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INTRODUCTION

Imagine a mother 1 being abused physically and emotionally until she reaches a breaking point, a point at which her desperation is so great that she severs all ties to friends and family and takes her child across international borders to escape her abusive husband. She’s alone with her child, with no support system or financial resources. Then, adding to her hardship, the left-behind father files a petition under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention) to ask a court to order the child’s return. This Note will focus on how the Hague Convention treats fleeing domestic-violence victims, like the mother described above.

Part I of the Note will outline the elements of the Hague Convention and how it operates in practice. This part will highlight how the profile of the abductor targeted by the Convention is changing from the abusive parent to the victimized parent. It will note how this change creates tension between discouraging child abduction and protecting victims of domestic violence.

Part II will discuss how that tension manifests itself in the unjust treatment of domestic-violence victims under the Hague Convention. It will break down the different ways in which the Convention’s purpose and language works against fleeing domestic-violence victims. However, it will also acknowledge an emerging trend towards more favorable treatment of such victims.

Part III identifies two ways in which the Hague Convention could make that positive trend permanent and then build on it to offer better protections for domestic-violence victims. Specifically, this part examines two different models that have been proposed: (1) Switzerland’s law defining “intolerable situation” and (2) the use of elective mediation.

This Note will demonstrate how the Hague Convention, in large part, treats domestic-violence victims unjustly. While there has been a positive trend emerging, it remains uncertain that the progress will become institutionalized and built upon. The two solutions that will be examined offer hope for progress in the future.

1. Despite the fact that not every abuser is male and not every victim is female, the Author has chosen, for the sake of consistency throughout this Note, to refer to the abuser as a man and to the victim as a woman because that is the most common scenario.
I. OPERATION OF THE HAGUE CONVENTION

The Hague Convention is an international procedural mechanism available to the left-behind parent in cases where a child is abducted by the other parent from one signatory nation to another. This procedural mechanism determines if the child will be returned to the original country of residence for the ultimate resolution of the underlying custody issues between the two parents. In order to understand how this Convention applies to cases of domestic violence, one needs to understand the structure of the proceedings and the realities on the ground today regarding international child abduction.

A. Structure of the Proceedings

It is helpful to think of the structure of proceedings in terms of the actors and their respective roles. There are three actors: the Central Authority, the left-behind parent (petitioner), and the abducting parent (respondent). Each signatory to the Convention must designate what is called a Central Authority. This Central Authority serves as the contact person between the petitioner and respondent across the two different countries, acting as a fact finder and source of information for both sides.

Using the Central Authority as a go-between, both the petitioner and the respondent then participate in a hearing in which each party must prove certain elements in order to determine if the child should be returned. There are three elements that the petitioner must prove: (1) that the child was wrongfully removed from his or her habitual residence, which was within a Contracting State to the Convention. A removal is wrongful if it breaches the rights of custody of the left-behind parent, including “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” However, those rights are subject to the legal power of the State of habitual residence to define the rights of custody with respect to the operation of the Convention through

3. See id. arts. 7, 19 (outlining a State’s obligations to secure the return of a child who was wrongfully removed but noting that a decision to return a child under the Convention is not a determination of custody).
4. Id. art. 8 (explaining that the initial step to secure the return of a child is to file an application to the Central Authority of any Contracting State identifying the applicant, the left-behind parent, and the “person alleged to have removed or retained the child,” the abducting parent).
5. Id. art. 6.
6. Id. art. 7.
7. See id. arts. 11–15 (describing the judicial proceedings to determine if the child should be returned and what the respondent must establish to negate such a return).
8. Hague Convention, supra note 2, art. 3.
9. Id. arts. 3(a), 4.
10. Id. art. 4.
11. Id. art. 3(a).
12. Id. art. 5(a).
legislation or judicial or administrative decisions.\textsuperscript{13} With respect to the second element, the habitual residence of the child refers to the residence of the child immediately before the removal.\textsuperscript{14} Accordingly, if the left-behind parent shows that the abducting parent took the child from the child’s home in violation of the rights of the left-behind parent, then a Hague court can order the return of the child.\textsuperscript{15}

However, the abducting parent has five defenses available to her that can nullify the request for the return of the child.\textsuperscript{16} For the purposes of dealing with a parent who abducts the child to escape domestic violence, the only relevant defense is Article 13(b) of the Convention.\textsuperscript{17} This defense, sometimes called the grave-risk defense, states that the return of the child may be denied if the abducting parent shows that “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.”\textsuperscript{18} There is no definition of what is meant by “physical or psychological harm” or “intolerable situation.”\textsuperscript{19} Yet, the U.S. Department of State has developed a spectrum of guidance on these terms.\textsuperscript{20} On one end, inconvenience due to economic hardship is insufficient.\textsuperscript{21} On the other end, abuse directed toward the child is sufficient to constitute the type of harm or situation needed to implicate this defense.\textsuperscript{22} The Convention itself does not establish any burdens of proof for these defenses; however, the implementing legislation in the United States establishes a burden of proof of clear and convincing evidence for the grave-risk defense.\textsuperscript{23}

The burden of proof is important because different outcomes are triggered depending on which party meets its burden. If the petitioning, left-behind parent meets his burden to show that the removal was wrongful, and the abducting parent does not meet her burden, then the return of the child is mandatory.\textsuperscript{24} However, if both the petitioner and the respondent meet their respective burdens, then the return of the child is left to the discretion of the judge.\textsuperscript{25} In other words, if the abducting parent proves that the child will be exposed to a grave risk of physical or psychological harm or an intolerable situation, the judge can still order the return of

\textsuperscript{13} Id. art. 3. For example, Texas legislation states that both parents have the right to possession and to designate the child’s residence. TEX. FAM. CODE ANN. § 151.001(a)(1) (West 2007).
\textsuperscript{14} Hague Convention, supra note 2, art. 3(a).
\textsuperscript{15} Id. art. 12.
\textsuperscript{16} Id. arts. 13, 20. These defenses are the following: (1) the return of the child would violate “human rights and fundamental freedoms,” (2) the left-behind parent was not actually exercising custody rights at the time of removal, (3) the left-behind parent “had consented to or subsequently acquiesced in the removal” of the child, (4) the return would expose the child to a “grave risk” of “physical or psychological harm,” and (5) the child has attained the age of maturity and objects to the return. Id.
\textsuperscript{18} Hague Convention, supra note 2, art. 13(b).
\textsuperscript{19} See id. arts. 5, 13 (demonstrating that there are no definitions of these terms in Article 13 or in the definitions of Article 5).
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} 42 U.S.C.A. § 11603(c)(2)(A) (West 2013).
\textsuperscript{24} Browne, supra note 17, at 1201.
\textsuperscript{25} Id.
the child provided the left-behind parent meets his burden of proof. There is no duty on the judge to deny the return of the child.

