What If She Leaves?

Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy

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I. INTRODUCTION

Maria met Tom five years ago.[1] In the beginning, Tom swept Maria off her feet. Maria was a recent immigrant from Mexico, and Tom enjoyed teaching her about American culture. Maria was attracted to Tom's blonde good looks, and she felt safe with him since he was a police officer. When Tom asked Maria to marry him, she was overjoyed finally to have a partner with whom to share her life. However, during Maria's first pregnancy, their relationship began to change as Tom became emotionally abusive. Tom forced Maria to give up her job in order to keep their house the way Tom liked it. Maria became depressed because staying at home limited her opportunities to practice English. With all her family and friends in Mexico, she was lonely and isolated. When Tom's abuse escalated to include physical as well as emotional violence, Maria had no one to

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1. The facts of this narrative are based on a true story personally recounted to the author during her work in the domestic violence field. Some of the identifying information has been changed to protect the confidentiality of the victim and her children.

whom she could turn for help. The physical and emotional abuse became so bad that one evening Tom ripped a handful of Maria's hair from her scalp and hung it over their vanity as a trophy. Tom told Maria that it was his reminder that he would always have control over her even if she tried to escape. Summoning all her courage, Maria moved out of the house with her newborn daughter and found an apartment.

Even after their separation, Tom's abuse did not stop. He harassed Maria with midnight phone calls, told mutual friends that their break-up was her fault, and drove by her new apartment often. One day, when Tom came over to pick up their daughter for court-ordered visitation, he forced his way into Maria's bedroom. He raped Maria and demanded that their daughter watch so she could see what an "animal" her mother was. When Tom left, Maria sank to her knees on the carpet. Deep inside, her survival instinct told her that she and her daughter needed to escape. Maria decided that the most logical decision was to flee to her home country, Mexico. Maria wanted to return to the support of her family and friends. She also wanted to return to a country where she spoke the language fluently and was familiar with the legal system.

If Maria had asked for an attorney's advice about her plan to relocate, she probably would have been surprised. Even though Maria thought she was protecting herself and her child, under the Hague Child Abduction Convention, Tom could force her to return to the United States to litigate the custody of their daughter.[2] Although Maria might have a "grave risk defense" against return of their daughter to the United States,[3] a competent attorney would inform her that this defense is risky and may not be successful even if child abuse is involved.[4] As a result, Maria is in a legal catch-22.[5]

A. The Fallacy of the Undertakings Remedy

In cases of domestic violence in which victims flee with their children to a different country, termed the receiving country, judges are fashioning new reme-

2. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, arts. 8-12, T.I.A.S. No. 11670, 6-8, 1343 U.N.T.S. 89, 100 (entered into force Dec. 1, 1983) (describing procedures for the return of abducted children to the country of habitual residence) [hereinafter Hague Convention].
3. *See id.* at art. 13(b), T.I.A.S. No. 11670 at 8, 1343 U.N.T.S. at 101.
4. *See, e.g.*, Blondin v. Dubois, 283 F.3d 153, 163 (2d Cir. 2001) (finding that a court may send a child to his or her home country even if allegations of abuse are involved) [hereinafter *Blondin IV*].
5. *See* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 689 (2001) (explaining that the "Catch 22" situation comes about because "if the mother leaves the child in order to escape the abuse, she loses her child and is in constant fear that the child is not safe. If she flees and takes the child with her, she violates the law.").

dies to help victims like Maria.[6] Called "undertakings," these remedies are orders issued by the court of the receiving country.[7] Their goal is to ensure mothers' and children's safe return to the country from which they fled, called the country of habitual residence, so the court in that country can make the custody decisions.[8] They commonly include restraining orders, arrangements for transportation, and lodging costs, and they may make provisions for a child's education.[9] This article will show that undertakings are not helpful remedies to victims of domestic violence.[10] As currently applied, undertakings are illegal, dangerous, unfair, and inefficient. Even if the Hague Convention reforms undertakings to ameliorate these problems, the undertakings remedy is inherently flawed because it enforces return to the country of habitual residence. Return, as applied in domestic violence cases, denies women's autonomy, furthers cultural imperialism, and perpetuates class inequalities. This article argues that the best way for the Convention and interested parties to assist victims is to create an explicit domestic violence defense to claims of child abduction.

This article uses undertakings as a springboard to reassess the return principle for several reasons. First, courts, domestic violence advocates, and policy makers need to take a critical look at undertakings in domestic violence cases. Referring to undertakings as "viable" and "valuable" judicial tools, the vast majority of commentators have voiced their approval of these remedies.[11] One au-

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6. For clarity, this article refers to the country to which the domestic violence victim has fled as the "receiving country" and the country that the victim has left as the "country of habitual residence." For a discussion of how different courts have determined whether a country qualifies as the country of habitual residence, see generally Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 641-50 (2002).

7. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 156-72 (P.B. Carter ed., 1999) (summarizing the history of undertakings and how they operate).

8. *Id.* at 156-72.

9. *Id.* at 158-59.

10. Although batterers may be male or female, the focus of this article is on men's violence against women intimates and their children. *See* L. Kevin Hamberger et al., *An Empirical Classification of Motivations for Domestic Violence*, 3 VIOLENCE AGAINST WOMEN 401, 401 (1990) (stating that although women use violence against their partners, when women do use violence, it is often for self-defense and escape, whereas men often use violence to control and punish). It is also important to acknowledge that there is significant battering within the gay and lesbian community. *See generally* Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 T. JEFFERSON L. REV. 23 (1996). However, in the author's experience, the domestic violence cases under the Hague Convention applying undertakings have all involved heterosexual couples. *See, e.g., Blondin IV*, 238 F.3d at 153 (involving a heterosexual couple).

11. *See e.g.*, Peter Glass, Blondin v. Dubois*: A Closer Step to Safeguarding the Welfare of Abducted Children?*, 26 BROOK J. INT'L L. 723, 758 (2000) (advocating use of undertakings); Courtney E. Hoben, *The Hague Convention on International Parental Kidnapping: Closing the Article 13(b) Loophole*, 5 J. INT'L LEGAL STUD. 271, 290 (1999) (calling undertakings a "viable" solution); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 239 n.77 (2000) (describing undertakings as practical and effective); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need For Purposive Analysis of the Hague Convention*

thor claims that undertakings are an ideal way to protect women and children from domestic violence and that they preserve the heart of the Hague Convention, the return principle.[12] However, a critical analysis of the weaknesses of undertakings is missing from the literature and needs to be explored. Second, as a relatively novel issue of law,[13] an examination is timely. As recently as the end of 2000, President Clinton discussed the merits of undertakings with officials on a trip to Germany.[14] Third, there is a small, but sufficient, amount of case law on undertakings to examine U.S. courts' trends.[15]

B. A Note on Structure

Part II of this article lays the foundation for understanding strong return policies and undertakings. It explains the relevance of domestic violence to child custody determinations, the background of the Hague Convention, the case law on the grave risk defense and undertakings, and common arguments advanced by proponents of undertakings. Part III analyzes the legal and practical problems posed by undertakings, focusing on the lack of legal authority over enforcement, safety conundrums, the high legal bar for victims, and procedural inefficiency. Part IV is a theoretical look at how undertakings and the return principle impact gender, culture, and class. Finally, Part V concludes with a policy recommendation for an explicit domestic violence defense to the Hague Convention.

II. UNDERSTANDING STRONG RETURN POLICIES AND UNDERTAKINGS

A. The Relevance of Partner Abuse to the Best Interests of Children

There is a misperception on the part of some judges and lay persons that if one simply separates the batterers and the victims, domestic violence will not impact child custody issues.[16] In *Walsh v. Walsh*, the district court opined that the damage to children's psychological well-being was "mitigated" so long as

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on the Civil Aspects of International Child Abduction, 33 COLUM. HUM. RTS. L. REV. 275, 252, 351 (2002) (taking a middle ground on undertakings by recommending their use as a "valuable tool," but cautioning that they may not always be adequate when domestic violence is present).

