

# U.S. Judicial Implementation of the Hague Convention in Cases Alleging Domestic Violence

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## ABSTRACT

This qualitative study examined U.S. legal cases where battered mothers living abroad fled with their children to the United States. These women subsequently faced child abduction lawsuits brought by their batterer. The cases are governed by the Convention on Civil Aspects of International Child Abduction (the Hague Convention) which was ratified by the U.S. in 1988. Using content analysis, the study analyzed 47 published U.S. state and federal judicial opinions involving the Convention and allegations of domestic violence. It finds that U.S. courts are reluctant to employ Convention provisions that could prevent children from being returned to their mother's batterer.

## INTRODUCTION

Transnational family relationships have become more common in the past thirty years. For abused women with children, ending these relationships is exceedingly complicated. Women with abusive partners often turn to family members for assistance in coping with abuse and repairing their lives (Goodkind, Gillum, Bybee, & Sullivan, 2003; Rose, Campbell, & Kub, 2000). However, when turning to family means leaving one nation for another, international treaties may determine children's placement and which courts decide it.

This article focuses on battered mothers and children who enter the United States from another country to seek safety, but who then face child abduction lawsuits filed by their

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abuser. These lawsuits are brought pursuant to the Convention on the Civil Aspects of International Child Abduction (hereafter referred to as the “Hague Convention”) (Hague Conference on Private International Law [HCPIL], 2010). In this article we describe and present findings from a study that analyzed 47 published U.S. state and federal appellate judicial opinions. These opinions were written to resolve Hague Convention cases among families where domestic violence is alleged.

The first section of the article is a brief overview of the Convention, its history, and policy goals. Second, we provide details about the opinions in the study sample and we describe the two methods (descriptive and content analyses) that were used to complete the research. Third, we present the results of our work. Key among these is the identification of five factors that courts look to when determining whether the Hague Convention’s exceptions apply to a case involving domestic violence allegations. We also show that domestic violence, even in extreme instances, does not necessarily prevent application of the Convention and children’s possible return to their mother’s abuser. Fourth, we discuss the significance of the study’s results in light of current social science research and recommended family law practice. In the fifth and final section, we offer suggestions for further action.

## THE HAGUE CONVENTION

The Hague Convention was finalized in 1980 and has since been adopted by 82 countries. In July 1988, the United States Congress implemented the Hague Convention by enacting the International Child Abduction Remedies Act ([ICARA] 42 U.S.C.A. § 11603). The Hague Convention defines child abduction as the removal of children in violation of another parent’s custody rights, or the retention of children in a country other than their “habitual residence” (HCPIL, 2010). When children are abducted, the Convention requires their prompt return to the habitual residence (Hague Convention, Article 1). Although not defined in the Convention, habitual residence is generally understood to mean the country where children have usually resided.<sup>1</sup>

In general, the Convention assumes that some parents may abduct their children and move them from one country to another in order to obtain a more favorable custody decision, a tactic referred to as “forum shopping.” Discussions during the drafting of the Convention centered on the significant negative impact of parental abduction on children’s development and well-being. Concern over this negative impact led to the Convention’s conclusion that a prompt return of children to their habitual residence facilitates better outcomes than permitting child abduction to pass unaddressed (Perez-Vera, 1981). Parents who bring their children into the United States without the other parent’s permission can be taken to civil court under the Convention. The parent bringing such a lawsuit is referred to as “the petitioner” and the parent defending against the lawsuit is “the respondent.”

The Hague Convention acknowledges that there may be a limited number of circumstances in which children should not be returned to the habitual residence. Consequently,

1 The Convention does not specify the minimum time period needed to establish habitual residence.

the respondent parent can argue that one or more of five exceptions (which are discussed in greater depth in the Results section of this article) prevent the children's return to the habitual residence and, potentially, to the abusive parent. These five exceptions apply when: (1) children will face a grave risk of physical or psychological harm or an intolerable situation when returning to the habitual residence; (2) the petitioning parent consented to the children's leaving the habitual residence; (3) the children are now resettled in the new country; (4) the children are mature enough to voice an opinion and object to return; or (5) returning the children to the habitual residence would violate their basic human rights. When one or more of these exceptions is successfully argued, the court may either dismiss or deny the petition and permit the children to remain in the new country with the taking parent.<sup>2</sup>

Because the Convention focuses exclusively on children, it does not explicitly recognize domestic violence between children's parents as a reason to deny children's return to the habitual residence, even if return means placement with the children's abusive parent. This gap in the Convention is significant because social science research tells us that many families experience both domestic violence and child maltreatment (Edleson, 1999). With little legal scaffolding in the Hague Convention itself, U.S. courts have wrestled with cases that ask what role domestic violence should play in decisions about children's placement. Previous research has described and analyzed this situation (Bruch, 2004; Kaye, 1999; Shetty & Edleson, 2005; Silberman, 2000; Weiner, 2000, 2004). Our study is the first, though, to pinpoint the specific factors courts look to when deciding these cases.