**B. The Changing Profile of Abductors**

In the time since the Hague Convention came into force, the profile of a typical abductor has changed. The Convention was drafted with the image of the abductor as a “parent[] who either lost, or would lose, a custody contest.” The drafters did not include any mention of domestic violence against a spouse in the Convention. The Convention operates under the premise that the abduction itself is a form of domestic violence. In fact, at the time the Convention was drafted, as many as twenty-five percent of batterers abducted their children.

Yet, that is not the typical case of child abduction with which the Convention has recently dealt. The majority of international parental kidnappings involve mothers fleeing violent relationships. The shift can be seen over time. In 2003, statistics showed that sixty-eight percent of all abductors were women and that, of those women, eighty-five percent were primary or joint-primary caretakers. Based on studies conducted in 2006 and 2007, the National Center for Missing and Exploited Children (NCMEC) revealed “sixty-five percent to seventy percent of international family abductors were female, and usually mothers.”

As a result of this shift, courts are placed in a difficult position in which they are applying the Article 13(b) defense to cases that the Convention’s drafters did not consider in the development of the defense.

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26. Id.
30. See id. at 42 (“Policymakers considered abduction a continuation of domestic violence on the part of the non-custodial father.”).
31. Id.
32. Browne, supra note 17, at 1195.
33. Williams, supra note 29, at 42–43.
34. Browne, supra note 17, at 1203.
36. Browne, supra note 17, at 1203–04.
II. JUSTICE FOR DOMESTIC-VIOLENCE VICTIMS UNDER THE HAGUE CONVENTION

Since the Convention was drafted without considering domestic-violence victims abducting their children for the purpose of escaping the violence, a tension has existed and continues to exist between the prevention of international child abduction and the protection of domestic-violence victims. This tension is evident in the past unjust treatment of domestic-violence victims and the emerging positive trends for accommodating these victims.

A. Past Unjust Treatment of Victims

The unjust treatment of domestic-violence victims who have abducted their children to escape violence has largely been a function of the overriding influence of the Convention’s original purpose and how the Convention’s language operates in practice.

1. Original Purpose of the Convention

The stated purpose of the Convention is “to secure the prompt return of children wrongfully removed to or retained in any Contracting State.” Commentators have largely restated this purpose in terms of a swift return to the status quo prior to the abduction of a child. Moreover, courts have interpreted the Convention’s statement of its objective as overriding guidance in shaping their decisions. However, as one examines the implications of using the Convention as a quick-return mechanism and its predisposition to ordering the return of children, it becomes evident that the Convention’s purpose creates problems for fleeing domestic-violence victims.

a. Quick-Return Mechanism

Reinforcing the already-clear emphasis on quick resolutions of the proceedings, the Convention states that in order to accomplish this objective, the Contracting States “shall use the most expeditious procedures available.” Specifically, the

37. See Weiner, Uniformity and Progress, supra note 28, at 278 (“[T]he Convention was not drafted with this fact pattern in mind, and it often works unjustly in these cases.”).
38. Hague Convention, supra note 2, art. 1(a).
39. See, e.g., Lozano v. Alvarez, 697 F.3d 41, 52 (2d Cir. 2012) (noting that the Hague Convention emphasizes restoring the status quo via the quick return of the wrongfully removed child); see also Williams, supra note 29, at 46 (quoting Carol S. Bruch, The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases, 38 Fam. L.Q. 529, 529 (2004)) (“[T]he Convention requires restoration of the status quo ‘as expeditiously as possible by returning the child to its habitual residence.’”)
40. See, e.g., Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) (citing Feder v. Evans-Feder, 63 F.3d 217, 226 (3rd Cir. 1995)) (“[A] federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.”).
41. Hague Convention, supra note 2, art. 2.
Convention states that a proceeding should take only about six weeks before a Central Authority can request an explanation for the delay.\footnote{\textit{Id}. art. 11.}

As a result of the importance attached to the quick return of the child, a court’s analysis of the Article 13(b) defense could be limited, and a domestic-violence victim is placed at a higher risk of being subject to separation violence by the abuser.\footnote{See Williams, \textit{supra} note 29, at 52 (“For the domestic violence abductor . . . a return order to the habitual residence subjects her . . . to the potential for additional and greater violence.”); \textit{see also id}. at 65 (discussing how infrequently U.S. courts accept a mother’s exposure to physical abuse to support an Article 13(b) defense regarding the return of a child).} In the context of escaping domestic violence, mothers face the choice of letting the child return alone to a parent with violent tendencies or going back with the child and facing the potential resumption of the abuse.\footnote{\textit{Id}. at 58.} When faced with this dilemma, evidence has led commentators to conclude that these mothers will stop at nothing to return with their children.\footnote{Merle H. Weiner, \textit{International Child Abduction and the Escape from Domestic Violence}, 69 FORDHAM L. REV. 593, 630 (2000) [hereinafter Weiner, \textit{International Child Abduction}].} Having severed all ties before fleeing, often such a return leaves the mother “without the resources to remain independent of their abuser.”\footnote{Williams, \textit{supra} note 29, at 67.} Therefore, that quick return of the child to the habitual residence usually means a quick return of the mother to the abuser. For a victim of domestic violence, such a prompt return is dangerous. They are not only subject to an increased risk of more intense violence, but they are also “at an even higher risk of being murdered following separation than they are while sharing their households with violent men.”\footnote{Bruch, \textit{supra} note 39, at 541–42.} Thus, an emphasis on using the Convention proceedings as a quick-return mechanism places domestic-violence victims who flee their abusers at a higher risk of separation violence if they return quickly after their separation.

