantee that this will lead to the return of the child. For example, Ravi Parmar's son was taken from the United States to India by his mother in 2012.¹⁸⁴ The mother alleged that Parmar was abusive towards their son, and an Indian court initially agreed with her.¹⁸⁵ However, a higher court, India's Family Court No. 5 in Pune, found these allegations to be unfounded.¹⁸⁶ Although the court criticized the mother's behavior in this situation, it declined to enforce the United States court's custody ruling in Parmar's favor, citing jurisdictional concerns, and his son remains in India today.¹⁸⁷ The *Amer* and *Parmar* cases are just two examples, out of many of similar ones, that demonstrate the difficulties of facilitating the return of children when non-Hague Convention countries are involved.

Another issue with the non-Hague Convention processes is the lack of uniformity and collaboration, issues which are especially apparent within the cultural differences that arise between Hague and non-Hague Convention countries.¹⁸⁸ This divide is exhibited in devoutly Muslim countries that practice *Shari'a* law.¹⁸⁹ *Shari'a* law is

¹⁸¹ *Id.*

¹⁸² *Id.* at 885.

¹⁸³ 1957. *International Parental Kidnapping*, U.S. DEP'T OF JUST. ARCHIVES (Nov. 2001), <https://www.justice.gov/archives/jm/criminal-resource-manual-1957-international-parental-kidnapping> [<https://perma.cc/PS34-83V6>].

¹⁸⁴ Jerry Carino, *Manalapan Dad Fighting to get Abducted Son Back From India*, ASBURY PARK PRESS (Aug. 19, 2019), <https://www.app.com/story/news/local/how-we-live/families-children/2019/08/19/international-child-abduction-goldman-act/1985368001/> [<https://perma.cc/67LY-KFGB>].

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See generally O'REGAN, *supra* note 27.

¹⁸⁹ *Id.* at 8 ("The Hague Conventions prioritization of the return of a child over other considerations is reportedly an obstacle for the accession to the Hague Convention of countries with legal systems based on religious or culture values, for which the return of a child to a parent with a different background could be problematic. Some observers have paid particular attention to Muslim-majority countries."); see also Schnitzer-Reese, *supra* note 162, at 3 (speaking of non-Hague convention countries governed by Islamic law and how international abductions to these

unique in that religion and law are completely intertwined, meaning religious principles inform the practice of family law.¹⁹⁰ As a result, these countries can have different priorities for their youth, making returns more difficult and unlikely.

Muslim-majority countries' custody laws often indicate a strong preference for children to be raised by Muslim parents, in a Muslim environment.¹⁹¹ Under *Shari'a* law, it is considered best practice, or in a Muslim child's "best interest," to have an education based in the Muslim faith.¹⁹² This cultural divide frequently arises in custody agreements between Muslim and non-Muslim parents, and "some commentators have attributed the reticence of some Muslim-majority countries to become the parties to the Hague Convention to a desire not to return children to non-Muslim parents."¹⁹³ This was one of the issues in the case cited above, *Amer*, as the Egyptian court determined that it was in the best interests of the children to remain in Egypt and have a Muslim-based education.¹⁹⁴ To accomplish this, the Egyptian court issued full custody to the father and allowed the children to remain in Egypt.¹⁹⁵

The Hague Convention has recognized this cultural divide as an issue in international kidnapping cases and has attempted to improve communication between Hague Convention states and non-Hague Convention states that practice or are influenced by *Shari'a* law.¹⁹⁶ In 2004, the Hague Convention launched the "Malta Process," which is a dedicated effort to improve dialogue between Convention states and non-Convention states that practice, or are influenced by, *Shari'a* law.¹⁹⁷ The Malta Process is aimed at "improving co-operation in cross-border family law disputes involving children with a view to

countries result in "legally unsolvable situations[s]" because of the cultural differences).

¹⁹⁰ Schnitzer-Reese, *supra* note 162, at 7.

¹⁹¹ O'REGAN, *supra* note 27, at 8; *see also* Schnitzer-Reese, *supra* note 162, at 3.

¹⁹² Schnitzer-Reese, *supra* note 162, at 8.

¹⁹³ O'REGAN, *supra* note 27, at 8; *see also* Schnitzer-Reese, *supra* note 162, at 9 ("It would therefore be rare that a court in a Muslim-majority country relying on *Shari'a* for matters of family law would award custody or demand the return of a child to a non-Muslim mother over a Muslim father in a Muslim majority country if the legal definition of the child's interest is to be raised as a Muslim.").