12. *See* Glass, *supra* note 11, at 758.
13. *See, e.g.*, Turner v. Frowein, 752 A.2d 955, 971 (Conn. 2000) (acknowledging that the undertakings issue was one of first impression for the court).
14. Anne L. Perry & Joan Zorza, *Can the "Grave Risk" Exception to Hague Convention Cases Protect Children Subject to Family Violence?*, 6 DOMESTIC VIOLENCE REP. 17, 17 (2001).
15. *See, e.g.*, Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002); *Blondin IV*, 238 F.3d 153; Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000) [hereinafter *Walsh II*]; Tabacchi v. Harrison, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000); *Turner*, 752 A.2d 955.
16. Joan Zorza, *Protecting Children in Custody Disputes: When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996).

the children were spared "exposure to their parents' fighting."[17] The court believed that parental separation would have a positive effect despite evidence that the father in the case had spit on his children, locked them in their rooms, and forced them to witness him bloody their half-brother.[18]

At the heart of this mistaken belief are incorrect assumptions that domestic violence occurs only between spouses and does not affect children.[19] As in *Walsh*, however, many men who batter their partners also batter their children.[20] In a recent meta-analysis, researchers found that up to sixty percent of abused children had mothers who were also abused by the children's fathers.[21] Just witnessing partner abuse negatively impacts children's well-being.[22] Furthermore, abuse still affects children even if they are not present.[23] For example, household tensions and the mothers' emotional distress are detrimental to children's well-being.[24] Although some may think that adult affairs are beyond a child's comprehension, children are very intuitive creatures who are aware of—and impacted by—the abuse.[25]

It is also incorrect to assume that partner abuse ends after separation.[26] Even after couples split up, batterers often continue to violate their victims.[27] In many cases, abuse increases because batterers realize that they are losing control.[28] One way batterers seek to maintain control is through the children, the one connection that will always tie the batterers to their victims.[29] Batterers undermine their victims' efficacy as parents by blaming and alienating them and openly communicating these negative messages to the children.[30] Batterers can use child visitation as an opportunity to threaten and intimidate their victims.[31] They may also use the legal system as a weapon to continue their control and coercion.[32] Batterers are twice as likely as non-batterers to apply for custody of their children and are just as likely to be successful in obtaining custody.[33] In

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17. 221 F.3d at 217.
18. *Id.* at 210-11.
19. Zorza, *supra* note 16, at 1119.
20. *Id.* at 1115; *see also* PETER G. JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 30 (Sage Publications 2003).
21. JAFFE ET AL., *supra* note 20, at 30.
22. *Id.* at 24; *see also* Blondin v. Dubois, 78 F. Supp. 2d 283, 290-91 (S.D.N.Y. 2000), *aff'd*, 238 F.3d 153 (2d Cir. 2001) (noting that a psychiatrist stated that the child suffered from acute traumatic disorder "caused by" her father's "physical and verbal abuse of her and her mother") [hereinafter *Blondin III*].
23. JAFFE ET AL., *supra* note 20, at 24.
24. *Id.*
25. *Id.* at 29.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 31.
31. *Id.* at 29.
32. *Id.* at 32.
33. *Id.* at 20.

one study involving fifty-two abused women, researchers found that the majority of victims endured years of litigation in which they felt that the courts rarely intervened to protect them from ongoing legal harassment.[34] Sadly, children can become the pawns that batterers strategically maneuver in order to facilitate their violence.

Since partner abuse often does not end at separation, victims live in perpetual fear.[35] Counselors who create safety plans for victims suggest measures such as hiding in confidential locations, changing phone numbers, and wearing disguises.[36] Battered women who do not have to resort to these extreme measures still may alter their lives by constantly looking over their shoulders, avoiding the batterer's friends and family, and changing the locks on their doors.[37] These harsh realities unfairly impact children. Having to live in battered women's shelters or living in fear that your father will hurt your mother are not positions in which we should put children. Courts should strive to increase victims' safety options so that children may live as normally as possible.

B. Domestic Violence and the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction is the primary international treaty dealing with child custody.[38] Completed in 1980, the Convention entered into force December 1, 1983, and today there are fifty-two member countries.[39] The provisions are applicable to citizens of member countries when one parent moves with a child under the age of sixteen from one member country to another, over the objections of the other parent.[40] The Convention's preferred response is for the receiving country promptly to return the child to the country of habitual residence for adjudication of the custody matter.[41] This is known as the return principle. Return prevents litigants from traveling to other countries in order to take advantage of more favorable custody laws.[42] The return mechanism also prevents litigants from avoiding custody orders in the country of habitual residence.[43]

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34. *Id.* at 21.
35. *Id.* at 18.
36. This information is based on the author's experience working with domestic violence victims as an intern at the San Francisco District Attorney's Office and at Bay Area Legal Aid, a legal services corporation that assists domestic violence victims with family law matters.
37. *Id.*
38. *See* Hague Convention, *supra* note 2; Weiner, *supra* note 6, at 597.
39. TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, TREATIES IN FORCE 404 (Aug. 2002), http://www.state.gov/documents/organization/17524.pdf.
40. Hague Convention, *supra* note 2, arts. 1-4, T.I.A.S. No. 11670 at 4-5, 1343 U.N.T.S. at 98-99.
41. *Id.* at art. 1(a), T.I.A.S. No. 11670 at 4, 1343 U.N.T.S. at 98.
42. Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW 391, 394 (2000).
43. *See id.*

The original members of the Convention thought that it adequately protected the interests of domestic violence victims.[44] However, the drafters primarily considered situations in which men kidnapped their children and fled to another country.[45] When parties began to litigate under the Hague Convention in United States courts, Congress and the media discovered that a different social phenomenon was more prevalent.[46] Mothers take their children out of the country of habitual residence in sixty-three percent of Hague custody cases filed in U.S. courts, while fathers take their children in only thirty-seven percent of the cases.[47] A typical pattern involves a female U.S. national who has married a male foreign national and moved with her spouse to a foreign country.[48] In most Hague cases invoking grave risk on the basis of domestic violence, the abuse begins before the transnational move.[49] Ultimately, the victim flees with her children back to the United States in order to escape the abuse.[50] The batterer, left behind in the country of habitual residence, then files a petition under the Hague Convention requesting return of the children to adjudicate the custody issues.[51]

Domestic violence victims most often respond to Hague petitions by claiming a "grave risk" defense.[52] Under Article 13(b) of the Convention, a court should not return a child if "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."[53] However, very few domestic violence victims successfully use this defense because courts interpret the exception narrowly.[54] In fact, the Sixth Circuit has held specifically that domestic violence is not sufficient to trigger the defense.[55] In *Friedrich v. Friedrich*, the court stated that the harm must involve war, famine, disease, or the child's risk of exposure to "serious abuse or neglect, or extraordinary emotional dependence" when the country of habitual residence is unlikely to protect the child.[56] Similarly, *Janakakis-Kostun v. Janakakis* denied the victim's Article 13(b) defense, commenting that

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44. Weiner, *supra* note 6, at 610.
45. *Id.* at 609.
46. *Id.* at 612-14.
47. June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. LAW 791, 792 (1998).
48. JAFFE ET AL., *supra* note 20, at 98.
49. *See, e.g.*, *Walsh II*, 221 F.3d at 209 (discussing a fact pattern in which the abuse began before the victim and batterer moved from the United States to Ireland); *Turner*, 752 A.2d at 962 (describing facts in which the batterer had controlled the mother so severely that she only agreed to move with him to Holland after he signed a contract agreeing that he would allow her to return to the United States.).
50. *See, e.g.*, *Walsh II*, 221 F.3d at 211; *Turner*, 752 A.2d at 963.
51. *See, e.g.*, *Walsh II*, 221 F.3d at 212; *Turner*, 752 A.2d at 963-64.
52. *See* Perry & Zorza, *supra* note 14, at 32 (commenting that other defenses may help battered women but that the grave risk defense is usually the most applicable).
53. Hague Convention, *supra* note 2, T.I.A.S. No. 11670 at 8, 1343 U.N.T.S. at 101.
54. Perry & Zorza, *supra* note 14, at 17.
55. *Id.*; *see, e.g.*, Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).
56. 78 F.3d at 1069.

courts should not "speculate on where the child would be happier."[57] In that case, the father caused the mother to be hospitalized for neck injuries after he assaulted her.[58]

Fortunately, more recent U.S. cases seem to be moving away from such restrictive interpretations of the grave risk defense.[59] In *Walsh*, the First Circuit stated that the lower court had erred when it required that there be an immediate risk of harm, noting that the Convention only requires that there be a grave risk of harm.[60] That court held that a batterer's generalized pattern of violence, such as ransacking the family home, threatening to kill people outside the family, and disobeying restraining orders, can satisfy the risk element.[61] In the watershed case of *Blondin v. Dubois*, the Second Circuit upheld a denial of return based on a psychological grave risk argument.[62] The *Blondin* court noted uncontroverted evidence that for children to witness their father's abuse of their mother was so psychologically traumatic that to return the children to the country where the abuse occurred would re-traumatize them, such as by triggering post-traumatic stress disorder.[63] Although some courts are more generous towards domestic violence victims, rulings are still highly variable. For example, in *Dalmasso v. Dalmasso*, the court affirmed that evidence that the father kicked and hit the mother was insufficient to show a grave risk to the children.[64] The successful cases are typically ones in which victims can show a strong connection between the abuse and harm to the child.[65]

C. Undertakings Revealed

With cases such as *Blondin*, a new trend is emerging in domestic violence cases under the Hague Convention.[66] Courts have begun to add another step to the grave risk analysis.[67] Instead of asking only whether a grave risk exists, judges are considering "the full panoply of arrangements that might allow children to be returned to the country" of habitual residence.[68] Called undertakings, these considerations are safety precautions taken to mitigate the grave risk to vic-