Overall, the number of Hague Convention cases heard by U.S. courts is likely to be small compared to the total number of domestic custody disputes. Understanding the experiences of battered women facing Hague petitions nonetheless remains important for three reasons. First, children are at the heart of these cases, and there is currently considerable legal dispute about what constitutes "harm" to children whose mother is a victim of domestic violence. Second, these cases provide general insights into how U.S. courts consider domestic violence when they make decisions that affect family relationships. Third, with the advent of globalization, we can anticipate a growing number of transnational families. For example, the number of American children with at least one foreign-born parent increased from 15% in 1994 to 22% in 2008 (Federal Interagency Forum on Child and Family Statistics, 2009). Given this, we can expect a rise in the number of transnational custody disputes, including ones in which battered mothers flee across national borders with their children.

## METHOD

Our study was designed to answer three general questions: (1) Who are the parties involved in Hague disputes in which domestic violence is alleged? (2) Which parties ultimately prevail in these disputes? and (3) How do courts account for domestic violence when making decisions in these disputes? Published judicial opinions serve as the data for this study.

<sup>2</sup> These exceptions are often referred to as "defenses." We use "exceptions" and "defenses" interchangeably throughout this article.

We used opinions because they include detailed information about the parties involved in the litigation, and because they are the official records of which party prevailed.

## Sample

We identified judicial opinions for our sample through online Lexis and Westlaw searches. All searches included reference to the Hague Convention as well as to domestic violence. Typical search terms included: physical, violence, harm, assault, fight, punch, harass, and abuse. In all, 57 different combinations of terms were used to identify cases in which domestic violence might have occurred.

We define domestic violence as an ongoing pattern of intimidating behavior in which the threat of serious physical violence is present and may be carried out with the overall goal of controlling the partner (Dutton & Goodman, 2005; Koss et al., 1994; Stark, 2007). This definition recognizes that domestic violence is more than an isolated experience of physical violence, and that any act of violence has to be evaluated within the overall context of reported relationship dynamics. For example, a single hit in the midst of an intense disagreement, while violent, would not constitute domestic violence in this study, unless it was coupled with behaviors intended to control the other person.

We recognize that domestic violence is an experience in which men may be victims of female perpetrators, or that same-sex partners may abuse men and women. However, a growing body of research has shown that men disproportionately perpetrate violence against women in intimate relationships (See Hamby, 2009; Houry et al., 2008; Saunders, 2002). Consequently, this study focuses on men's violence against women.

We obtained state and federal court opinions—at all court levels—through our online searches, but we located no U.S. Supreme Court opinions.<sup>3</sup> The results of the Lexis and Westlaw searches were supplemented by searching the International Child Abduction Database (INCADAT) for disputes involving domestic violence that were litigated in the United States. INCADAT was established by the Permanent Bureau of the Hague Conference and includes judicial decisions from courts in 34 countries that interpret the Convention. Our INCADAT search used terms mirroring those used in the Lexis and Westlaw searches.

The online search initially yielded 306 judicial opinions. We then took several steps to construct the final sample. First, we reviewed the opinions to determine whether they actually discussed domestic violence, and, in fact, litigated the Hague Convention. Opinions that did not meet these criteria were removed. For example, we removed opinions discussing child abuse without allegations of adult to adult domestic violence and also opinions that simply cited or made reference to the Convention without actually issuing a legal judgment about it. None of the opinions in our sample were focused on determining whether domestic violence existed. The allegations were generally presented as part of each case's background.

Second, we consolidated multiple opinions into single "cases" for purposes of analysis. Specifically, in several instances there were multiple court opinions involving a single pair of litigants. For example, there may have been opinions written by both the trial and appellate courts, or a case may have had multiple appeals, each with its own written decision. Because

<sup>3</sup> Abbott v. Abbott (2010) was decided after our research was completed.

**TABLE 1**  
**States and Courts where Hague Petitions were Filed**

<i>State</i>	<i>State Court (n)</i>	<i>Federal Court (n)</i>	<i>Total</i>
Alabama	0	1	1
California	1	1	2
Connecticut	2	0	2
Florida	0	1	1
Georgia	0	2	2
Illinois	0	3	3
Iowa	0	1	1
Kansas	1	0	1
Kentucky	2	0	2
Maryland	0	5	5
Massachusetts	1	4	5
Michigan	0	1	1
Minnesota	1	2	3
New Hampshire	0	1	1
New Jersey	0	1	1
New York	1	4	5
North Carolina	0	1	1
Ohio	1	2	3
Puerto Rico	0	2	2
Texas	2	0	2
Tennessee	0	1	1
Utah	0	1	1
Washington	0	1	1
Total	12	35	47

we were interested in determining the ultimate outcomes of Hague litigation, these multiple decisions were consolidated into single “cases.”<sup>4</sup> Once all of the opinions were consolidated into cases, we utilized Shepard’s citations to ensure that we had located all relevant appellate history. The most recent opinion in our sample was issued in 2008.