¹⁹⁴ *United States v. Amer*, 110 F.3d 873, 877 (2d Cir. 1997).

¹⁹⁵ *Id.*

¹⁹⁶ *See* Schnitzer-Reese, *supra* note 162, at 3-4.

¹⁹⁷ Press Release, The Hague Conf. on Priv. Int'l L., 10th Anniversary of the Malta Process (Mar. 24, 2014), <https://www.hcch.net/en/news-archive/details/?va-revent=349> [<https://perma.cc/8S9J-FR2E>].

finding solutions in situations where the relevant international legal framework is not applicable.”¹⁹⁸

Going beyond the issues involved in non-Hague Convention negotiations, the fact is that non-Hague Convention countries weaken the reach of the Hague Convention:

The reality of the Convention’s reach resembles a fishing net permeated with large holes: cast this net and you *might* catch some fish, but it is more likely that the fish will swim out through the readily available holes. The holes of the net represent those countries which are not party to the Convention; the fish are the abducting parents, and they swim, abducted kids in tow, directly towards the holes, where they in fact find protection from the world community that seeks to prosecute them.¹⁹⁹

III. SOLUTIONS

The solutions to the above-outlined issues are pragmatic and reasonable ones. First and foremost, the Hague Convention and Hague Convention countries must continue to encourage non-Hague Convention countries to sign onto the Convention. This is the most straightforward way to facilitate the return of wrongfully taken children. Despite its flaws, the Hague Convention is still the best civil remedy to address international kidnappings.

To start, the Hague Convention must update its stance on domestic violence as it relates to the Convention and international parental abductions. As demonstrated previously, the Hague Convention can often be utilized unjustly, by giving domestic abusers a legal route to bring victims back under their control.²⁰⁰ Additionally, parents who took their children to flee from their abusers “frequently find themselves faced with a court battle under the Hague Convention in which they are viewed as an ‘abductor,’ by a court that may not understand the dynamics of domestic violence.”²⁰¹

¹⁹⁸ *Id.*

¹⁹⁹ Schnitzer-Reese, *supra* note 162, at 6.

²⁰⁰ See Yamaguchi Lindhorst, *supra* note 98, at 19.

²⁰¹ Jessica S. Goldberg & Sudha Shetty, *Representing Battered Respondents under the Hague Convention on the Civil Aspects of International Child Abduction*, BERKLEY GOLDMAN SCH. OF PUB. POL’Y (2015), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/projects/the-hague-domestic-violence-project/attorneys-practice-guide-preview-2-15.pdf [<https://perma.cc/VA7B-X6TE>].

The Hague Convention's initial failure to recognize domestic violence, although troubling, was more understandable when it was first drafted in 1980, as domestic violence was still unrecognized and un-researched.²⁰² However, decades later, as the problem swells, the Hague Convention's passive response to domestic violence is now unacceptable. According to estimates published by the World Health Organization, about thirty percent of women globally have been victims of physical and/or sexual abuse by an intimate partner.²⁰³ In 2018, it was estimated that one in seven women had experienced physical and/or sexual violence from a husband or intimate partner within the past year.²⁰⁴ This already prevalent issue has been escalating in recent years, with the COVID-19 pandemic.²⁰⁵ According to both the United Nations group, U.N. Women, and the American Journal of Emergency Medicine, "when the pandemic began, incidents of domestic violence increased 300% in Hubei, China; 25% in Argentina, 30% in Cyprus, 33% in Singapore and 50% in Brazil."²⁰⁶ Similar trends were reported in the United States and the United Kingdom.²⁰⁷

This is not to say that the Hague Convention must rewrite the Article 13(b) defense to include domestic violence as an automatic defense to return proceedings. There are many other ways that the Hague Convention could address this issue. For example, the Hague Convention conducts a significant amount of post-Convention work, usually in the form of publications or Special Commissions, yet none has explicitly addressed domestic violence.²⁰⁸ During the most recent Special Commission, in 2017, the Hague Convention hosted a conference

²⁰² U.S. DEP'T OF JUST., *supra* note 7 ("The Hague Convention was drafted thirty years ago, before most of the social science research on domestic violence and its effect on children was conducted. Those who crafted the Convention likely had little empirical knowledge of the effects of domestic violence on children and the parent who is the victim of the violence.").

²⁰³ *Violence Against Women*, WHO (Mar. 9, 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/9C3E-JBCM>].