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57. 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (quoting *Friedrich*, 78 F.3d at 1068) (internal quotation omitted).
58. *Id.*
59. *See, e.g., Walsh II*, 221 F.3d at 219.
60. *Id.* at 218 (citing Hague Convention, *supra* note 2, art. 13(b), T.I.A.S. No. 11670 at 8, 1343 U.N.T.S. at 101).
61. *Id.* at 219-20.
62. *Blondin IV*, 238 F.3d at 161, 168.
63. *Id.* at 160, 166.
64. 9 P.3d 551, 558-59 (Kan. 2000).
65. *See, e.g., Walsh II*, 221 F.3d at 219 (finding the lower court "inappropriately discounted the grave risk of physical and psychological harm [to the children] in cases of spousal abuse").
66. *See* Nelson, *supra* note 5, at 685 (identifying the developing trend in American cases). *But see* BEAUMONT & MCELEAVY, *supra* note 7, at 157 (stating that undertakings have played a role in English family law over the last forty years).
67. *See* Nelson, *supra* note 5, at 686.
68. Blondin v. Dubois, 189 F.3d 240, 242 (2d Cir. 1999) [hereinafter *Blondin II*].

tims of domestic violence and their children so they can return to the country of habitual residence for custody determinations.[69] Undertakings can include restraining orders, payments of housing and transportation costs, temporary custody arrangements, and many other safety requests.[70]

1. *Blondin v. Dubois*

The Second Circuit's opinions in the *Blondin* cases offer an in-depth discussion of undertakings.[71] In that case, Felix Blondin and Merlyne Dubois lived in France with their two children.[72] During the relationship, numerous incidents of physical abuse occurred.[73] For example, when their daughter was less than two years old, Felix put an electrical cord around the child's throat and threatened to kill her and her mother.[74] Merlyne left Felix twice and spent nine months in a battered women's shelter.[75] As Felix became increasingly volatile, Merlyne decided to flee with her children to the United States without Felix's knowledge.[76] After discovering their flight, Felix responded by filing a Hague petition requesting the return of the children to France.[77]

The district court held that there was grave risk of harm if the children returned to France.[78] On appeal, the Second Circuit remanded the case so the district court could perform a more complete analysis of safety arrangements that would allow the children to return to France.[79] On remand, the district court made additional findings of fact regarding domestic violence social services and legal protections in France.[80] The court found that Merlyne would be eligible for free legal and social services.[81] Felix agreed to assist Merlyne with the financial costs of moving back to France.[82] Despite these possibilities, the court gave great weight to the uncontested expert testimony of a psychiatrist, finding that "even these arrangements—indeed *any* arrangements at all—would fail to miti-

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69. *See* Weiner, *supra* note 6, at 676 ("In the context of a Hague proceeding, undertakings are verbal assurances given to the court by a litigant, typically through counsel, as a condition of the child's return.").
70. *See, e.g.*, *Blondin IV*, 238 F.3d at 153; *Walsh II*, 221 F.3d at 217; *Tabacchi*, 2000 WL 190576, at *15; *Turner*, 752 A.2d at 974 (all illustrating the broad discretion that judges have in fashioning undertaking orders). *But see Danaipour*, 286 F.3d at 21-22 (limiting the discretion of judges in terms of what types of undertaking orders they can issue).
71. *See Blondin IV*, 238 F.3d at 160-63; *Blondin II*, 189 F.3d at 248-49.
72. Blondin v. Dubois, 19 F. Supp. 2d 123, 124 (S.D.N.Y. 1998), *vacated*, 189 F.3d 240 (2d Cir. 1999) [hereinafter *Blondin I*].
73. *Id.*
74. *Id.*
75. *Id.* at 124-25.
76. *Id.* at 125.
77. *Id.* at 126.
78. *Id.* at 127.
79. *Blondin II*, 189 F.3d at 249-50.
80. *Blondin III*, 78 F. Supp. 2d at 288-89.
81. *Id.* at 289.
82. *Id.*

gate the grave risk of harm to the children."[83] The court concluded that a return to France would cause the children irreversible psychological trauma because Felix had abused the family in France.[84] On a second appeal, the Second Circuit declined to disturb the trial court's finding.[85]

Although subsequent courts have often looked to the *Blondin* cases for guidance on undertakings,[86] several factors make *Blondin* unique. For example, on the second appeal, the Second Circuit pointed out that it was "presented with a rare situation in which, for unexplained reasons, no evidence was presented by one party that would contradict the conclusions of an expert procured by the opposing party."[87] This statement implies that if Felix had provided an expert to contradict the psychological testimony, the undertakings might have been found sufficient. The court also noted that the "serious" nature of the abuse weighed in favor of allowing Merlyne's children to stay in the United States.[88] It is unclear how victims who experience less extreme abuse or victims who have abusers who can offer contradictory expert testimony would fare.

2. *Walsh v. Walsh*

The First Circuit considered undertakings in *Walsh*.[89] John Walsh, an Irish national, and Jacqueline Walsh, a U.S. national, lived for several years in Massachusetts.[90] During this time they married and had a daughter.[91] On more than one occasion, John physically abused Jacqueline.[92] In 1993, the State of Massachusetts charged John with threatening to kill his neighbor and attempting to break and enter.[93] Before the trial, John absconded to Ireland.[94] Over two months later, Jacqueline, who was several months pregnant, and their daughter joined him in Ireland.[95] John's abuse of Jacqueline continued throughout her pregnancy and for years afterwards.[96] Other members of the immediate family became victims of John's random beatings and emotional abuse.[97] For example, John forced his daughter to look at her bloodied older half-brother after John had

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83. *Blondin IV*, 238 F.3d at 157.
84. *Id.*
85. *Id.* at 163.
86. *See, e.g.*, *Walsh II*, 221 F.3d at 219; *Tabacchi*, 2000 WL 190576, at *15; *Turner*, 752 A.2d at 971.
87. *Blondin IV*, 238 F.3d at 160.
88. *Id.* at 163.
89. *Walsh II*, 221 F.3d at 217-22.
90. *Id.* at 209.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 210.

beaten him.[98] Jacqueline eventually obtained an Irish protective order against John.[99] However, he violated the order by assaulting her and allegedly ransacking the family home.[100] To escape John, Jacqueline fled back to Massachusetts with her children.[101] John later filed a Hague petition.[102]

In 1998, the district court held that the evidence did not "reveal an immediate, serious threat to the children's physical safety that [could not] be dealt with by the proper Irish authorities."[103] Jacqueline appealed, and the court stayed the return order.[104] On review, in 2000, the First Circuit agreed that plaintiffs can "mitigate" Article 13(b) defenses by stipulating to undertakings.[105] The court cited *Blondin II* as a "good example" of this approach.[106] However, as in *Blondin III*, it stated that there may be times when it is still not safe to return the children despite undertakings.[107] While the First Circuit had confidence in the Irish authorities, the court was concerned that the use of undertakings had "little chance of working here" because there was a high probability that John would violate the orders.[108]

The *Walsh II* opinion is illuminating. It demonstrates that in determining the feasibility of undertakings, courts can take into account the probability of compliance. *Walsh II* also stated more explicitly what the *Blondin* cases only implied—that there is a strong connection between the partner abuse and harm to the child.[109] The court highlighted that John directed his abuse towards the children, and their presence did not lessen his abuse of others.[110] At the same time, *Walsh II* may not be particularly useful precedent for victims of domestic violence because the facts are so extreme. It is still unclear where courts will draw the line to hold that the risk is minimal enough that undertakings are sufficient to ensure a safe return.

3. *Turner v. Frowein*

In 2000, the Connecticut Supreme Court also examined undertakings.[111] In *Turner*, Ava Turner, an American citizen, was married to Onno Frowein, a

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98. *Id.*
99. *Id.*
100. *Id.* at 210-11.
101. *Id.* at 211.
102. *Id.* at 212.
103. In re Walsh, 31 F. Supp. 2d 200, 206 (D. Mass. 1998), *rev'd*, 221 F.3d 204 (1st Cir. 2000) [hereinafter *Walsh I*].
104. *Walsh II*, 221 F.3d 204.
105. *Id. at* 219.
106. *Id.*
107. *Id.* at 220.
108. *Id.* at 221.
109. *Id.* at 220.
110. *Id.* at 221.
111. *Turner*, 752 A.2d 955.