Once we removed cases that did not fit our criteria and consolidated multiple opinions in a single case, our final sample was 47 cases. Most of these (35 or 74%) were litigated in federal courts; 22 states and Puerto Rico are represented in the sample as seen in Table 1. All cases used in our analyses are included in the “Legal Cases” list at the end of this article and are indicated by an asterisk (\*) before the case citation.

<sup>4</sup> For example, there are several opinions pertaining to the dispute between Felix Blondin and Marthe Dubois between 1998 and 2000, including decisions made by the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Southern District of New York. All of these opinions were consolidated into one case for purposes of our research.

Overall, the sample is characterized by two key features. First, it includes all of the published state and federal opinions involving the Hague Convention and domestic violence at the time of our research. Our focus on published opinions is typical of empirical legal research (Chew & Kelley, 2005; Choi & Gulati, 2008; Perry, Kulik, & Bourhis, 2004). A case is “published” in a legal context when it is made available in systematized state or regional case reporters. Our focus on published opinions is significant because it means that the sample comprises all binding precedents involving the Convention and domestic violence. Put differently, the cases we studied are predictive of future court rulings and they “shape and constrain” the rulings that courts can make (White, 1995).<sup>5</sup> Second, our sample does not include state trial court decisions because they are generally not published nor available for empirical study (Eisenberg, 2004). In addition, these decisions do not have precedential value. It is unknown how many state trial court cases a year involve the Hague Convention and domestic violence, though the number is expected to be limited.<sup>6</sup>

## Data Analyses

We employed two analytic strategies during this research. First, we completed a descriptive analysis to answer our questions about the parties and which ones prevail in Hague disputes. Second, to answer our questions about the court’s treatment of domestic violence, we completed a content analysis of the opinions.

*Descriptive analysis.* We developed a detailed coding form to help extract needed information from the opinions. We used this form to collect demographic information about the parties; information about the disputes (including residence and citizenship of the parents and children); the children’s genders and ages; the severity and frequency of domestic violence; and the presence of child maltreatment. Data were also collected about key legal issues, including the judge’s decision on the children’s habitual residence, the Hague defenses litigated during the dispute, and whether the court granted or denied the petition. All data were placed into Microsoft Excel and frequencies were determined. The results are presented in tabular form throughout this article.

*Content analysis.* Our content analysis focused on evaluating those portions of the opinions that addressed domestic violence and its implications for the court’s decision. We selected content analysis because it is well suited to the empirical study of legal texts (Hsieh & Shannon, 2005). Indeed, content analysis resembles the process of legal reasoning, including the systematic reading of materials, identifying and coding their consistent features, and drawing inferences about their use and meaning (Hall & Wright, 2008; Lens, 2008). Researchers have previously used content analysis to study a variety of legal phenomena, such as use of the primary caretaker standard in

<sup>5</sup> Gibbons (1999, p. 15) summarizes the nature of precedent in the following way: “. . . if the judgment has any significance in terms of extending or restricting a rule of law, or establishing a rule of statutory interpretation, then it is reported and becomes part of the huge volume of precedents that constitute case law . . . it is then a source of law and potentially an originating point for a new trial process with a new set of parties.”

<sup>6</sup> The total number of battered mothers subject to legal proceedings under the Hague Convention is difficult to ascertain because there is no central repository of all Hague cases or of international divorce and custody cases that include allegations of domestic violence. The U.S. Department of State (2010) reported that there were 2,075 children allegedly abducted by parents during FY2009, of which 829 were abducted to Hague partner countries and 454 were removed from Hague partner countries and brought into the U.S. The remaining children were abducted from the U.S. to non-Hague countries.

custody disputes (Mercer 1998), the admissibility of expert evidence (Merlino, Murray, & Richardson, 2008), and criminal sentencing of youth sex offenders (Bouhours & Daly, 2007).

The content analysis proceeded in two phases. First, we searched for specific terms and phrases that were associated with concepts in our coding sheet, including child maltreatment, the severity and frequency of domestic violence, and whether children testified during the court proceedings. In addition, mindful of the potential lethality of domestic violence, we also noted any reported threats by the abuser to kill his partner or children. Second, it became clear that the opinions included several key concepts that were not included in our coding form, but which were critical to the courts' decision making. We recorded these concepts as they appeared and later searched the opinions for them. Examples of these emergent concepts include whether a child was diagnosed with Post-Traumatic Stress Disorder, whether a child witnessed violence in the home, or whether experts testified during the proceeding. Overall, the analysis was iterative in nature and included identifying and coding key concepts and then returning to the opinions to expand or contract the codes until no further concepts were identified (Graneheim & Lundman, 2004; Lens, 2008).