This scenario is made more likely due to the limited nature of the Article 13(b) defense.\footnote{See Weiner, \textit{International Child Abduction, supra} note 45, at 657–58 (illustrating the “numerous obstacles” domestic-violence victims face when attempting to invoke the Article 13(b) defense).} A court’s analysis of the Article 13(b) grave-risk defense could be limited by the emphasis on the expeditious return of the child.\footnote{\textit{Id}. at 660–61 (quoting Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999)) (noting that the Second Circuit, when evaluating an Article 13(b) defense, emphasized deference to the child’s country of habitual residence and required an inquiry into what “ameliorative measures” could be taken to protect the child upon return).} For example, domestic-violence victims use the psychological-harm aspect of the defense as a way to argue that exposure to the violence creates an unhealthy environment for the child.\footnote{Browne, \textit{supra} note 17, at 1204–05.} This can be at odds with the quick-return model because, in order to support such an argument, the abducting parent would typically need an expert witness to testify about the psychological harm to the child.\footnote{See, e.g., Lozano v. Alvarez, 697 F.3d 41, 46–49 (2d Cir. 2012) (describing the use of expert witnesses to show psychological harm); \textit{cf}. Weiner, \textit{Uniformity and Progress, supra} note 28, at 348–50 (critiquing the perceived need for expert witnesses in Hague Convention proceedings).} Adding witnesses, particularly expert
witnesses, always lengthens proceedings and increases the costs.\textsuperscript{52} Despite the benefits for domestic-violence victims that expert testimony could provide, courts nevertheless have the discretion to find that “the remedy of return was intended to be expeditious, convenient, and affordable, and that an emphasis on the importance of expert testimony could undermine the Convention’s usefulness.”\textsuperscript{53} Given that possibility, one can see how the added delay and costs of using expert witnesses can be interpreted as contrary to the purpose of the Convention and how that potentially limits the arguments that a victim can make under Article 13(b).

b. Predisposition to Use Return Remedy

The explicitly stated purpose of the Convention is the prompt return of an abducted child and the restoration of the status quo.\textsuperscript{54} Accordingly, a predisposition to use the return remedy has emerged.\textsuperscript{55} This predisposition has emerged from a combination of two factors: (1) the de facto design of the proceedings and (2) the narrowness of the defenses available to abductors.

The proceedings seem designed to set up a judge to order the return of the child. This design, while not explicit in the Convention itself, arises from the interplay of the Convention’s conceptualization of the best interest of the abducted child, international comity, and the discretion given to judges. The Convention premises its return remedy on “the judgment that in most instances, a child’s welfare is best served by a prompt return” to the country of habitual residence.\textsuperscript{56} That judgment reflects the principle that the country of habitual residence is uniquely positioned to know how to best determine issues of custody and access.\textsuperscript{57}

The concept of international comity represents a fundamental trust and respect for the institutions of another country.\textsuperscript{58} In the context of domestic violence, it means that “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 child who has suffered abuse.”\textsuperscript{59} U.S. courts have even cited international comity in their opinions.\textsuperscript{60} The court in \textit{Blondin v. Dubois\textsuperscript{52} Weiner, Uniformity and Progress, supra note 28, at 349–50.\textsuperscript{53} Id. at 353.\textsuperscript{54} Hague Convention, supra note 2, pmbl.; see also Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) (“[T]he Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.”).\textsuperscript{55} See \textit{Lozano}, 697 F.3d at 51 (“[T]he default presumption under the Convention is that a child shall be returned to a state from which she was wrongfully removed . . . .”).\textsuperscript{56} \textit{Lozano}, 697 F.3d at 53; see also Weiner, Uniformity and Progress, supra note 28, at 278–79 (noting that the Convention encourages quick returns in part so that custody hearings can take place in the “forum where most of the relevant evidence exist[s]”).\textsuperscript{57} See Pérez-Vera Report, supra note 27, para. 19 (“[T]he Convention rests implicitly upon the principle that any debate on the merits . . . of custody rights, should take place before the competent authorities in the State where the child had its habitual residence . . . .”); see also Koc v. Koc, 181 F.Supp.2d 136, 145 (E.D.N.Y. 2001) (supporting the notion that the child’s country of habitual residence should determine custody matters).\textsuperscript{58} See Browne, supra note 17, at 1211 (stating that trust in the ability of other Contracting States’ courts to protect children is essential to international comity).\textsuperscript{59} Bruch, supra note 39, at 532.\textsuperscript{60} E.g., Blondin v. Dubois, 189 F.3d 240, 248–49 (2d Cir. 1999); Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996).
specifically invoked international comity in its decision: “In the exercise of comity that is at the heart of the Convention . . . we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.” 61 In fact, the court in Blondin went so far as to impose an additional requirement to the Article 13(b) defense, requiring the court to evaluate any mitigating measures that the country of habitual residence or the parents could take to protect the returned child. 62

When the Convention’s conceptualization of the child’s best interests and the concept of international comity interact, judges often use their discretion to order the return of the child. 63 When judges operate on the premises that returning the abducted child is in that child’s best interest and that they must avoid suggesting that another country’s system will not be effective, those judges often conclude the child should be returned and custody should be decided in the country of habitual residence. 64 Thus, it seems as though the interaction of those three factors creates a de facto design that tends to favor the return of the child.

In addition to this de facto design favoring return, the narrowness of the defenses available to an abducting parent tends to indicate that the Convention has a predisposition to return the abducted child. Courts have interpreted the Article 13(b) defense so narrowly that the abducting parents often have difficulty succeeding in its use. 65 Such a narrow interpretation appears to have been a conscious decision by the drafters. 66 Commentators have pointed out “the reason for the restrictive interpretation lies in the fear that the Convention would be swallowed by its defenses.” 67 This fear of rendering the Convention’s purpose of deterring international child abduction ineffective by creating overly broad defenses has thus led to a narrow reading of the defense. 68 As such, there have been “harsh results in abuse cases.” 69 Two cases in England illustrate the high bar that one needs to meet in order to show the existence of a grave risk of harm sufficient to satisfy Article 13(b). In one case, a child was ordered to return despite the fact that social workers believed that the father’s roommate had sexually abused the child. 70 In another case, a court ordered the return of a child who had not only threatened the life of his wife

61. Blondin, 189 F.3d at 248–49.
62. Id. at 248; see also Blondin v. Dubois, 238 F.3d 153, 156, 158–60 (2d Cir. 2001) (recounting this requirement and reviewing the district court’s analysis on the matter).
63. See, e.g., Weiner, International Child Abduction, supra note 45, at 654–57 (illustrating a Hague proceeding in which the court rejected the mother’s Article 13(b) defense by downplaying the abuse she had suffered and emphasizing the ability of the country of habitual residence to provide adequate protection for her and her child).
64. Cf. id. at 657 (“Courts . . . tend to have confidence in the willingness and ability of the courts in the place of the child’s habitual residence to sort out these claims and take the necessary protective measures . . . .”).
65. Weiner, Uniformity and Progress, supra note 28, at 337.
66. Williams, supra note 29, at 63.
67. Id.
68. Id.
69. See, e.g., Bruch, supra note 39, at 533–35 (explaining the difficulty in establishing the Article 13(b) defense in England, where the Convention defenses have indeed been interpreted narrowly).
70. Id. at 535.
but who was also already in prison for murder. These two examples illustrate the high level of danger needed to implicate the Article 13(b) grave-risk defense.