Dutch citizen.[112] They both lived in the United States.[113] From the beginning, "the marriage had been fraught with multiple episodes of [Onno's] violence and emotional abuse."[114] At one point, Ava obtained a restraining order against Onno.[115] However, they later reconciled and moved to Holland.[116] While in Holland, Onno's abusive and controlling behavior continued.[117] Once, Ava discovered Onno sleeping with their son, who was naked from the waist down, leading Ava to believe that Onno may have been sexually abusing their son.[118] At another point, Onno did not allow Ava to see their son.[119] When Ava requested to see their son, Onno beat her so severely that she required a hysterectomy.[120] Onno would not allow Ava to visit their child until she agreed to withdraw the divorce petition that she had filed.[121] Seizing her opportunity to escape, Ava fled with their son back to the United States.[122] Onno then filed a petition under the Hague Convention.[123]

The trial court held that there was sufficient evidence of a grave risk.[124] On appeal, the Connecticut Supreme Court concluded that the lower court properly found a grave risk.[125] However, it remanded the case because the lower court's analysis failed to consider undertakings.[126] The supreme court instructed the trial court to find an arrangement that placed the child outside the father's care in Holland.[127] If the trial court could not do this, it should deny the petition.[128]

By instructing the lower court to consider the "range of placement options and legal remedies that might allow the child to return," *Turner* made it more difficult to deny undertakings than the court in *Blondin* had.[129] In *Blondin*, the children could have been repatriated to France and reasonably placed in the care of a third party or provided "with subsidized housing and social services."[130] However, the court decided that this was insufficient.[131] In contrast, the *Turner* court implied a preference for the children's return by expanding the number of

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112. *Id.* at 961.
113. *Id.*
114. *Id.*
115. *Id.* at 962.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 963.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 966.
125. *Id.* at 975.
126. *Id.* at 976.
127. *Id.* at 977.
128. *Id.*
129. *Id.* at 976.
130. 238 F.3d at 160-61.
131. *Id.* at 161.

factors that should be considered when determining whether safe return is possible.[132] If *Turner*'s approach is followed by other courts, it will be easier for batterers to defeat grave risk defenses with promises of alternate housing and guarantees of the children's safety.[133] Yet *Turner* still leaves a dark well of uncertainties. How much discretion do judges have to fashion undertakings? How long can undertakings last? Who will enforce undertakings?

4. *Danaipour v. McLarey*

A recent opinion discussing undertakings was the case of Iraj Danaipour and Kristina McLarey.[134] Kristina is a dual citizen of the United States and Sweden.[135] Iraj is an Iranian national and a citizen of Sweden.[136] They married in Massachusetts and lived in Sweden.[137] After having two daughters, their relationship deteriorated and they filed for divorce, but they continued to cohabitate in Stockholm.[138] Iraj was abusive and controlling toward Kristina after they filed for divorce.[139] Kristina suspected that Iraj had "inappropriate sexual contact with their daughters."[140] The youngest daughter experienced nightmares, complained that her "Baba" hurt her "pee pee," and she exhibited sexually inappropriate behavior toward Kristina's fiancé.[141] After the Swedish authorities ordered joint custody and the American Embassy refused to help, Kristina fled with her daughters to the United States.[142] Iraj later filed a Hague petition.[143]

The district court ordered that Kristina return to Sweden with their daughters and that Iraj agree to undertakings.[144] Despite expert testimony showing that the children would be unlikely to talk about the abuse if they returned to Sweden, the district court decided that an abuse evaluation should occur in Sweden.[145] On appeal, the First Circuit held that the lower court exceeded its authority in issuing undertakings before answering the grave risk question.[146]

Danaipour answered several questions that past case law had left open. First, *Danaipour* was one of the first cases to discuss at length judges' authority

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132. *Turner*, 752 A.2d at 975-76 (listing the ability of the abuser to provide adequate support and a separate residence for the victim and their children, the preventative remedies in the receiving country, the receiving country's waiver of criminal proceedings against the victim, and the ability for the courts to expedite child custody proceedings as factors to be considered).
133. *Id.* at 976.
134. *See Danaipour*, 286 F.3d 1.
135. *Id.* at 5.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 6.
142. *Id.* at 6-7.
143. *Id.* at 7.
144. *Id.* at 11.
145. *Id.* at 10-11.
146. *Id.* at 15.

to craft and to enforce undertakings.[147] The appellate court noted that the trial court went beyond its jurisdiction when it imposed requirements on a foreign court by stating that a sexual abuse examination of the children should be supervised by the Swedish courts.[148] The court "accord[ed] great weight" to the U.S. Department of State's view that

> [U]ndertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.[149]

The court further cited the U.S. Department of State's explanation that "[u]ndertakings would appear most consistent with the Convention when designed primarily to restore the status quo ante, or when they impose reciprocal obligations" on abusers and victims.[150] The court approved of the U.S. Department of State's examples of appropriate undertakings, including assignments of costs for return flights and interim custody arrangements until home courts can rule.[151] In terms of duration, undertakings should terminate as soon as the home court takes action.[152] *Danaipour* clearly limits judges' discretion to fashion undertakings. Notably, nowhere in the opinion did the court address undertakings such as restraining orders, payments for separate housing, long-term transportation costs, or batterer agreements to drop criminal kidnapping charges.[153]

Second, the court made clear that judges cannot ignore grave risk questions in order to consider undertakings immediately.[154] Rather, courts must first address grave risk issues and then "proceed intelligently down the next avenue of inquiry—whether the children can be returned safely to the country of habitual residence."[155]

Danaipour's guidance has its boundaries. The opinion focused on the specific facts of the case, and in particular, the issue of child sexual abuse.[156] The court noted that both the Convention and the U.S. Department of State recog-

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147. *Compare id.* at 21-26 (exploring the court's ability to design undertakings), *with Walsh II*, 221 F.3d at 219 (reviewing generally how other courts have approached undertakings, but failing to consider its authority to fashion its own remedy).

148. *Danaipour*, 286 F.3d at 16.

149. *Id.* at 22 (quoting a letter from the U.S. State Department to the British government) (second bracket in original).

150. *Id.* (quoting a legal memorandum attached to a letter from the U.S. State Department to the British government).

151. *Id.*

152. *Id.*

153. *See generally Danaipour*, 286 F.3d 1.

154. *Id.* at 15.

155. *Id.*

156. *Id.*

nized that the protection of children must remain "paramount."[157] To achieve this goal, the U.S. Department of State recommended that courts use undertakings sparingly when there is evidence that the fleeing parent is protecting the child.[158] Given the facts of *Danaipour*, it is not clear whether one could prevail by arguing that partner abuse constitutes harm to the child and that undertakings should also be applied sparingly to these situations.

In light of the recent U.S. case law, it is time that we critically analyze the usefulness of undertakings. Are undertakings legal? Do these remedies protect victims? Do courts enforce them? What kind of legal burdens do they place on victims? Are they efficient procedural devices?

III. A CLOSER ANALYSIS OF UNDERTAKINGS

A. Legal Authority

In the Convention's language, it is difficult to find any legal authority for undertakings.[159] Under the enabling legislation of the Hague Convention, there are only three defenses to the return principle.[160] One of the defenses is when a "defendant [is] fleeing an incidence or pattern of domestic violence."[161] This defense says nothing about undertakings, safe harbors, parallel rulings, or ameliorative measures.[162] Nor do the guidelines to the Convention, which elaborate the legislative intent, refer to the ability of home countries to protect children, an important aspect of the undertaking analysis.[163]

Although undertakings have no basis in the Convention or its legislative intent, one possible argument in their favor is that these rulings have become part of customary international law.[164] This type of law has two characteristics.[165] The first is practice over time as evidenced by court rulings applying accepted treaties and legislation.[166] "Where consensus among the states is great, and no state objects, less practice may be needed."[167] Secondly, there must be evidence

157. *Id.* at 26.
158. *Id.* at 25.
159. Weiner, *supra* note 6, at 677.
160. 18 U.S.C. § 1204(c)(1)-(3) (1994).
161. *Id.*
162. *See generally id.*; Hague Convention, *supra* note 2 (making no mention of these measures).
163. *See Turner*, 752 A.2d at 974 n.17 (acknowledging that it is "reasonable" to conclude that the Convention drafters did not intend an Article 13(b) defense to include an undertakings analysis based on the language of the convention, the official commentary, and the U.S. State Department's interpretive guidelines).
164. *See* Barbara Stark, *Symposium on Integrating Responses to Domestic Violence: Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, Etc.)*, 47 LOY. L. REV. 255, 265-66 (2001) (defining customary international law).
165. *Id.* at 265.
166. *Id.* at 266.
167. *Id.*

of opinion juris, "the idea that such state practice is legally mandated."[168]

It is doubtful whether undertakings qualify as customary international law. The first element, state practice over time, is not present. Although U.S. courts have issued a handful of undertaking rulings,[169] and New Zealand, Canadian, and Australian courts have also fashioned similar orders,[170] undertakings have mainly been recognized in "jurisdictions of Anglo-American tradition."[171] Even the fifty-two members of the Hague Convention, [172] compared to the number of countries in the world, do not constitute a critical mass. Satisfying the second element, opinion juris, is also problematic. In *Blondin III*, the district court questioned the appellate court's authority to require an undertaking analysis in the case.[173] The lower court believed that the requirement was too narrow a reading of the grave risk exception.[174] While judges continue to question their own authority to issue undertakings, there clearly is not a consensus that they are legally mandated state practices.