## RESULTS

Our research led to five sets of results that we present in the following sections. The first two are rooted in our descriptive analysis: we provide information about the people involved in the cases we studied, and we present success rates for the petitions in our sample. The next three sets of results are informed by the content analysis. Specifically, we explore the courts' consideration of domestic violence when determining habitual residence, we detail how often the defenses to these petitions were asserted and accepted, and we identify the factors the courts relied upon when ruling on the grave risk defense.

### Description of Parties

The 47 opinions in our sample provide important data about the parties involved in Hague litigation. For example, of the 40 cases where the father's citizenship was identified, the majority were not U.S. citizens ( $n = 32$ , 80%). Foreign fathers were most often citizens of France, Israel, Mexico, Greece, or Italy. In contrast, the mothers in our sample were most often U.S. citizens. Mothers' citizenship was identified in 39 disputes and of these, 25 (64%) were American (or held dual citizenship) (see Table 2 for citizenship details).

We also found that fathers—not mothers—most often initiated Hague petitions in U.S. courts when domestic violence allegations were present. Fathers initiated petitions in 44 of the 47 (94%) cases in our sample. The typical fact pattern involved fathers, who were not U.S. citizens, petitioning for return of their children against mothers who were U.S. citizens. These battered mothers left their abuser, with their children, and entered the U.S. This pattern was present in 25 of the cases (53%).

The Convention applies to youth under 16 years of age. Our analysis shows that the median age for children in the sample was 6 years old (ages were reported for 75 of the 79 children in the sample). A slight majority of the children were girls (52.5%).

**TABLE 2**  
**Citizenship of Fathers and Mothers**

<i>Country</i>	<i>Number of Fathers</i>	<i>Number of Mothers</i>
Argentina	2	1
Australia	2	0
Belize	0	1
Canada	0	1
Ethiopia	1	0
Finland	0	1
France	5	1
Germany	2	1
Greece	3	0
Holland	1	0
Hungary	1	1
Ireland	1	0
Israel	2	2
Italy	3	0
Mexico	3	2
Norway	1	0
Pakistan	1	1
Poland	1	1
Portugal	1	0
South Africa	1	0
Sweden	1	1
United States	8	25
Total	40	39

### **Petition Success Rates**

Of the 47 disputes we studied, 22 (46.8%) resulted in dismissal or denial of the Hague petition (meaning the children remained with the respondent—usually the mother—in the U.S.). On the other hand, 20 disputes (42.6%) resulted in granting of a petition (meaning that the children were returned to the country of habitual residence). In five instances (10.6%), the outcome could not be determined because the dispute was remanded to a lower court and no subsequent opinion could be located. Table 3 summarizes these outcomes. Overall, fewer than half of the cases were decided in favor of the taking mother.

### **Habitual Residence and Domestic Violence**

One of the first decisions a court must make in a Hague Convention case is whether the children have been removed from their habitual residence. Using data drawn from our content analysis, we identified only three cases (7%) in which the court linked the coercive and

**TABLE 3**  
**Outcomes of Petitions**

<i>Petition Outcome</i>	<i>Number</i>	<i>Percent</i>
Dismissal/Denial	22	46.8
Granted	20	42.6
Remanded to Lower Court	5	10.6
Total	47	100.0

controlling attributes of domestic violence to children's habitual residence. First, in *Tsarbopoulos v. Tsarbopoulos* (2001), the court explicitly considered a battered mother's isolation in a country where she was not familiar with cultural norms and did not speak the local language. The court found no habitual residence in Greece—the country from which the battered mother took the children—because she had been coerced into living there. The court found that the father's violent behavior left the children's mother socially isolated, unable to communicate with others, with limited access to financial assets, and living in fear of violence. In sum, the court wrote that the husband had “control of all major decisions of the couple” (*Tsarbopoulos*, 2001, p. 455).

Second, in *In re Ponath* (1993), the court found that the petitioner (father) prevented his wife and two-year-old son from leaving Germany and returning to the United States by “verbal, emotional and physical abuse” (*Ponath*, 1993, p. 366). The father was also arrested for physically attacking a family member while he was trying to see the mother and their child. Altogether, the father's violent history led the court to conclude that the mother and child “were detained in Germany against her desires” (*Ponath*, 1993, p. 367). The court concluded that under such circumstances, the child was not habitually resident in Germany.