²⁰⁴ *Facts and Figures: Ending Violence Against Women*, U.N. WOMEN (Jan. 2022), <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> [<https://perma.cc/7934-3VWG>].

²⁰⁵ See Jeffrey Kluger, *Domestic Violence is a Pandemic within the COVID-19 Pandemic*, TIME MAG. (Feb. 3, 2021), <https://time.com/5928539/domestic-violence-covid-19/> [<https://perma.cc/PB9T-N6NA>].

²⁰⁶ *Id.*

²⁰⁷ U.N. WOMEN, *supra* note 204.

²⁰⁸ At the last Special Commission Meeting for the Hague, in 2017, both the agenda and the conclusions and recommendations adopted by the Commission make no mention of domestic violence. See HAGUE CONF. ON PRIV. INT'L L., *supra* note 31 (Conclusions and Recommendations).

on the issue of domestic and family violence as it related to the Convention where it was acknowledged that “[d]omestic violence, can, by itself, establish the grave risk exception.”²⁰⁹ Mediation, protective undertakings, and the need for further research were all discussed, yet nothing about domestic violence was included in the final conclusions and recommendations adopted by the Special Commission following the meeting.²¹⁰ Other Hague Convention publications have acknowledged domestic violence, but none have been thorough and explicit enough.²¹¹ With such a prevalent and serious problem, a strong response is required; it is not enough for it to be mentioned here and there.

Alternatively, the Hague Convention could endorse groups that address this issue. For example, the American Bar Association Commission on Domestic and Sexual Violence sponsors the Hague Domestic Violence Project, which was “formed to help battered mothers, attorneys, judges, and advocates incorporate child exposure to domestic violence as a defense to prevent the otherwise required return of the child to her or his home country, and to a potentially abusive parent.”²¹² An endorsement of such a program by the Hague Convention could go a long way in helping domestic abuse victims and their children. This endorsement would signal to Convention states that the Hague Convention acknowledges the implications of domestic violence in Convention proceedings, and perhaps allow judges interpreting Convention cases to consider the issue with more flexibility. Given how the Hague Convention aims to give discretion to Convention states, this could be a happy compromise, as it would allow the Hague Convention to both recognize domestic violence and continue to give Convention states discretion to interpret and apply the Convention as they wish.

²⁰⁹ Permanent Bureau, *Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention*, 12 June 2017, The University of Westminster, London, HAGUE CONF. ON PRIV. INT'L L. (Aug. 2017), <https://assets.hcch.net/docs/0a145947-ff60-4721-9ea8-0d118e063ef2.pdf> [<https://perma.cc/M955-HTJQ>].

²¹⁰ See HAGUE CONF. ON PRIV. INT'L L., *supra* note 31.

²¹¹ See *Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation*, HAGUE CONF. ON PRIV. INT'L L. (2012), <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf> [<https://perma.cc/XSH2-VMYT>].

²¹² *The Hague Domestic Violence Project*, ABA, https://www.americanbar.org/groups/domestic_violence/our-projects/hague-dvproject/ [<https://perma.cc/8CEL-6NPA>] (last visited Sept. 10, 2022).

The fact is, any official recognition, no matter how small, is imperative. The Hague Convention's insufficient address of this issue only grows more troubling, given the statistics of domestic violence during the COVID-19 pandemic. If the Hague Convention is truly invested in the best interests of the child, as it claims, it must do more to recognize domestic violence victims and the dangerous situations that many children are in as a result.²¹³

Another way to address this issue, from the outside, would be to encourage mediation in domestic violence cases and international parental abductions. Although mediation is mainly promulgated by the Hague Convention within the context of the Malta Process, it could also prove helpful within the context of domestic violence.²¹⁴ The Hague Convention has acknowledged the benefits of mediation, for example in 2012, when it published a "Guide to Good Practice" under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction on Mediation.²¹⁵ When it comes to domestic violence, there is some debate among experts as to whether mediation is safe and appropriate.²¹⁶ Undoubtedly, mediation will not be a perfect solution in every case, as some cases of domestic violence are too extreme and volatile to be resolved through mediation. However, the mere existence of domestic violence should not preclude a victim from choosing mediation if they wish to do so. Domestic violence takes many forms, and affects victims and families differently, "so simply knowing that IPV [intimate partner violence] has occurred is not enough to assess the appropriateness of mediation."²¹⁷ Of course, if mediation is chosen, more safeguards and screening processes should be in place to protect the victim.²¹⁸ The Hague Guide to Good Practice on Mediation illustrated some of the benefits of mediation within the context of domestic violence and mentioned that some experts believe that when a victim has informed consent and

²¹³ See The Hague Convention, *supra* note 9, at Preamble.