2. Language and Operation of the Convention

The second cause of the unjust treatment of domestic-violence victims fleeing their abusers stems from how the Convention operates in practice. There are three ways in which the Convention places victims at a disadvantage: (1) the creation of an artificial two-prong test for the Article 13(b) defense, (2) a literal interpretation of the Article 13(b) defense, and (3) the definition of habitual residence.

a. Artificial Two-Prong Test

When implementing the Article 13(b) grave-risk defense, some courts have created an artificial two-prong test that places a higher burden on victims. U.S. courts require the abducting parent to show not only that there is a grave risk of psychological and physical harm but also that there are no mitigating measures that can be taken in the country of habitual residence to reduce that risk. While Article 13(b) explicitly requires this first prong, the second prong of the grave-risk defense is not present in the language of the Convention or any implementing legislation. This two-prong analysis has taken root in some U.S. courts of appeals and was explicitly invoked in the case of Blondin v. Dubois. The inquiry as to “whether suitable arrangements to protect the child can be made in the country of habitual residence, despite a finding of grave risk,” may have developed because of the Convention’s predisposition for returning the abducted children. This predisposition fosters a judicial culture whereby courts have created new doctrines “unsupported by the Convention and . . . likely to impose unjustifiable hardships,” out of “enthusiasm for returning children under virtually all circumstances.”

Therefore, in addition to the existing difficulty in gathering evidence, fleeing victims must now also show that the legal system of the other country cannot

71. Id.
73. Id. at 349–50.
74. Hague Convention, supra note 2, art. 13(b); see Browne, supra note 17, at 1211 (discussing the extra burden on the domestic-violence victim to provide “evidence showing that the country of origin would fail to protect the child upon return”).
75. See Williams, supra note 29, at 63 (noting that U.S. courts of appeals are “split on the issue” of adding the secondary inquiry to the Article 13(b) defense regarding mitigating measures to reduce risk to the child); Browne, supra note 17, at 1211 nn.116–17, 1212 n.120 (acknowledging that some U.S. courts of appeals, including the Second, Third, and Sixth Circuits, have adopted the two-prong analysis of the Article 13(b) defense, while others, such as the Seventh and Eleventh Circuits, have rejected it).
76. Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999); Blondin v. Dubois, 238 F.3d 153, 156, 158–60 (2d Cir. 2001).
77. Williams, supra note 29, at 63.
78. Bruch, supra note 39, at 536.
adequately protect the child.\textsuperscript{79} Two major obstacles arise when trying to evaluate the adequacy of foreign domestic-violence regimes. First, proving this element presents similar evidentiary obstacles in that the evidence needed to evaluate the legal system is most readily available in the country from which the victim fled.\textsuperscript{80} Moreover, while the Central Authority can help gather and transmit such evidence and affidavits, “the information obtained is often without the mother’s input, potentially making the report factually inaccurate.”\textsuperscript{81} Second, victims must also overcome the potential disconnect between how a country’s laws appear on paper and how it’s laws operate in practice.\textsuperscript{82} “[I]neffective law enforcement or inadequate implementation” can undermine the effectiveness of the laws as they appear on paper.\textsuperscript{83} The U.S. Department of State’s Human Rights Reports do indeed suggest the existence of this disconnect between what the domestic-violence laws in Contracting States are supposed to do and the protection they actually provide to victims.\textsuperscript{84} This poses an enormous problem for fleeing victims because it is difficult to prove a negative, specifically that a government will not enforce the domestic-violence laws as they appear on paper.\textsuperscript{85} This burden is made even more demanding given the tendency of courts to defer to the adequacy of foreign legal systems under international comity.\textsuperscript{86} Thus, fleeing victims must first prove the abuse, which is difficult in its own right, then confront the even more challenging task of proving the practical inadequacy of the laws of the other country, all in a context where courts readily trust the sufficiency of another government’s laws as they appear on paper.

Additionally, courts rely on—and abusers manipulate—the use of undertakings.\textsuperscript{87} Undertakings are voluntary assurances made by the left-behind parent promising not to jeopardize the safety of the child or the mother and are usually attached to an order of return.\textsuperscript{88} This, of course, makes a court more likely to believe that the mother and child will be protected in the original country.\textsuperscript{89} A 2003 study found that “undertakings were issued in just over half of the cases studied.”\textsuperscript{90} However, while a court issues these undertakings, they have no real impact on the mother or child’s safety because courts in the other country generally do not enforce them, and even if they are enforced, batterers do not consistently follow them.\textsuperscript{91} For
example, the same study revealed that, of the undertakings issued, sixty-seven percent were never implemented in the relevant original countries. Moreover, abusers sometimes manipulate the court into granting these undertakings with no intention of obeying them. Batterers may have two faces: a “brutal” one that they show at home and a “calm or even mild-mannered” one that they present to judges. The face the abusers present to the court convinces the judges that they can be held to their word, but studies show two-thirds of those commitments are broken as soon as the order is issued and the mother and child are returned. Results like this are supported by other studies highlighting that “batterers often violate court orders designed to impact the behavior of the batterer.” Moreover, such behavior is enabled by the fact that there is no remedy for the violations of undertakings. However, while these statistics are publicly, a victim must prove to a court that the foreign legal system will not implement the undertaking in addition to proving that the abuser will not abide by the terms of the undertaking.

b. Literal Interpretation of the Article 13(b) Defense

When the language of the Convention is put into practice, courts have a tendency to read the language of Article 13(b) literally, excluding abuse to the parent as a way of showing grave risk of harm. Article 13(b) states that return should be denied when “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.” The fact that the language only mentions the child in relation to the harm has led courts to refuse to find that domestic violence against the mother constitutes a grave risk to the child. Commentators have found that only in “a few Hague Convention cases have judges accepted that children’s exposure to their mother’s [sic] victimization at the hands of an abusive partner represents a grave risk of harm to the children.” In fact, a 2010 study found that courts were more likely to order the return of a child when a mother reported that only she was subject to abuse, not their children.

92. Id.; see also Bruch, supra note 39, at 543 (noting the results of the same study).
93. Williams, supra note 29, at 67.
94. Bruch, supra note 39, at 543.
95. Id.
96. Williams, supra note 29, at 67.
98. See id. at 660–61 (noting the difficulties of the two-prong approach to the Article 13(b) defense, namely, that the abductor must prove “the future noncompliance of a batterer with undertakings or inaction by governmental authorities with their laws-on-the-books”).
99. See id. at 657–58 (emphasis added) (explaining how courts focus on the child when evaluating the Article 13(b) defense by looking to whether the “abuse of the parent qualifies as a grave risk of harm to the child”).
100. Hague Convention, supra note 2, art. 13(b).
101. See Williams, supra note 29, at 65 (“[S]ome commentators allege that the [U.S.] judiciary fails to recognize domestic violence against mothers of the children as a grave risk to the children themselves.”).
102. Id. (quoting JEFFREY L. EDLESON ET AL., MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES 25 (2010)) (internal quotation marks omitted).
103. Id.
Reading Article 13(b)'s defense to exclude abuse to the mother as a factor of grave risk leads courts to order the return of children to an environment of possible physical abuse and almost certain emotional abuse. Extensive social-science research reveals that "in approximately half of families where a partner is physically violent to their spouse . . . the children in the household are also physically or sexually abused." Moreover, the same research shows that, if the mother returns with the child, and the abuse resumes, "[m]any children physically intervene to protect an abused parent." Thus, returning the child despite evidence of abuse of the mother places the child at risk of physical abuse.