In the third case (*Ostevoll v. Ostevoll*, 2000), an abused wife argued that by the end of the couple's relationship she was not permitted to leave her home in Norway without her abusive husband. The court also noted that the husband hid the wife's and children's passports, thus preventing them from leaving the country. The court held that Norway was not the children's habitual residence because for much of the wife's time there she remained “voluntarily, albeit reluctantly” (*Ostevoll*, 2000, p. 42).

### Defenses to a Hague Petition

Respondents to Hague petitions may argue that any of five exceptions prevents return of their children to the habitual residence. The first exception is premised on Article 13(b) of the Convention, which applies when a “grave risk” appears that a child returned to the habitual residence will suffer “physical or psychological harm,” or an “intolerable situation.” We address this exception more fully in the next section.

The Convention's second exception is consent. Under Article 13(a), if the parent filing a Hague petition initially consented to a child's removal, the removing parent can offer that consent as a defense against a Hague claim. In *Friedrich v. Friedrich* (1996), the court stated that

consent needed to be a formal “act or statement,” such as “testimony in a judicial proceeding; a convincing renunciation of rights; or a consistent attitude of acquiescence over a significant period of time” (*Friedrich*, 1996, p. 1070). Subsequent cases have differentiated between consent and acquiescence and have indicated that consent can be informal (*Baxter v. Baxter*, 2005).

Third, under Article 12, the Convention allows a child to remain with the removing parent if the child has been away from the habitual residence and is settled in the new environment, typically after one year. Judicial opinions make clear, however, that if a removing parent has hidden a child from the other parent, this exception may not apply. The one-year time limit was designed to prevent a left-behind parent—who was aware of the child’s removal and in ongoing contact with the child—from later petitioning a court and asking that the child be returned to the original country. This defense also reflects the understanding that children need continuity and stability in their lives.

Fourth, Article 13 of the Convention states that where a child objects to return and has attained an age and degree of maturity at which it is appropriate to take the child’s views into account, the objection may constitute an exception to return (*Ostevoll v. Ostevoll*, 2000). The Convention does not set a specific age at which the child’s views should be considered because the drafters felt such a specification was “artificial, even arbitrary” (*Perez-Vera*, 1981). Instead, the Convention leaves the decision of when to consider children’s views to a court’s individual discretion.

Fifth, according to Article 20, a child’s return is not appropriate when it contravenes “the protection of human rights and fundamental freedoms” of the child. This exception has been interpreted to mean that children should not be returned to countries where their fundamental human rights may not be secured. Weiner (2004, p. 583) has noted that Article 20 defenses are “seldom used and frequently unsuccessful” in Hague litigation.

Overall, the five exceptions were effective only occasionally in the cases we studied. Altogether, a Hague exception prevented return of a child in 18 disputes or 38% of the cases in our sample. Table 4 summarizes how often exceptions were raised and their success rates. Grave risk was the most frequently asserted exception (raised in 81% of the 47 cases), but was successful in only one-quarter of the disputes. The other four exceptions were raised less frequently and were rarely successful.

**TABLE 4**  
**Success Rates for Defenses (n = 47)\***

<i>Defense</i>	<i>Asserted</i>		<i>Successful</i>	
	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>
Grave Risk	38	81%	12	26%
Consent/Acquiescence	14	30%	1	2%
One-year/Settled	12	26%	3	6%
Child Opinion	9	19%	2	4%
Human Rights	7	15%	—	—

\*Totals do not add to 47 because multiple defenses can be argued in the same case.

## Judicial Rulings on Grave Risk

Because the courts in our sample only occasionally accepted the grave risk defense—despite its seeming relevance to domestic violence—we sought to understand the reasoning behind their decisions. To do this we closely reviewed the 38 opinions written in cases where grave risk was argued as a defense. We also used content analysis to examine the passages of these opinions that addressed the defense. The results of this analysis suggest that courts respond to five distinct factors when determining grave risk: (1) whether the petitioning parent directly maltreated the children; (2) whether the children witnessed domestic violence; (3) whether the children suffer from Post-Traumatic Stress Disorder; (4) whether the abuser threatened to kill the children or others; and (5) whether expert testimony was heard by the court. Table 5 identifies how often each of these factors was present in the cases in which grave risk was asserted, and whether the court accepted this defense.