²¹⁴ Press Release, The Hague Conf. on Priv. Int'l L., 10th Anniversary of the Malta Process, *supra* note 197.

²¹⁵ HAGUE CONF. ON PRIV. INT'L L. (2012), *supra* note 211.

²¹⁶ See Gabrielle Davis, Loretta Frederick & Nancy Ver Steegh, *Intimate Partner Violence and Mediation*, A.B.A. (Apr. 1, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/spring-2019-family-matters/11-davis-et-al-safer/ [<https://perma.cc/HF4K-2U5X>]; see also HAGUE CONF. ON PRIV. INT'L L., *supra* note 202, at 73.

²¹⁷ Davis, Frederick & Ver Steegh, *supra* note 216.

²¹⁸ HAGUE CONF. ON PRIV. INT'L L. (2012), *supra* note 211, at 23.

subsequently pursues mediation, it empowers the victim.²¹⁹ Further, with mediation in the context of domestic violence, safeguards are put in place before the sessions begin, to ensure the safety of the victim.²²⁰ Such “rules set out for the mediation’s session can prohibit degrading behavior combined with a provision for the mediation’s immediate termination if these rules are not respected.”²²¹

As seen previously from examining both United States and United Kingdom jurisprudence, formal Hague Convention proceedings have the potential to harm domestic violence victims and their children by forcing them back into the hands of their abuser.²²² However, mediation could be beneficial in addressing some of the issues presented in the jurisprudence and interpretation of domestic violence as it relates to the Hague Convention. For example, one critique is that, in Hague Convention proceedings where domestic violence is alleged, at least in the United States, a child’s objections are not adequately considered.²²³ However, with mediation, children’s views may be more likely to be considered than they are in a judicial hearing.²²⁴ Another issue examined above was the tendency of both United States and United Kingdom courts to over-rely on undertakings to justify returns.²²⁵ Similar to the process of child objections, mediation could provide domestic violence victims a forum to discuss these undertakings and give all parties involved a better, more comprehensive view of their effectiveness. If the answer to addressing domestic violence is not in hosting Special Commissions, writing publications, or endorsing groups that address the issue, mediation has the potential to better confront the issue.

Besides strengthening the Hague Convention from within, more can be done to encourage non-Hague Convention countries to sign onto the convention. To encourage non-Hague Convention countries to sign on, the Hague Convention should recognize non-Hague Convention countries’ concerns with the Convention. For one, India clearly expressed that the Hague Convention’s inadvertent repercussions on domestic violence victims were a motivating factor in

²¹⁹ *See id.*

²²⁰ *See* Davis, Frederick & Ver Steegh, *supra* note 216.

²²¹ HAGUE CONF. ON PRIV. INT’L L. (2012), *supra* note 211, at 23.

²²² *See* Yamaguchi & Lindhorst, *supra* note 98, at 19.

²²³ *See* Kenworthy, *supra* note 27.

²²⁴ HAGUE CONF. ON PRIV. INT’L L. (2012), *supra* note 211, at 69-70.

²²⁵ *See generally* Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999); *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 (Fam. Div.) (Eng.).

resisting the Convention.²²⁶ Similarly, Muslim-majority countries are reticent to sign on because of their differing views regarding *Shari'a* law.²²⁷ If the Hague Convention could address these issues, it would likely encourage more countries to sign on and strengthen its ability to help taken children. Special focus should be directed at Middle Eastern and North African countries, as none of them, except for Israel, are signed on to the Convention, creating a “situation [that] simultaneously provides a safe haven for the abducting parent, and a legal black hole for the child and the left-behind parent.”²²⁸ As discussed above, countries that strictly adhere to *Shari'a* law are more reticent to sign on to the Hague Convention, as they have a different legal system, and therefore different standards as to what the best interests of the child are.²²⁹

Some scholars have suggested that the best method to encourage these countries to sign onto the Hague Convention is to tie the Hague Convention goals into the rights outlined in the international treaty, the United Nations Convention on the Rights of the Child (“UNCRC”).²³⁰ Almost every non-Hague Convention country is a signatory to this document and, arguably, some of the rights in the UNCRC are violated when a child is wrongfully abducted from the home by a parent.²³¹ For example, Article 9 states that signatory states “shall ensure that a child shall not be separated from his or her parents against their will.”²³² Even more explicitly, Article 11 states that signatory states “shall take measures to combat the illicit transfer and non-return of children abroad.”²³³ Although these two rights are blatantly violated when international parental kidnapping occurs, many signatory states continue to ignore or even endorse it when it occurs. The UNCRC is primarily enforced by the United Nations Committee on the Rights of the Child, which all signatory states must report to every five years.²³⁴ These reports include information regarding the