B. Enforcement and Effectiveness

Undertakings pose serious issues of safety and enforcement. Nonetheless, many commentators theorize that undertakings are good compromises.[175] They believe that undertakings balance the need for maintaining the ideals—that is, the return principle—of the Convention while at the same time protecting victims.[176] However, the general experiences of domestic violence victims and advocates show that scholars need to reassess these assumptions. Even when undertakings are used, there are several obstacles to making them effective tools that protect victims. For example, if courts force victims to return to countries of habitual residence, where they are immigrants, judges may unwittingly enable batterers to control their victims more effectively.[177] As immigrants, victims of-

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168. *Id.* at 265.
169. *See, e.g., Blondin IV*, 238 F.3d at 168; *Walsh II*, 221 F.3d at 220; *Friedrich*, 78 F.3d at 1069; *Tabacchi*, 2000 WL 190576, at *46-47; *Turner*, 752 A.2d at 960.
170. JAFFE ET AL., *supra* note 20, at 111, 117, 127.
171. BEAUMONT & MCELEAVY, *supra* note 7, at 157.
172. TREATY AFFAIRS STAFF, *supra* note 39, at 404.
173. *Blondin III*, 78 F. Supp. 2d at 298.
174. *Id.*
175. *See e.g.*, Glass, *supra* note 11, at 758; Hoben, *supra* note 11, at 290-91; Silberman, *supra* note 11, at 239-40; Weiner, *supra* note 6, at 677.
176. *See, e.g.*, Glass, *supra* note 11, at 758; Hoben, *supra* note 11, at 290-91; Silberman, *supra* note 11, at 239-40; Weiner, *supra* note 6, at 677.
177. *See also* JAFFE ET AL., *supra* note 20, at 98 (stating that domestic violence international child abduction cases often arise when a U.S. national marries a foreign national, moves with the spouse to the foreign country, and then is abused in the foreign country. The U.S. citizen will most likely to want to return to her country of habitual residence to be close to her family and support system.); Deborah Epstein, *Redefining the States' Response to Domestic Violence: Past Victories and Future Challenges,* 1 GEO. J. GENDER & L. 127 (1999) (recommending that the battered women's movement begin working in the private sector to increase social support for victims instead of relying too heavily on state intervention); *see generally* Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration*

ten do not have their own family or support networks.[178] They may not speak the language or know how to navigate the institutions.[179] Victims who return to these situations are often vulnerable to being abused again.[180] Batterers can easily isolate and take advantage of victims' marginalized status.[181] Furthermore, batterers' verbal promises to provide houses, cars, and child support payments may not sufficiently protect victims when batterers pose serious physical threats. In one Hague case, the batterer at times slapped, pushed, and strangled his victim, and once, after the victim informed him that she was going to flee to the United States, gave her a black eye while he was holding their daughter.[182] Although this victim may need the financial security attainable through her abuser's promise to provide her with housing and a car,[183] she needs physical security even more.

Danaipour limits the duration and the types of undertakings courts can fashion; thus, judges are hamstrung in what they can do to protect victims' safety.[184] Moreover, judges display a lack of understanding about the nature of domestic violence. For example, in fashioning undertakings, judges do not seem to understand that the separation of the parties is the most dangerous time for the victim.[185] Researchers have coined the term "separation assault" to describe this critical time period when beatings often occur.[186] Separation assault may apply in many domestic violence cases in which the Hague Convention is involved. Escape to a foreign jurisdiction signals to batterers that their victims are leaving them. When victims return, batterers may be furious and seek retribution. Perhaps the best example of judges' naiveté is when they order that batterers provide housing for victims.[187] This is absurd because the last thing victims want is for batterers to know where they are living.

Case law encourages judges to consider whether batterers have displayed past disobedience of court orders when deciding whether to order undertakings.[188] However, in one egregious case in which the batterer violated a restrain-

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Laws on Battered Immigrant Women, 6 B.U. PUB. INT. L.J. 589, 592 (1997) (enumerating the unique obstacles that immigrant victims of domestic violence face).

178. *See* Loke, *supra* note 177, at 592.
179. *Id.*
180. *Id.* at 593.
181. *Id.* at 589.
182. *Tabacchi*, 2000 WL 190576, at *2-3.
183. *Id.* at *6.
184. *See Danaipour*, 286 F.3d at 25 (stating that undertakings should be used "more sparingly" where there is evidence of child abuse).
185. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64-65 (1991) (describing the dynamics of separation assault and why victims need extra protection during this critical time period).
186. *Id.* at 65.
187. *See, e.g.*, *Turner*, 752 A.2d at 975.
188. *See, e.g.*, *Walsh II*, 221 F.3d at 219 (reprimanding the district court for its failure to give sufficient weight to the batterer's chronic disobedience of past court orders).

ing order by strangling his victim, the court still considered undertakings.[189] Even if batterers do not have histories of disobedience, it is difficult for courts to predict whether future violence may occur if an undertaking is ordered.[190] Studies on the dynamics of battering show that court orders often have little deterrent effect.[191] In the criminal arena, some studies on mandatory arrest and mandatory prosecution suggest high recidivism.[192] In the civil context, due to the possibility of assault, it is standard practice for advocates to counsel victims that restraining orders are only pieces of paper that will not necessarily protect their physical safety.[193] Moreover, courts are not the best predictors of violence. Rather, victims are often in the best position to predict future abuse based on their everyday experiences with batterers.[194] Many battering relationships follow cycles of tension building, exploding abuse, and then loving contrition.[195] Victims are often keenly aware of each phase.[196]

In addition to problems of effectiveness, undertakings also have numerous international enforcement problems. Once batterers leave the country, courts no longer have jurisdiction unless the batterer travels into a jurisdiction that recognizes undertakings.[197] Although courts could consider punishments such as issuing contempt actions, requiring postage of a bond, or dismissing future Hague Petitions, these solutions seem like mere slaps on the wrist for the assault or possible murder of victims.[198] One potential remedy is a safe harbor order.[199] This means that the court of habitual residence would issue an order that would "mirror" the undertaking orders of the issuing court.[200] However, some courts have not utilized this option.[201] Furthermore, safe harbor orders do not have the same

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189. *Turner*, 752 A.2d at 962.

190. *See* Edward W. Gondolf & Assoc., *Do Batterer Programs Work?: A 15 Month Follow-Up of Multi-Site Evaluation*, 3 DOMESTIC VIOLENCE REP. 65, 79 (1998) (finding no correlation between "negative outcomes" and personality type, behavior characteristics, or intervention programs, where "negative outcomes" are defined as re-assaults, threats, domestic violence arrests, or changes in the victim's quality of life).

191. *Id.* at 66, 78 (finding, based on study samples, that men who comply with court-mandated batterer intervention programs have a thirty-nine percent re-assault rate (based on reports from men and women, as well as arrest records) and a seventy percent verbal abuse rate (based on women's reports)).

192. *See, e.g.*, Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1543 (1998).

193. Based on the author's experience working in the Bay Area domestic violence movement for seven years, it is standard practice for most service providers to warn victims about the limits of restraining orders.

194. *Id.*

195. LENORE E. WALKER, THE BATTERED WOMAN 65 (Harper & Row 1979).

196. Based on the author's experience working with domestic violence victims, clients often know when a batterer is moving into an explosive phase.

197. BEAUMONT & MCELEAVY, *supra* note 7, at 157.

198. Weiner, *supra* note 6, at 678.

199. *Id.*

200. *See id.* at 678-79.

201. *See id.*

level of acceptance outside the United States.[202] Civil law countries are unlikely to enter them.[203] Finally, safe harbors can be cumbersome and inefficient because the victim must go through two court proceedings, first to have the issuing court order the undertakings, and then to have the country of habitual residence uphold the undertakings in the safe harbor order.[204]

Besides enforcement problems, victims' options for self-help are unclear. If batterers violate undertakings, what happens to the status of return orders? Can victims immediately leave the country of habitual residence to escape the abuse? Would they have to exhaust all their available remedies in that country first? Furthermore, the Convention has probably foreclosed victims' ability to bring international tort or human rights claims against it or the involved countries for failure to protect the victims. At the time of publication, the law is unclear on these issues.