### *Child Maltreatment*

Of the 12 disputes in which the grave risk defense was successful, courts found evidence of child maltreatment in almost all (11, or 92%). Maltreatment nearly always consisted of direct physical or sexual child abuse. For example, the petitioner in *Van De Sande v. Van De Sande* (2005) “physically abused” his daughter by spanking her repeatedly and at “least once” delivered “a sharp blow to the side of [the child’s] head” (*Van De Sande*, 2005, p. 569). In *Rodriguez v. Rodriguez* (1999), one child involved in the case testified that “his father first began to beat him when he was six years old” when he was struck “with a one inch belt about the legs, back, and buttocks. The force of the blows, and resulting welts and bruises, were such that the [the child] was caused to miss a week of school” (*Rodriguez*, 1999, p. 459). The father told the child that if he had bruises from maltreatment “[he] must not tell anyone” (*Rodriguez*, 1999, p. 459). Similarly, the court in *Elyashiv v. Elyashiv* (2005) accepted the grave risk defense where the children’s father “routinely used his belt, shoes or hand to hit [the children]” (*Elyashiv*, 2005, p. 394). The *Elyashiv* court concluded that “most frequently, the abuse occurred when the children’s playing interfered” with their father’s sleep. Once, for example, “[their father] became so enraged that he placed a pillow over [his son’s] face to quit his crying” (*Elyashiv*, 2005, p. 399).

Successful grave risk defenses are not limited to instances of physical abuse, however. In *Tsarbopoulos v. Tsarbopoulos* (2001), the court denied a father’s Hague petition because he sexually abused his four-year-old daughter. The court found that not only had the child described sexual abuse to her teacher, but that she also exhibited behaviors which were consistent with sexual abuse (*Tsarbopoulos*, 2001, p. 1060).

### *Witnessing Domestic Violence*

In 10 of the 12 cases (83%) that found grave risk, the court indicated that children had intervened in or witnessed violence between their parents. Three cases illustrate this finding. First, in *Simcox v. Simcox* (2007), the couple’s oldest child, a daughter, testified that her father would grab her mother’s jaw and “put his finger on her neck, pulling hair” (*Simcox*, 2007, p. 599). She also described how once while driving, her father “banged her mother’s head

**TABLE 5**  
**Grave Risk and Presence of Factors (Cases where grave risk was found are shaded)**

<i>Case</i>	<i>Defense Found</i>	<i>Total Factors</i>	<i>Witnessed DV</i>	<i>Expert Testimony</i>	<i>Child Maltreatment</i>	<i>Threats to Kill</i>	<i>PTSD</i>
Walsh	Yes	5	+	+	+	+	+
Elyashiv	Yes	5	+	+	+	+	+
Blondin	Yes	5	+	+	+	+	+
Rodriguez	Yes	5	+	+	+	+	+
Ostevoll	Yes	4	+	+	+		+
Simcox	Yes	4	+	+	+		+
Tsarbopoulos	Yes	4	+	+	+		+
Danaipour	Yes	4		+	+	+	+
Adan	No	3	+		+	+	
Van De Sande	Yes	3	+		+	+	
Frowein	Yes	3	+	+	+		
Jankakis	No	3	+	+			+
Aldinger	No	2	+			+	
Baran	Yes	2	+		+		
Whallon	No	2	+	+			
Dalmasso	No	2	+			+	
Tabachi	No	2	+	+			
Croll	No	1	+				
Ciotola	No	1		+			
Dallemagne	No	1				+	
Hasan	No	1	+				
Koc	No	1	+				
Panazatou	Yes	1		+			
Perez	No	1			+		
Prevot	No	1		+			
Silverman	No	1				+	
Wipranik	No	1			+		
Antunez	No	0					
Antonio	No	0					
Belay	No	0					
Currier	No	0					
Fabri	No	0					
Lynch	No	0					
Miller	No	0					

against the passenger window of the vehicle” and that she “often had to intervene by placing herself between them.” In the same case, another child in the family testified that her father had “held her mother by the neck against a wall” and that her older sister had “tried to stop him but he hit her” (*Simcox*, 2007, p. 598).

Second, in *Walsb v. Walsb* (2000), one of the couple’s children recounted seeing domestic violence in the home. The court noted that the child had told a social worker that “she had memories about her mother being abused . . . that her mother was hit and hurt by her father, and that her father pushed her mother down stairs” (*Walsb*, 2000, p. 211). She also stated that “her father once became enraged at her . . . over dirty shoes, spitting in her face and calling her stupid . . . She said she was terrified of phone calls from her father” (*Walsb*, 2000, p. 52). Third, in *Turner v. Frowein* (2000), the court described a violent incident between a child’s parents this way: “[T]he defendant began choking and kicking the [child’s mother], inflicting a beating so severe that she subsequently required a hysterectomy. Like the previous violent incidents, the child witnessed this beating” (*Turner*, 2000, p. 324).

### *Expert Testimony*

Based upon our study, expert testimony that described the harm children might suffer if they are returned to their habitual residence makes it more likely that a grave risk exception will be found by the court. Expert testimony was offered in 10 of the 12 successful grave risk claims (83%). For example, in *Danaipour v. McLarey* (2004), a child psychologist who was treating a young girl involved in the case gave expert testimony that the father had sexually abused the child. The court “credited the observations” made by the expert that returning the child to Sweden, where her father resided, would amount to returning her “to the place of trauma [and the] location of her victimization” and could “have profoundly disturbing effects on the Child” (*Danaipour*, 2004, p. 296).