While abuse of the mother demonstrates a risk of physical abuse of the child, it is a near certainty that returning the child will expose him or her to emotional harm. As described above, returning a mother to an abusive spouse will most likely lead to resumption and often even escalation of the abuse because the period following separation is the most dangerous time for an abused spouse. There is well-documented research supporting the proposition that exposure to such abuse has negative psychological effects on a child. Evidence shows that exposure to violence can lead to "emotional problems, including feelings of fear, insecurity, anxiety, stress, low self-esteem, or guilt." Furthermore, those emotional problems can manifest themselves through drug and alcohol abuse.

Thus, a strict reading of Article 13(b), a reading that orders the return of the child despite evidence that only the mother has been abused, places the child in a home where he or she is at risk of physical abuse and is almost certain to suffer emotional abuse. Making the abuse of the victimized parent irrelevant to an Article 13(b) defense often deprives the victim of the only defense available to her, making the victim feel powerless to protect herself and her children.

c. Habitual Residence

The Convention drafters included the element of habitual residence in conjunction with wrongful removal so as to prevent the abductor from moving the child to forum shop for a favorable custody determination; however, in the context

104. Id. at 70 (quoting EDLESON ET AL., supra note 102, at 22) (internal quotation marks omitted).
105. Id. (quoting EDLESON ET AL., supra note 102, at 22) (internal quotation marks omitted).
106. See Browne, supra note 17, at 1205–06 (noting the various emotional and developmental repercussions of witnessing domestic violence at a young age, including higher rates of depression, aggression, and anxiety).
107. Bruch, supra note 39, at 541–42.
108. Browne, supra note 17, at 1205–06.
110. Id. at 622.
111. See Browne, supra note 17, at 1202 (footnote omitted) (“Fleeing parents who allege domestic violence in Convention proceedings most often rely on Article 13(b), and thus its interpretation is key in balancing the rights of fleeing mothers and left-behind fathers.”).
112. See Weiner, International Child Abduction, supra note 45, at 642–43 (quoting In re Ponath, 829 F.Supp. 363, 368 (D. Utah 1993)) (internal quotation marks omitted) (noting a goal of the Convention is “to prevent one parent from obtaining an advantage over the other in any future custody dispute” and thus, under the Convention, forum shopping is not acceptable).
of domestic violence, the abusive left-behind parent can use the language of habitual residence to forum shop.\textsuperscript{113} Given the power and control dynamics of an abusive relationship, the abuser’s control over the victim will frequently be pervasive enough to enable the abuser to determine where the family lives.\textsuperscript{114} This dynamic, where the abuser isolates and controls the residence of the family, makes the victim a “virtual prisoner” in the country of habitual residence.\textsuperscript{115} As such, the abuser is allowed to forum shop through violence and isolation. Given that one of the expressed aims of the Convention is to prevent forum shopping, allowing such a result under the language of habitual residence undermines this fundamental principle of the Convention.\textsuperscript{116} Such a result, taken into account with the changing profile of abductors, demonstrates the need to reevaluate the Convention.

The combination of an unsupported, artificial two-prong test, a strict reading of Article 13(b) that makes abuse of the mother practically irrelevant, and a conceptualization of habitual residence that reinforces an abuser’s power over the victim all unjustly disfavor a domestic-violence victim abducting her child to escape a violent relationship. Professor Merle H. Weiner explains it best:

This perspective reinforces the domestic[-]violence victim’s view that legal solutions will not help her, and further disempowers her. It tells the batterer that the system will help him exercise power and control over his victim, and thereby reinforces his power. The children are taught that violence is rewarded, and that the system does not care about their mother’s plight.\textsuperscript{117}

\textbf{B. Positive Trends for Victims}

Despite the ways in which a literal reading of the Convention can lead to unjust treat of domestic-violence victims escaping their abusers, a positive trend has emerged in which courts have shifted toward an interpretation of psychological harm envisioned in Article 13(b) that includes exposure to the mother’s abuse. This protective interpretation of psychological harm in recent case law reflects courts’ efforts to adapt the Article 13(b) defense to the realities of domestic abuse in intimate relationships.\textsuperscript{118}

Many courts have adopted this protective interpretation.\textsuperscript{119} There are four U.S. cases in particular that illustrate this positive trend. The first of these cases is \textit{Baran v. Beaty}, an Eleventh Circuit decision involving a couple that lived in Australia from which the mother abducted their child and fled.\textsuperscript{120} The mother produced evidence

\begin{itemize}
  \item \textsuperscript{113} Williams, supra note 29, at 57.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} See Weiner, \textit{International Child Abduction}, supra note 45, at 644 (quoting Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 378 (8th Cir. 1995)) (internal quotation marks omitted) (describing a situation where a victim was forced to keep her habitual residence in Mexico due to the abuse of her husband and her father-in-law, even though she had no intent to live or remain there).
  \item \textsuperscript{116} Weiner, \textit{International Child Abduction}, supra note 45, at 642.
  \item \textsuperscript{117} Id. at 631 (footnote omitted).
  \item \textsuperscript{118} Browne, supra note 17, at 1195.
  \item \textsuperscript{119} See id. at 1208 (discussing recent decisions by the First, Seventh, and Eleventh Circuits that recognize the link between exposure to domestic violence and psychological harm to a child).
  \item \textsuperscript{120} Baran v. Beaty, 526 F.3d 1340, 1342 (11th Cir. 2008).
\end{itemize}
that the father had been verbally and physically abusive to her.\textsuperscript{121} The district court, affirmed by the Eleventh Circuit, refused to return the child to Australia even though “there was no evidence [the father] had ever beaten or otherwise physically harmed [the child].”\textsuperscript{122}

The second case is \textit{Van De Sande v. Van De Sande}.\textsuperscript{123} The Seventh Circuit reversed and remanded the district court’s order of return, reasoning that the district judge had been “unduly influenced by the fact that most of the physical and all the verbal abuse was directed to [the mother] rather than to the children.”\textsuperscript{124}