Finally, the Hague Convention offers weak protections to children after they return to the country of habitual residence. The Second Special Commission, appointed to study the operation of the Convention, vetoed a proposal requiring Central Authorities, the bodies in each member country that carry out duties under the Hague Convention, to follow up when children return to the situations that precipitated the abduction.[205] The Central Authorities' duties "'are terminated once the child is returned' and dealing with any problems is 'within the exclusive competence of the State of habitual residence.'"[206] These safety and enforcement issues are serious bars to making undertakings viable solutions.[207]

C. The Asymmetry in the Allocation of Burdens

Undertakings set a very low bar for batterers and an extremely high bar for victims. Since batterers want to move proceedings to a different location, it is in their best interest to "agree" to undertakings.[208] Batterers simply have to make verbal assurances that they will follow through with their promises in order for judges to order undertakings.[209] When courts are judging their "good faith," batterers often know how to manipulate judges.[210] Abusers often appear as rational,

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202. *See id.* at 679 (quoting BEAUMONT & MCELEAVY, *supra* note 7, at 157).
203. Weiner, *supra* note 6, at 679.
204. *Id.*
205. Lewis, *supra* note 42, at 403, 428.
206. *Id.* at 428 (quoting a special committee meeting report that studied how the Hague Convention affected the civil aspects of international child abduction).
207. These concerns are similar to issues reflected in a *forum non conveniens* defense (a defense based on the idea that another forum would be more appropriate). Although the author's review of the case law never found such a claim, this defense may be a creative alternative for domestic violence victims when courts are considering return to the country of habitual residence.
208. *See Danaipour*, 286 F.3d at 9; *Walsh II*, 221 F.3d at 212.
209. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 161.
210. *See, e.g.*, Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's*

charming, and co-operative litigants.[211]

On the other hand, victims are in strategically more difficult positions. Victims usually have to prove that batterers will not comply with undertakings.[212] They can do this by pointing to past behavior.[213] However, obtaining past evidence may be difficult. Since domestic violence often occurs in private and many victims do not utilize legal systems, there may be no documentation of abuse.[214] In addition, if proof exists, it would most likely be located where the abuse occurred—in the country of habitual residence. Logically, it would be difficult for the victim to obtain such evidence because she is in the receiving country, and not in the country where the evidence may be located.

Another strategy domestic violence victims may use is to show that the country of habitual residence will not protect them.[215] This avenue is also problematic.[216] In Hague proceedings, there is an unofficial rebuttable presumption that the adjudication processes of member states are adequate.[217] To overcome the presumption, victims must offer evidence describing the home country's policies on domestic violence.[218] However, finding experts to do this may be difficult and expensive.[219] Moreover, most countries will not want to admit that they have poor protections for victims of domestic violence.[220] One commentator noted that the district court's searching analysis of the French legal system in *Blondin III* upset French authorities.[221] They took offense to the idea that their country could not adequately protect domestic violence victims.[222]

On top of these legal and political difficulties, victims often appear to be tense, unstable, and irrational litigants.[223] Although it is logical that one would be emotional after experiencing abuse, judges often do not take this into account

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Story, 35 HOUS. L. REV. 29, 56 (1998) (recounting a powerful narrative where the victim appeared highly emotional in court whereas the batterer appeared rationale, charming, and trustable).

211. *See, e.g., id.*

212. *See* Nelson, *supra* note 5, at 692.

213. *Id.*

214. Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How to Recognize It*, 17 FAM. ADVOC. 14, 14 (1995) (commenting that "[e]ven when there is evidence of injury or threats of severe violence, the complex dynamics of domestic violence and the secrecy and distortions that shroud it can lead professionals to minimize or fail to recognize it altogether").

215. *See* Nelson, *supra* note 5, at 691.

216. *Id.*

217. *See id.*

218. *See, e.g.*, Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995).

219. Based on a conversation with Liz Aguilar-Tarchi, Assistant District Attorney, San Francisco District Attorney's Office, former head of the San Francisco Domestic Violence Unit, in San Francisco, Cal. (Fall 2000) (commenting that the retention of a domestic violence expert is extremely expensive and often so exorbitant that her office can not afford one).

220. Nelson, *supra* note 5, at 692.

221. *Id.*

222. *Id.*

223. *See* Waits, *supra* note 210, at 57.

when determining victim credibility.[224] In sum, the allocation of burdens is extremely unfair to victims.

D. Efficiency

Despite problems with enforcement and effectiveness, some commentators believe that undertakings are efficient procedural devices.[225] They recommend that courts first assess whether undertakings are feasible.[226] If they are feasible, then courts should return the child without asking the grave risk question.[227] However, there are two main problems with this approach. First, experience has shown that undertakings are not shortcuts. Undertakings are time-consuming and complicated, and they often involve conflicting expert testimony.[228] For example, the series of *Blondin* cases spent many years in the court system.[229] Second, with the First Circuit's decision in *Danaipour*, judges will not be able to turn directly to undertakings without first determining the factual issues of the case.[230] Even if other circuits do not follow *Danaipour*, it is very difficult to assess whether countries can protect victims without first knowing the dimensions of the abuse, which will slow down proceedings.

E. The Insufficiency of Reform

Undertakings are illegal, dangerous, unfair, and inefficient. Weiner has argued that reform might be able to overcome some of these problems.[231] One of Weiner's suggestions is for the signatory countries to the Hague Convention to reconvene and legislate an explicit provision authorizing undertakings.[232] The enforcement quagmire could be ironed out so that undertakings have more teeth.[233] The standard for showing future batterer non-compliance could also be lowered.[234] Judges could streamline the process by first assessing whether undertakings are feasible.[235] However, even if undertakings were reformed as Weiner has suggested, undertakings would still be poor solutions because they reinforce the return principle.

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224. *See id.*
225. *See, e.g.*, Linda Silberman, *Hague International Child Abduction Convention: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 31-32 (1994).
226. *See, e.g., id.* at 33.
227. *See, e.g., id.*
228. *See, e.g., Danaipour*, 286 F.3d at 9-10.
229. *See Blondin IV*, 238 F.3d 153 (decided in 2001); *Blondin I*, 19 F. Supp. 2d 123 (decided in 1998).
230. *Danaipour*, 286 F.3d at 22-23.
231. Weiner, *supra* note 6, at 674-81.
232. *Id.* at 678.
233. *Id.*
234. *Id.* at 680.
235. *Id.* at 677.

IV. A THEORETICAL ANALYSIS OF UNDERTAKINGS AND THE RETURN PRINCIPLE

A. Cultural Imperialism

One of the primary goals of the Hague Convention is comity.[236] This principle is similar to the American concept of full faith and credit, except that it is a voluntary doctrine.[237] "International comity encompasses the idea that countries should interpret an international Convention that applies to both of them so as not to undermine the other country's laws and structure."[238] In the interest of encouraging comity, one of the express purposes of the Hague Convention is to ensure that the custody laws in state X are effectively respected in state Y.[239]

In considering undertakings, a court assesses its own confidence in how another country handles domestic violence.[240] One critic of this approach has noted that "the court's reasoning of whether a child should be returned to its habitual residence should never be based on the generic confidence a U.S. court has in the home country or its custody laws."[241] This commentator argues that "[i]t is not for the United States to decide how other countries should structure their family policy."[242] However, in some cases, American courts are conducting such analyses about other countries' child care systems.[243] This has caused considerable upset in the countries of habitual residence.[244]

More problematic issues of cultural imperialism can arise when there are conflicting orders from different countries.[245] In *Danaipour*, the U.S. court ordered undertakings, according to which the father had no visitation with his daughters and had to cooperate with the sexual abuse evaluation.[246] Yet, the Swedish court issued contradictory orders continuing joint custody and preserving the issue of conducting a sexual abuse evaluation for future adjudication.[247] Even when Sweden finally agreed with the U.S. undertakings, the Swedish court could not comply.[248] The Swedish court did not have the "legal authority" to

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236. Lewis, *supra* note 42, at 392.
237. *Cf. id.* at 429 (acknowledging a tension "between the duty of courts to act according to their independent discretion and the primary goal of comity set forth by the Hague Convention," implying that the goal of comity is a voluntary pursuit).
238. Nelson, *supra* note 5, at 691.
239. Lewis, *supra* note 42, at 401.
240. Nelson, *supra* note 5, at 691.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* (giving an example of the French authorities' displeasure after a U.S. district court denied an undertaking to France).
245. *See, e.g.*, *Danaipour*, 286 F.3d at 21 (conflicting with order from Sweden).
246. *Id.* at 11.
247. *Id.* at 9.
248. *Id.* at 24 (stating that the Swedish court did not have the authority to order a forensic sexual abuse evaluation that complied with established protocols for such investigations, as ordered

confirm certain portions of the order.[249] From this perspective, undertakings are not only confusing for victims, but they also undermine the goals of comity.