In *Panazatou v. Panazatos* (1997), a child psychiatrist testified that “separation of the [three-year-old] child from the mother’s care would cause grave risk of psychological harm to the child, both short and long term” (*Panazatou*, 1997, p. 4). Similarly, in *Turner v. Frowein* (2000), a court-appointed psychologist who examined both the child and the father stated that the father “had a tendency toward aggressive behavior” (*Turner*, 2000, p. 328). During the trial court proceedings which included allegations of both domestic violence and child sexual abuse, the psychologist testified that the “child was anxious and very afraid of [his father] . . . and that the child likely would suffer substantial psychological harm if forced to return to his father’s care” (*Turner*, 2000, p. 328).

### *Post-Traumatic Stress Disorder (PTSD)*

Post-Traumatic Stress Disorder may occur in people who have been exposed to a traumatic stressor such as the threat of death or injury (American Psychiatric Association, 2000). Persons suffering from this disorder typically experience a constellation of symptoms including intrusive re-experiencing of the trauma, avoidance of things associated with the trauma, and higher levels of arousal (such as difficulty sleeping or concentrating). Children were found to have a diagnosis of PTSD in eight of the 12 cases (67%) in which a grave risk defense was successful.

In these eight disputes, the courts indicated that returning children to their habitual residence might cause a recurrence of stress symptoms characteristic of the disorder. PTSD occurred in these cases either because the children witnessed domestic violence in the home, or because they themselves were victims of maltreatment. The court in *Ostevoll v. Ostevoll* (2000) makes this point in a case where a father physically and emotionally abused his wife and three daughters, ages 8, 11, and 13. In supporting its grave risk finding, the *Ostevoll* court wrote that the children were “suffering from post-traumatic stress syndrome, having all experienced the abuse themselves as well as having witnessed their mother’s abuse” (*Ostevoll*, 2000, p. 48).

Similarly, in *Simcox v. Simcox* (2007), the court found that all but one of the children “were suffering from some level of post-traumatic stress disorder” and that their psychological trauma could be exacerbated if they were to be returned to Mexico (their habitual residence) and came into contact with their father (*Simcox*, 2007, p. 608). The court in *Blondin v. Dubois* (2001) made a similar finding that the children in the case had suffered from PTSD. The appellate court in the case cited the lower court’s finding that “the children face an almost certain recurrence of traumatic stress disorder on returning to France because they associate France with their father’s abuse and the trauma they suffered as a result” (*Blondin*, 2001, p. 161).

### *Threats to Kill*

In six of the 12 cases (50%) in which grave risk was found, the batterer threatened to kill the mother, a child, or himself. Oftentimes these threats were explicit, as in *Elyashiv v. Elyashiv* (2005). Here the court explained that when the children’s mother asked her husband for a divorce, he “refused and threatened that, if forced to do so, he would kill [her]” (*Elyashiv*, 2005, p. 399). Similarly, the couple’s child once reported to a teacher that her father was physically abusing her. Upon learning of the report, the father “threatened to kill [the child]” (*Elyashiv*, 2005, p. 400). In *Blondin v. Dubois* (2001), a dispute involving more than three years of appeals, the Court of Appeals for the Second Circuit cited the child’s testimony and denied the father’s Hague petition. The court wrote that one of the couple’s children “described various instances of abuse and its effects on her, including her father’s spitting on and hitting her mother, at least once with a belt buckle; [and] his putting something around [her sister’s] neck and threatening to kill her . . .” (*Blondin*, 2001, p. 167).

Implicit threats of harm also helped justify a grave risk exception. For example, in *Baran v. Beaty* (2007), a mother left her husband in Australia and returned to her parents’ home in the U.S. During the relationship, the petitioning father stated his son “should have been aborted, that [the child] would die if he ‘became an American’ and that [the mother] could not blame him if something happened’ to the child” (*Baran*, 2007, p. 1257).

### *Multiple Factors and Grave Risk*

Our content analysis indicates that the courts in our sample addressed five distinct factors when determining whether grave risk could be used as a defense to a Hague petition. These factors frequently overlap in the same case. In fact, as Table 5 shows, grave risk was found in all cases in which four or five factors were present, but very infrequently in cases in which three

or fewer factors were found. This pattern suggests that multiple factors have a cumulative effect which increases the likelihood that the court will find grave risk.