The third case is \textit{Walsh v. Walsh}.\textsuperscript{125} The First Circuit found that returning the child would subject the child to a grave risk of harm based, in part, on evidence of the father’s abuse of the mother, where the child was a witness to the violence rather than the target.\textsuperscript{126}

The last case is \textit{In re Lozano}.\textsuperscript{127} This case was decided in August of 2011, making it the most recent indication of the positive trend taking hold in U.S. courts.\textsuperscript{128} While the district court determined that the evidence was insufficient to show a grave risk to the child, the district court correctly considered the abuse to the mother when evaluating the Article 13(b) defense.\textsuperscript{129} In \textit{Lozano}, an abused mother abducted her child and moved them both to New York, where they both received therapy.\textsuperscript{130} After the father filed a Hague petition, the therapist testified in the proceeding that the child “was unable to speak, make eye contact, or play” in her office.\textsuperscript{131} Moreover, the child would “wet herself, was hyper vigilant, and had a very heightened startle response.”\textsuperscript{132} As a result, the therapist diagnosed the child with post-traumatic stress disorder (PTSD), noting that these symptoms had manifested in part because the child “kn[ew] that her mother had been harmed or threatened.”\textsuperscript{133} Even though the evidence was determined to be insufficient to prove grave risk, the district court took a positive step by acknowledging that the abuse of the mother was relevant to the Article 13(b) defense.\textsuperscript{134}

\textsuperscript{121}. \textit{Id.} at 1342–43.
\textsuperscript{122}. \textit{Id.} at 1343, 1352–53; \textit{see also} Browne, \textit{supra} note 17, at 1208 (mentioning that the court refused to return the child, “even though there was no evidence that the abusive father had ever intentionally harmed the child”).
\textsuperscript{123}. \textit{Van De Sande v. Van De Sande}, 431 F.3d 567 (7th Cir. 2005).
\textsuperscript{124}. \textit{Id.} at 570, 572; \textit{see also} Browne, \textit{supra} note 17, at 1208 (noting the significance of the \textit{Van De Sande} case).
\textsuperscript{125}. \textit{Walsh v. Walsh}, 221 F.3d 204 (1st Cir. 2000).
\textsuperscript{126}. \textit{Id.} at 209–12, 222.
\textsuperscript{128}. \textit{Id.} at 197.
\textsuperscript{129}. \textit{Id.} at 203–07, 209–10, 212, 225.
\textsuperscript{130}. \textit{Id.} at 212.
\textsuperscript{131}. \textit{Id.}
\textsuperscript{132}. \textit{Id.}
\textsuperscript{133}. \textit{In re Lozano}, 809 F.Supp.2d at 212.
\textsuperscript{134}. \textit{Id.} Notably, the evidence of the mother’s abuse was also mentioned in the court of appeals decision. \textit{See Lozano v. Alvarez}, 697 F.3d 41, 45–46, 48 n.4 (2d Cir. 2012) (recounting the abuse of the mother but not considering the Article 13(b) defense on appeal).
While most of the decisions creating this positive trend are recent, it is a sign that courts have begun to “appreciate the injustice that can result from applying the Hague Convention to domestic-violence victims.” This protective interpretation of psychological harm under Article 13(b) specifically addresses the problem of courts strictly reading the defense to make the mother’s abuse practically irrelevant. Thus, applying the Hague Convention to domestic-violence victims seems to precipitate significant injustices for victims, but there is an emerging trend towards addressing those injustices. Moving forward, it is necessary to craft solutions to entrench the positive trend and address the other sources of tension between the Convention’s objectives and its treatment of domestic-violence victims.

III. SOLIDIFYING AND ADVANCING PROGRESS

Looking forward at how to solidify the positive trends and make progress on addressing the areas where victims still face obstacles, this Note will examine two paths: (1) working within the existing framework and (2) adding a new mechanism to the Convention. For a solution that works within the existing framework of the Convention, this Note will evaluate a Swiss law that defines existing language in the Convention in such a way as to provide more protection to domestic-violence victims. With respect to adding a new mechanism, this Note will evaluate the effectiveness of elective mediation for protecting victims. However, before evaluating these two paths to improving the Convention, it is prudent to first identify the limitations within which any proposed change must work. There are three such limitations: (1) mission creep into custody issues, (2) maintaining uniformity and predictability, and (3) the rights of left-behind parents.

A. Limitations to Work Within

Any proposed change to the Convention must work within three limitations. First, a proposal should not change the nature of the Convention such that a court must resolve issues relating to a final custody determination. Second, to avoid forum shopping, any proposed solution should try to maintain uniformity and predictability in the enforcement of the Convention. Third, any proposed change should refrain from infringing on the rights of the left-behind parent, in the interest of ensuring compliance with court decisions.

1. Mission Creep

Mission creep in this context refers to the possibility that the grave-risk defense could be read beyond its original meaning and be supplanted by a best-interest-of-the-child analysis. There are two primary rationales for this caveat, the first of which is preventing forum shopping. An aim of the Convention “is to prevent one parent from obtaining an advantage over the other in any future custody dispute.” As such, crafting a change that intrudes on custody issues and requires a best-interest

determination could leave those standards open to interpretation among jurisdictions, creating an environment that fosters forum shopping.\textsuperscript{138}

Second, crafting a change that directly or indirectly crosses into a best-interest determination for the child could encourage international child abduction as a remedy to domestic violence. If a showing of best interest can defeat a Hague petition, then the abducting parent would merely need to establish the necessary ties to the new community to reach that standard and avoid return of the child.\textsuperscript{139} Therefore, including a best-interest determination in any defense could make it easier for victims to establish ties purely to defeat a Hague petition, increasing the attractiveness of international child abduction as a remedy to a violent relationship.

2. Uniformity and Predictability

Uniformity and predictability are important for three reasons. First, uniformity protects against forum shopping. If different countries have different interpretations of the Convention, then abductors “can exploit divergent legal interpretation and thereby avoid the Convention’s application and sanction.”\textsuperscript{140}

Second, without uniformity and predictability, the Convention might not remain a timely remedy for left-behind parents.\textsuperscript{141} If there is no uniform interpretation, specifically regarding defenses, then petitioners or respondents will be encouraged to try novel arguments in the hopes that courts will accept them.\textsuperscript{142} The emergence of such a trend would, in turn, also increase the number of appeals.\textsuperscript{143} As such, between the considerations of novel legal arguments and the increase in appeals, the Convention proceedings would face more and more delay.