In ignoring comity, there is a strong danger that courts will be culturally imperialist.[250] Judges may feel more comfortable sending battered women back to countries that have similar cultural ideas about the treatment of women. But can we trust judges to issue unbiased undertakings and return orders in cases of cultural conflict between the parties? Undertakings have been recognized mostly among the jurisdictions with Anglo-American traditions.[251] However, it is not difficult to imagine that post-September 11th, prejudices about the status of women in the Muslim world could play an unfair and possibly unconstitutional role in Western judges' decisions whether to issue undertakings. In addition, cultural conflicts may arise among signatory countries themselves. For example, stereotypes about machismo could play a role in assessing return to Latin countries.[252]

By relying heavily on the use of expert witnesses, it is likely that courts will fall prey to cultural stereotyping.[253] In the notorious case of Dong Lu Chen, a Chinese man murdered his wife after he learned about her infidelity.[254] The court found credible an expert witness who claimed that the husband's actions were culturally acceptable.[255] This case illustrates that it is difficult to have an expert speak about an entire nation or culture because countries have a plurality of voices. Often, the treatment of women and domestic violence is specific to locality and time.[256] Furthermore, judges and juries may apply testimony regarding cultural practices in an arbitrary and sexist manner in accord with their own experiences and stereotypes.[257] Alternatively, they may be faced with a "battle of

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by the U.S. district court).

249. *Id.* at 12 (relating the Swedish court's statement that it did not have authority to order the mother to return the children to Sweden at her own cost, to limit the father's contact with the children, to require the mother to surrender her passport and not to leave Sweden without court permission, or to require that the father not initiate proceedings against the mother or attempt to enforce custody rights until the court decided otherwise).

250. *See* Starr, *supra* note 47, at 791 (pointing out that when marriages between citizens of different countries fail, a cultural clash is likely to ensue when child custody issues are involved, especially in the case of Muslim/Non-Muslim intermarriage).

251. BEAUMONT & MCELEAVY, *supra* note 7, at 157; *see also* Starr, *supra* note 47, at 807 (stating that no Muslim country is a signatory to the Hague Convention).

252. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 234 (1994). The term "Latin" is used loosely in this context and is not meant to imply that all Spanish-speaking countries can be easily grouped together. The term is simply used to point out that American culture tends to essentialize Latinos and treat them as a monolithic and stereotypical group.

253. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 62 (1994).

254. *See id.* at 64-65 (citing People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988)).

255. *See id.* at 64-73.

256. *See id.* at 73 (quoting a trial judge's consideration of the fact that the defendant was born and raised primarily outside of the United States as a mitigating factor for his murder conviction and sentencing).

257. *See* Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered*

the experts" in which they are forced to choose only one or the other's cultural narrative.[258] This behavior erroneously essentializes cultures as monolithic entities.[259]

B. Class Implications

Undertakings that require forced return also have the potential to impact unfairly victims who are poor. In many cases, courts have ordered costly undertakings such as lodging, cars, and trans-Atlantic plane tickets.[260] When batterers cannot afford undertakings, victims will most likely have to choose between bearing the cost of the undertakings themselves or putting their children into a state institution.[261] However, one commentator argues, "only in special circumstances . . . should the court be willing to separate the children from their primary care-giver and consider allowing the welfare system of the foreign country to safeguard the children in the interim."[262] Furthermore, removing the children would unfairly impact impoverished domestic violence victims. Rich victims would be able to stay with their children because they could afford the cost of undertakings if their batterers cannot pay, while poor victims would likely be separated from their children. In *Blondin*, for example, the batterer could not afford undertakings.[263] The appeals court remanded the case for the trial court to determine whether there was a possibility of a placement with the government.[264]

Not only must the impoverished victim endure the trauma of being separated from her child, she is also at a disadvantage in fighting her custody case because she may not be able to afford to be present. The court will not hear her voice. She will not be able to hear her batterer's testimony and confront him. She will not be able to strategize with her attorney in person. Without the presence of the victims, courts may not accurately weigh allegations of domestic violence in determining custody. Furthermore, for the victims who are barely able to pay undertakings, their economic resources may be so depleted that they are not able to afford adequate legal representation. Nonetheless, the Hague Convention does not mandate legal aid for poor victims of domestic violence.[265]

Woman and Cultural Defenses, 7 MICH. J. GENDER & L. 107, 122-24 (2000).

258. *See, e.g.*, Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555, 564-69 (1977) (describing cases in which experts have offered "sharply differing interpretations" of Native American culture and one case in which the court found one side's cultural testimony more credible than the other side's testimony).

259. *Cf. id.* at 123 ("[T]he argument that the defense promotes cultural stereotypes consists of two points: 1) that a culture cannot be defined accurately as a generalization; and 2) that stereotypes of a minority culture inherently promote inaccurate stereotypes of the majority culture.").

260. Glass, *supra* note 11, at 758.

261. *Cf. id.* at 757-59.

262. *Id.* at 758.

263. *Blondin I*, 19 F. Supp. 2d at 128 (noting that the batterer had "no more money").

264. *Blondin II*, 189 F.3d at 250.

265. *See generally* Hague Convention, *supra* note 2.

One solution to this problem is requiring the batterer to pay the cost of litigating in the receiving country if a victim has proven the existence of domestic violence. Batterers have committed acts of violence. One way to deter abuse and hold batterers accountable is to make it costly to repair the damage. If one wants to promote economic restorative justice, victims should not have return to the country of habitual residence and litigate at their own expense.

C. State Re-Victimization: Denying Women's Autonomy

Many commentators have pointedly overlooked the coercive nature of undertakings and the return principle.[266] In addition to the Hague Convention is a U.S. criminal statute that authorizes prosecution of parents who abduct their children to foreign countries.[267] Such statutes, coupled with courts' heavy-handed use of undertakings and requirement of return, can substantially limit a domestic violence victim's autonomy. In *Blondin*, France threatened criminal charges against the mother, Merlyne, if she did not bring the children back to France.[268] At the same time, the U.S. court contemplated—although ultimately rejected—placement of her children with a third party.[269] Under this pressure, it is surprising that Merlyne did not succumb and "agree" to the undertakings.

Victims of domestic violence face many challenges once they escape their abusers, such as "anxiety, depression, [and] low self-esteem."[270] Thus, return can be psychologically disempowering to these victims because it may exacerbate these problems.[271] Furthermore, return may be psychologically harmful to children. In *Blondin*, the expert psychiatrist concluded that a forced return would put the children at risk of undoing "'the benefit of the psychological and emotional roots they have established with their mother and her extended family'" and would "'almost certainly' trigger a post-traumatic stress disorder . . . leading to 'long-term or even permanent harm to their physical and psychological development.'"[272]

Forced returns negatively affect all battered women, not just the litigants. American society has continually lamented the inability of battered women to leave their abusive partners.[273] Some commentators construct battered women as

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266. *See, e.g.*, Glass, *supra* note 11; Hoben, *supra* note 11; Silberman, *supra* note 11 (all three failing to discuss the coercive nature of undertakings and return).

267. Jacqueline D. Golub, *The International Parental Kidnapping Crime Act of 1993: The United States' Attempt to Get Our Children Back—How Is It Working?*, 24 BROOK. J. INT'L L. 797, 802-05 (noting that Congress stated an intent to use the International Parental Kidnapping Crime Act of 1993 when the Hague Convention could not be implemented, such as when the other country has not signed the Convention).

268. *Blondin III*, 78 F. Supp. 2d at 289-90.

269. *Id.* at 286.

270. JAFFE ET AL., *supra* note 20, at 18.

271. *Id.* at 24.

272. *Blondin III*, 78 F. Supp. 2d at 291-92.

273. *See* Mahoney, *supra* note 185, at 5-6.

passive victims who are unable to control their fate.[274] However, when victims finally shatter this perception by taking action and leaving, undertakings punish them by forcing them to return to the batterer's home country. The victim paradigm becomes a self-fulfilling prophecy. Return places battered women even more deeply into the role of the victim and ultimately reinforces negative and inaccurate societal attitudes. Forced returns are also damaging because they add to the list of numerous domestic violence laws that take away victims' choices. Mandatory arrests, mandatory prosecutions, and medical reporting by health care workers are just some examples of such laws that U.S. jurisdictions use to control victims.[275] Some feminists have even alleged that states are taking over the roles of batterers.[276]

In summary, when examined through the lenses of gender, race, and class, undertakings and the return principal are extremely problematic. Since judges have great discretion, courts can apply undertakings in culturally discriminatory ways. To avoid this problem, one may think that the solution is to return all victims in order to limit judges' discretion. However, not only would this option be unsafe, it would also unfairly impact impoverished victims. With all of these pitfalls, we should seriously examine whether a domestic violence defense to return is a better, more viable alternative.

V. POLICY RECOMMENDATIONS: A DOMESTIC VIOLENCE DEFENSE

The Hague Convention should reconvene to legislate a domestic violence defense to claims of child abduction. Under such a defense, if a parent poses a domestic violence risk to any fleeing victim of a member country, the abused victim would not have to return to the home country to litigate custody. First, the receiving country's court would assess whether there is credible evidence of domestic violence.[277] If there is sufficient proof, the court could then adjudicate the custody matter, applying the applicable law of the receiving country.[278]

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274. *E.g.*, WALKER, *supra* note 195, at 47.