²²⁶ See *India: Decision Not to Sign Hague Treaty on Child Abduction*, LIBR. OF CONG. (Jan. 23, 2017), <https://www.loc.gov/item/global-legal-monitor/2017-01-23/india-decision-not-to-sign-hague-treaty-on-child-abduction/> [<https://perma.cc/8M8P-2MWT>].

²²⁷ See Schnitzer-Reese, *supra* note 162, at 3-4.

²²⁸ *Id.* at 12.

²²⁹ *Id.* at 7-9.

²³⁰ *Id.* at 13.

²³¹ *Id.*

²³² Convention on the Rights of the Child, Nov. 20 1989 art. 9, 1577 U.N.T.S. 3.

²³³ *Id.* art. 11.

²³⁴ *Implementing and Monitoring the Convention on the Rights of the Child—Turning Child Rights Principles into Action and Results for Children*, UNICEF,

situation of children in the country and detail the measures each state has taken to realize these rights.²³⁵ Reports are then reviewed by the United Nations Committee, which provides feedback on how well these rights are upheld.²³⁶ To address the uncooperativeness of those non-Hague Convention States, the United Nations could point out this discrepancy and encourage these states to sign on to the Convention, or just generally encourage them to do more to facilitate the return of children.

Furthermore, the Hague Convention should continue to develop the Malta Process and encourage mediation within this area. According to the Hague, “[t]he Malta Process has [] fostered co-operation to resolve international family disputes involving children when these Convention do not apply and contributed to a better understanding on the different legal systems’ approach to solving international child abduction, access or custody cases.”²³⁷ A primary focus of the Malta Process is mediation, which can be an invaluable tool in facilitating the resolution of international parental kidnappings, especially when opposing cultural and legal systems are involved.²³⁸ Mediation has many benefits, beyond just the context of the Malta Process and it has proven to have “both a short-term and a long-term positive impact on outcomes for parties compared to court-based processes.”²³⁹ Additionally, participants in mediation report a higher satisfaction rate than those who go to court.²⁴⁰ Even in the long term, those who resolved their issues through mediation were more satisfied with the outcome of their cases, and more committed to the settled outcome.²⁴¹ Given these benefits, the Hague Convention should continue to encourage non-Hague Convention countries to engage in mediation with

<https://www.unicef.org/child-rights-convention/implementing-monitoring> [https://perma.cc/26D6-FF3C] (last visited Sept. 10, 2022).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Press Release, The Hague Conf. on Priv. Int’l L., *supra* note 189.

²³⁸ See *Working Party on Mediation in the Context of the Malta Process*, THE HAGUE CONF. ON PRIV. INT’L L. (Nov. 2010), <https://assets.hcch.net/docs/30dc5a61-b930-460f-a10d-0ad13fdb8ad6.pdf> [https://perma.cc/HAA8-N5RA]; see also *International Seminar Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children*, THE HAGUE CONF. ON PRIV. INT’L L. (Apr. 7, 2014), <https://assets.hcch.net/docs/cca5370b-e4ce-4f87-b980-5611deeca1b6.pdf> [https://perma.cc/7JZY-N7CA].

²³⁹ *How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages/ [https://perma.cc/2W3H-6HW4].

²⁴⁰ *Id.*

²⁴¹ *Id.*

Convention countries, especially when it comes to negotiations between two countries with vastly different legal systems.

The Hague Convention undoubtedly returned thousands of children to their proper homes.²⁴² Even today, with its expansive reach, it remains the best remedy to quickly facilitate the return of children. However, although the Hague Convention was created to accomplish these positive goals, that is, to discourage international child abduction and promote the best interests of the child, these purposes are being actively undermined by the lack of protection for domestic violence victims and their children and the way that Hague Convention return proceedings can be used as methods of control by abusers. Not only does this have consequences for the safety and well-being of children under the Convention, but it is arguably harming children outside the Convention, whose countries are reluctant to sign on until this issue is addressed. It is imperative that the Hague Convention develop a stronger response to domestic violence, in any of the ways suggested by this Article, so that children can be kept safe from harm—wherever they are.

²⁴² See Lowe & Stephens, *supra* note 84, at 11.