Third, without predictability, rules can be inconsistently applied. Generally, it is difficult for an individual to plan around inconsistency because that inevitably results in different, seemingly arbitrary outcomes.\textsuperscript{144} In the context of domestic violence, “[i]ndividuals need stable rules in order to structure their family relationships.”\textsuperscript{145}

\textsuperscript{138.} See Weiner, Uniformity and Progress, supra note 28, at 289 (explaining that without “uniform interpretation” of the Convention, “abductors may be encouraged to abduct” in order to take advantage of perceived legal benefits in another forum); Browne, supra note 17, at 1200 (juxtaposing the Convention’s emphasis on wrongful removal with its total minimization of the best-interest standard).

\textsuperscript{139.} See Browne, supra note 17, at 1209 (noting that the incorporation of the best-interest standard in Article 13(b) “permits an abducting parent to use newfound ties in the destination country—such as having recently given birth or gotten married—to resist a return order”).

\textsuperscript{140.} Weiner, Uniformity and Progress, supra note 28, at 289.

\textsuperscript{141.} See Browne, supra note 17, at 1208–09 (providing as an example the risk in interpreting Article 13(b) so broadly “as to undercut the Convention’s purpose of deterring child abduction by providing for the swift return of abducted children”).

\textsuperscript{142.} Weiner, Uniformity and Progress, supra note 28, at 290.

\textsuperscript{143.} Id.

\textsuperscript{144.} See id. at 295–96 (remarking how a purposive approach, which focuses on the objective behind the Convention, fosters more uniformity than a constructivist approach to the Convention, which “focuses on the language” of the Convention, because the constructivist approach may incorporate national culture and nationally derived meanings into the Convention).

\textsuperscript{145.} Id. at 291 (noting that unpredictable interpretation of the Convention creates “difficulties for parents who want to travel abroad with their children”).
3. Rights of the Left-Behind Parents

Protecting the rights of left-behind parents is important as a way to increase the chances of compliance with an adverse outcome. Social-science research indicates that an abuser’s compliance with court orders depends on procedural justice. Procedural justice refers to the extent to which an abuser feels his voice is heard in the process; an abuser who feels unfairly treated is more likely to view the process itself and any subsequent court order as illegitimate. Convention proceedings already have trouble in this respect. Left-behind parents often complain that, once domestic violence allegations are made, all sense of fairness leaves the proceeding, and “the odds, they feel, are against them from the moment of abduction.” Therefore, any proposed change to the Convention that does not adequately address the rights of the left-behind parent will likely only exacerbate this problem; whereas, a proposal that addresses this concern may improve the chances that a left-behind parent may comply with an adverse outcome.

B. Two Paths

Working within those limitations, there are two paths forward to make the Convention more responsive to domestic-violence victims: (1) working within the existing framework or (2) adding a new mechanism to the Convention. As an example of the first path, Switzerland passed a new law that defines intolerable situation under Article 13(b). Under the second path, some have proposed adding an elective mediation option for resolving the dispute between the two parents before initiating a Convention proceeding.

1. Working Within the Existing Framework

Courts have already started to work with the existing language of grave risk of psychological harm, reading into the Article 13(b) defense a way for domestic-violence victims to make exposure to their abuse a factor in the proceeding. One way to build off of that progress is to look at the model established in Switzerland. In 2007, the Swiss passed the Federal Act on International Child Abduction and the

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147. Id. at 47–48.
148. See Browne, supra note 17, at 1213–16 (summarizing some of the challenges left-behind fathers face in litigating Convention cases specifically in the United States, including less access to legal representation, stereotyping, and the risks associated with an overly broad interpretation of the Article 13(b) defense).
149. Id. at 1214.
150. Weiner, Intolerable Situations, supra note 72, at 336.
152. See supra Part II.B.
Hague Conventions on the Protection of Children and Adults. The law states that an intolerable situation exists when the following three conditions are present:

a. placement with the parent who filed the application is manifestly not in the child’s best interests;

b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or this cannot reasonably be required from this parent; and

c. placement in foster care is manifestly not in the child’s best interest.

The Swiss law bases this definition of intolerable situation on notes from delegates at the initial drafting of the Convention. The U.K. delegate indicated that Article 13(b) was meant to apply when the abductor was threatened with domestic violence. The delegate illustrated a scenario in which the physical and psychological harm provisions would not apply to threats and violence between spouses, but the child would unmistakably have been in an intolerable situation when the spousal abuse occurred.

To this end, the Swiss law provides protection for domestic-violence victims in two ways. First, by providing a statutory definition of intolerable situation, the law could increase uniformity and predictability with respect to the enforcement of the Convention by preventing divergent interpretations of the same language and thus increasing the predictability of outcomes under the Article 13(b) defense. While one might argue that the best-interest standard in the Swiss law is still subjective enough to leave open the possibility of divergent interpretations, the fact that guidance exists where none previously existed helps to narrow the possible interpretations significantly.

Second, by defining intolerable situation in a way that clearly distinguishes it from grave harm, the law undermines the artificial two-prong test. Commentators

155. Weiner, Intolerable Situations, supra note 72, at 341–42.
156. Id. at 342.
157. Id.
158. Cf. id. at 339–40 (discussing how the Swiss approach was rejected by the Special Commission to Review the Operation of the Hague Convention due to concerns that the approach “would potentially excuse return whenever the best interest of the child required it”); cf. id. at 371–72 (defending the Swiss best-interest standard and distinguishing it from the traditional best-interest analysis in a custody dispute).
159. See id. at 346

([T]he language only suggests that the drafters believed a “grave risk of physical or psychological harm” was an “intolerable situation.” It would be incorrect to assume that a “grave risk of physical or psychological harm” is required for an “intolerable situation,” given the words “or otherwise” in the provision and the legislative history from the drafting of the
have observed that U.S. courts treat the grave-risk and intolerable-situation provisions as coextensive, causing those courts to create the artificial requirement to show that the other country’s legal system is incapable of protecting the child and mother. Defining intolerable situation would help prevent such a coextensive reading of Article 13(b).

However, the language of this Swiss law has garnered criticism for creating flexibility that allows courts to make merits determinations that may be better suited for custody cases. The language concerning a best-interest determination would allow the abducting parent “to use newfound ties in the destination country—such as having recently given birth or gotten married—to resist a return order.” As previously mentioned, intruding into custody issues with a best-interest determination of this kind would also facilitate forum shopping for abducting parents looking for countries with lenient standards to adjudicate the underlying custody issues.

Proponents of the law, however, argue that it does not create a loophole through which the parties can adjudicate custody issues. The use of the word manifestly in relation to the best-interest standard creates a higher threshold than a merits determination. Moreover, the law may require that respondents using the defense prove all three elements by clear and convincing evidence, narrowing the application of the defense. Lastly, the law does not allow a comparative analysis to determine which parent is better; instead, “[t]he defense focuses the court solely on the petitioner, and the court must find a significant concern that affects that parent’s fitness.”