275. Linda G. Mills, *The Case Against Mandatory State Interventions: A Reply to Evan Stark*, 6 DOMESTIC VIOLENCE REP. 1, 14 (2000). *Contra* Evan Stark, *Mandated State Interventions: Evan Stark's Response*, 6 DOMESTIC VIOLENCE REP. 1, 15 (2000) (advocating mandatory arrest and prosecution because these measures empower victims).

276. *See, e.g.*, Stark, *supra* note 275, at 1 (critiquing Linda Mills's contention that mandated interventions "parallel battering").

277. The standard could be similar to the "credible threat" standard used in asylum cases. *See, e.g.*, Aguirre-Cervantes v. I.N.S., 242 F.3d 1169 (9th Cir. 2001). This standard is both subjective and objective. *Id.* at 1177. Objective evidence could be police reports, doctor's reports, photographs of injuries, third party declarations, and proof of residency in a shelter. Subjective evidence could be how fearful the victim is of her batterer, or whether she believes he will physically abuse her further if given the opportunity. Critics who worry about a slippery slope might be more easily swayed by this test since it is not an easy burden to satisfy, and an objective component helps prevent fraudulent claims.

278. In conflict of law situations, courts are moving toward applying the law of the adjudicating forum rather than applying the law of the country of habitual residence when there is an alle-

A. Giving Full Effect to the Intent of the Convention

The Convention did not legislate an explicit defense "because domestic violence was not as highly visible a political issue" at that time.[279] To the policy makers, domestic violence was "sometimes relevant . . . to the extent that the abduction comprised a continuation of domestic violence."[280] Members mistakenly thought that child abductors in these situations were male abusers, rather than female victims, for two reasons.[281] First, they understood kidnapping as a common weapon that batterers use against their victims.[282] Second, at the time of the drafting, the Convention thought that most countries favored mothers in custody disputes, which would lead to fathers abducting the children.[283] However, Convention members did not realize that it is common for victims to flee from abuse with their children.[284] Thus, the Convention did not see a need to legislate a separate domestic violence defense.[285]

Moreover, the Convention thought that victims could take advantage of other provisions. For example, during the XIVth session, a United Kingdom delegate noted the importance of the final phrase in the Article 13(b) defense: "or otherwise place the child in an intolerable situation."[286] The delegate explained that the addition was necessary to deal with situations not covered by "physical or psychological harm" to the child.[287] One example he gave was when a mother was fleeing domestic violence and the child might not be in immediate harm, yet may nevertheless be in an intolerable situation.[288] Clearly, the Convention intended that the treaty protect battered women, yet judges have not interpreted the provisions in this manner. A domestic violence defense would force judges to give full effect to the Convention's intent.

B. Domestic Violence Is an International Human Rights Issue

Domestic violence is a violation of women's basic human rights. The world community has already recognized and incorporated this idea into interna-

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gation of endangerment to the health and safety of the child, as in domestic violence situations. *See, e.g.*, Ferreira v. Ferreira, 512 P.2d 304 (Cal. 1973); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 660-68 (3d ed. 2000).

279. Weiner, *supra* note 6, at 606.
280. *Id.*
281. *Id.*
282. *Id.* at 610.
283. *Id.* at 606.
284. Lewis, *supra* note 42, at 395 (stating that many victims of domestic violence flee their homes to protect themselves and their children from their abusers).
285. Weiner, *supra* note 6, at 601-02.
286. *See* Hague Convention, *supra* note 2, T.I.A.S. No. 11670 at 8, 1343 U.N.T.S. at 101; BEAUMONT & MCELEAVY, *supra* note 7, at 136.
287. BEAUMONT & MCELEAVY, *supra* note 7, at 136.
288. *Id.*; *see also* Stark, *supra* note 164, at 255 (discussing domestic violence within the framework of child abduction).

tional law.[289] For example, the Declaration on the Elimination of Violence Against Women recognizes that violence against women "both violates and . . . nullifies the enjoyment by women of human rights and fundamental freedoms."[290] The Hague Convention can best reflect this principle by reconvening to legislate an explicit domestic violence defense. This approach offers distinct advantages. The signatory countries would be contributing to a consistent and predictable body of international law. The Convention would also be sending a strong message that the international community will not tolerate domestic violence.

C. Furthering the Best Interests of Children

An explicit domestic violence defense would alleviate the fundamental problem of recognizing domestic violence as a harm to children. Judicial interpretation of Article 13(b) narrowly focuses on the danger to the child in the form of child abuse.[291] As a result, lawyers have trouble arguing that partner abuse constitutes a grave risk to children.[292] However, social science research documents that partner abuse does harm children, and that the abuse often does not stop when parents separate.[293] An explicit domestic violence exception would force judges to be consistent with current and accepted social science.

D. Increasing Fair and Just Outcomes

One way to approach a domestic violence defense is to examine its consequences. Even with the defense, both parents will still have their day in court. What is really at stake is which party chooses the custody forum. A domestic violence defense acknowledges that victims who have first proven the existence of domestic violence should have the right to choose the forum where they feel safest. By increasing victims' security, courts can remove the coercive elements of the custody dispute. Victims will not feel compelled to bargain away custody rights for physical safety. Batterers will know that they cannot easily manipulate courts. Judges are then in better positions to come to fair and just custody decisions.

E. Forum Shopping

Some commentators support strict return policies because they want to prevent forum shopping.[294] However, in most cases, victims do not forum shop.

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289. *See* Stark, *supra* note 164, at 264.
290. *Id.* (internal quotation omitted).
291. *See, e.g.*, *Tabacchi*, 2000 WL 190576, at *13 (finding that the primary risk of physical harm was to the mother, not the daughter, and that the child should be returned to Italy).
292. JAFFE ET AL., *supra* note 20, at 17.
293. Lewis, *supra* note 42, at 408-12.
294. *See, e.g., id.* at 424.

Most battered women flee to countries where they have significant connections that increase their safety.[295] Family networks, friends, and knowledge of the language and cultural institutions all empower victims to protect themselves.

Admittedly, there may be cases in which battered women forum shop. A victim may choose a country because she believes it offers strong domestic violence laws or more opportunities to build a new life. Some battered women cannot return to their countries of origin because they fear persecution for protesting their abuse.[296] Cases such as these present tensions between preventing forum shopping and protecting battered women. In deciding these cases, courts should recognize that the Convention allows courts to retain autonomy and to protect the best interests of children in particular situations. Based on all of the problems with undertakings and the return principle, domestic violence should be one of those particular situations. If victims choose the country with the best interests of the child in mind, then they should be able to utilize the defense.

F. Comity

Undertakings do not further comity. When judges return some victims, but not others, to the countries of habitual residence, they are respecting the laws of signatory countries only intermittently and perhaps capriciously. The best way to solve this problem is to remove the arbitrary respect for foreign law by having the Convention vote on an explicit domestic violence defense. In contemplating their vote, member countries should realize that domestic violence situations are unique and the interests of victims should be paramount.

G. Efficiency

A domestic violence defense might lengthen court proceedings.[297] For example, *People v. Griffith*, in which the mother utilized a domestic violence defense, took six weeks at trial.[298] However, undertakings are also a lengthy analysis; the *Blondin* court took months to make a decision.[299] Even if the Hague proceeding becomes more involved because of the inclusion of a domestic violence defense, interests of the child's and mother's safety are more important than procedural efficiency.

H. Justifiability

Another criticism of a new domestic violence defense is that, theoretically,

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295. JAFFE ET AL., *supra* note 20, at 98.
296. *See, e.g.*, Brief of Amici Curiae Debevoise & Plimpton et al., In re R-A-, 22 I. & N. Dec. 906 (2001).
297. Weiner, *supra* note 6, at 694.
298. *Id.* at 695 (citing People v. Griffith, 620 N.E.2d 1130 (Ill. App. Ct. 1993)).
299. *Blondin III*, 78 F. Supp. 2d 283.

it justifies the abduction.[300] The implication of this justification is that the victim has gained something unfairly. This is not the case. Under a domestic violence defense, victims would still have to litigate the custody issues; they would not be able to take a child away from the other parent without having to go to court.

VI. CONCLUSION

After considering undertakings and the return principal, Maria's predicament can be viewed in a different light. Although Maria stayed in the United States to litigate custody, she was one of the "lucky" victims. Her husband, Tom, was no longer a threat because a judge imprisoned him for ten years after he committed a crime against a stranger. Maria's story reminds us that law powerfully affects people's lives. A domestic violence defense to the Hague Convention would have empowered Maria and increased her safety options. A defense would give full effect to the intent of the Convention. It would protect victim's human rights and further the best interest of children. These advantages should outweigh criticisms of a defense, especially if we re-conceptualize our ideas about forum shopping, efficiency, and justified abductions. International law can assist both children and domestic violence victims.

300. Weiner, *supra* note 6, at 697.