The Swiss law provides guidance to courts, enhancing uniformity and predictability while simultaneously circumventing the artificial two-prong test that creates difficulty for domestic-violence victims. Nevertheless, when deciding if this law is a good model, it is necessary to also balance those benefits with the possibility that the law could be used as a loophole to adjudicate underlying custody issues. Moreover, there are potentially enormous difficulties in terms of getting a change like this approved. For example, Switzerland proposed this very change at the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention in 2006, and the proposal failed. If countries were to follow the Swiss
example and pass a domestic law, then it would undermine uniformity until a sufficient number of countries pass such a law defining intolerable situation. However, this piecemeal approach might be the only way to build enough momentum to create long-term change to the Convention.

2. Adding a New Mechanism

Another option that would make the Convention more accommodating to victims fleeing their abusers would be to add an elective mediation mechanism for victims and left-behind parents to use. This option would allow the two parties to choose to have an appointed mediator seek a compromised solution to the child abduction. Elective mediation provides three benefits to domestic-violence victims. First, it increases the chances that the left-behind parent will comply with the outcome by promoting cooperation and amicable resolutions between the abducting and left-behind parents. In fact, it has been shown that “mediation can even improve communication, facilitate collaborative parenting, and diffuse underlying conflicts that motivated or exacerbated abuse.” Such a cooperative mechanism gives the left-behind parent a voice in crafting a solution, thus increasing procedural justice and, in turn, the chances of compliance with the outcome.

The second benefit of elective mediation is that it does not treat victims as criminals. It offers a victim who abducted her child “an alternative to facing criminal prosecution, extradition and incarceration.” In some cases, prosecutors will drop criminal charges once the child is returned to the custodial parent or the parents have stipulated to a valid, enforceable parenting agreement. On a functional level, not treating victims as criminals may lessen the stakes for them when responding to a petition under the Convention.

The third benefit is that the mediation model addresses the underlying disempowerment dynamics of an abusive relationship. While some might argue that putting the victim in mediation with her abuser is setting the victim up to be revictimized, commentators note that such a criticism is “approaching women’s rights from a victimization framework,” which “may be stripping women of what agency they do possess.” By treating victims like they are strong enough to handle mediation, the process empowers them. These victims had the “strength, tenacity and resilience” to leave their abusers and relocate abroad, often without financial

170. See id. at 62 (“Elective mediation is one appropriate mechanism to promote cooperation, voluntary return and an amicable (or at least mutually acceptable) resolution.”).
171. Id. at 85.
174. Id. at 52 n.7.
175. See id. at 66–67 (discussing how mediation is sometimes the only option for victims of domestic violence and how a ban on mediation can destroy a victim’s decision-making ability and take away her chance to be heard).
176. Id. at 67 (footnote omitted).
177. Id. at 68, 82.
means or support. A mechanism that inherently relies on such strength makes a meaningful statement in support of the victims that goes a long way in recalibrating the power dynamics within the abusive relationship.

However, despite these benefits, the criticism has been made that elective mediation could produce a coerced outcome. On the one hand, the abuser’s presence can create an imbalance during the mediation, implied by the fact that the fear instilled in the victim was so severe that she fled the country, and the abuser may still be able to intimidate and harass her through the mediation process if appropriate safeguards are not put into place. On the other hand, the fact that the victimized parent has physical possession of the child can give that parent leverage and thus power to yield a coerced result. Physical possession is such a powerful factor that the Model Standards of Practice for Family and Divorce Mediation suggests that the mediator terminate or suspend the mediation in cases of parental kidnapping. Thus, both parents, in the context of mediation, have power and leverage to produce coerced outcomes.

Therefore, when deciding to add this mechanism as an option, it is imperative to balance the three benefits with the possibility of a coerced outcome. When looking at how to implement this change, it is important to note that progress has already been made. In 2005, the United States and Germany agreed to form a binational pilot mediation scheme to provide this option for Convention cases. While that effort was never fully implemented or funded, the NCMEC, a nonprofit organization in the United States, currently attempts to provide volunteer mediators and attorneys for parents in order to make the option to mediate more available in international parental-kidnapping cases. This approach offers a model for the drafters of any potential formal changes to the Convention and offers an example of a way to create change in international parental-kidnapping cases without engaging in the formal process needed to change any convention.

CONCLUSION

As one can see, the Convention, in many instances, operates against the interests of domestic-violence victims fleeing with their children from an abusive spouse. Because the Convention was drafted without contemplating domestic-violence victims as the abducting parents, the elements and operations of the Convention have created tension between the interests in discouraging international child abduction and protecting these victims.

178. Id. at 68.
179. See Alanen, supra note 35, at 82 (commenting that “elective mediation can be characterized as an empowerment right” and a means through which victims of abuse can realize other human rights) (citation omitted).
180. Id. at 51.
181. Id. at 51.
182. Id. at 84–85.
183. Id. at 76, 84.
184. Id. at 76.
185. Id. at 63.
186. See Alanen, supra note 35, at 63 (noting that, at least as of 2008, “the United States ha[d] neither implemented nor funded a formal international parental[-]kidnapping mediation program”).
In practice, the Hague Convention has often worked against victims. The emphasis on the Convention as a quick-relief mechanism places victims at risk of separation violence. Moreover, the Convention’s predisposition to returning the abducted children often leaves victims feeling like the law works against them. Judges have created an artificial two-prong test that compounds the already enormous difficulty in gathering evidence and proving the elements of the Article 13(b) defense. The language of the Article 13(b) defense has been construed narrowly so as to make the abuse of the victim irrelevant. Lastly, the Convention’s definition of habitual residence creates the possibility that the abuser can coerce the mother and child into living in a residence against their will through isolation and violence. However, an emerging positive trend has counteracted some of the deficiencies in the Convention by allowing exposure to domestic violence to constitute grave psychological harm under Article 13(b).

In order to make those changes permanent, Contracting States can follow the Swiss example or add an elective mediation option as a possible relief mechanism. While the Swiss law, which provides guidance as to what intolerable situation means, was rejected by the Contracting States, countries can pass domestic laws similar to the Swiss law in order to build change individually or garner support for another attempt to change the Convention. The elective mediation model can empower victims, and it respects the rights and voices of left-behind parents, increasing the chances of their compliance with the court’s orders. This model even has organizations and bilateral agreements to build on in order to establish it as a viable alternative.

Thus, such solutions have the possibility of building on the progress already taking place and addressing the inherent tension that exists in enforcing the Convention due to the emergence of domestic-violence victims as a main driver of international child abduction.