It is also important to note that no matter how violently a batterer may treat his wife or partner, this violence is not in and of itself automatically considered harm to children in the absence of the five factors. Two cases illustrate this finding. First, in *Robles Antonio v. Barrios Bello* (2004), a mother testified that she had been physically abused during her marriage. However, the court wrote that “she made no claim and submitted no evidence that petitioner had ever harmed” their son (*Robles Antonio v. Barrios Bello*, 2004, p. 3). Because her child had not been directly harmed, the court held that the grave risk exception was not applicable. Second, in *Dallemagne v. Dallemagne* the father had previously punched the children’s mother until she was unconscious and had tried to run her over with a car. Nevertheless, the court did not find grave risk because “there was no credible evidence that the petitioner has ever physically harmed the children” (*Dallemagne v. Dallemagne*, 2006, p. 1299).

## DISCUSSION

This study tells us three important things about Hague litigation in U.S. courts involving allegations of domestic violence. First, early assumptions about which parent would remove children and seek their return through Hague petitions do not reflect the reality of cases involving domestic violence today. Second, the courts in our sample rarely considered domestic violence in conjunction with habitual residence determinations. Third, when the courts accepted a grave risk defense, our content analysis suggests that five factors are particularly important to their decisions. Taken together, our findings have important policy and legal practice implications for women who flee domestic violence with their children and cross international boundaries.

### Parties in Hague Convention Disputes

Our descriptive analysis indicates that the men in our sample who batter their wives and partners are typically the individuals who bring Hague petitions. These petitions are brought against women who have fled one country with their children and entered the U.S. This finding contradicts early assumptions that helped to shape the Convention, specifically, that fathers would primarily be the “taking” parent and that left-behind mothers would seek redress using the Convention (Weiner, 2000).

### Domestic Violence and Habitual Residence

One of the first steps in resolving a Hague petition is determining a child’s habitual residence. Despite its significance, the Convention does not define habitual residence and as a result, U.S. courts have stated that decisions about it “remain fluid and fact based, without becoming rigid” (*Levesque v. Levesque*, 1993, p. 666; *Prevot v. Prevot*, 1994, p. 560). Given this ambiguity, U.S. courts have taken conflicting and “extreme positions in resolving the argument” over the term’s meaning (Weiner, 2000, p. 641). Our research found that courts rarely

considered the presence or severity of domestic violence when determining habitual residence. In fact, in only three of the 47 cases (6%) we examined did the court find that domestic violence had a significant bearing on a habitual residence determination.

We recognize that current law does not require courts to attend to or address domestic violence when determining habitual residence. We believe this gap in law falls short of accounting for the actual, lived experience of battered women and their children. Inherent in domestic violence is a pattern of coercion that may prevent a woman from participating in decisions about where she and her children live (Stark, 2007). Similarly, controlling behavior is a common characteristic of abusive partners, and this control encompasses family decision making (Barnish, 2004) and household finances (Alvi & Selbee, 1997). The failure of the Hague Convention and its U.S. implementation to recognize these dynamics creates an additional barrier to safety for women seeking to protect themselves from a violent partner.

Barnish's (2004) summary of prior research on battered women who emigrate to a new country is helpful when considering the Hague Convention and the habitual residence question. Barnish has explained that batterers ensure that women remain silent about their abuse by misleading them about their rights in the new country, preventing them from accessing language classes, destroying their passports and visas, threatening them with deportation, and restricting their contact with friends and family in their home country (Barnish, 2004). Under these circumstances—which are analogous to the cases we studied—battered women and their children are, in essence, confined to their homes through violence, coercion, and control.

Our research suggests that a more expansive legal process for determining habitual residence is needed. Such a process would specifically ask whether a mother has decided where she and her children live under threat of violence. If courts were to directly address domestic violence when determining habitual residence, their decisions would more accurately account for the real-world lives of battered women. Such decisions would also better contribute to the safety of battered women and their children.

### Grave Risk Factors

Because of its particular relevance to domestic violence cases, we were especially interested in how the courts in our sample applied the grave risk defense. It is unsurprising that the defense had a low rate of success given that U.S. courts have consistently stated that all of the defenses should be narrowly interpreted. To do otherwise, they hold, would undermine the Convention's policy goal of returning children who are wrongfully removed from their habitual residences (*Friedrich v. Friedrich*, 1996; *Simcox v. Simcox*, 2007).

The courts in our sample were relatively explicit in their reluctance to use the defense. For example, in *Whallon v. Lynn* (2000) the court held that the harm necessary to prove the exception must be "a great deal more than minimal," and must exceed that which would "normally" be expected to result from a transfer of custody (*Whallon*, 2000, p. 92). Similarly, the court in *Friedrich v. Friedrich* (1986) stated that the exception applies only when the evidence shows that children would be placed in an "intolerable situation."

The reluctance of most courts in our sample to link domestic violence with a grave risk of harm to children runs counter to the weight of social science research. Research tells us that

as many as 40% of children of abused mothers are, themselves, also abused (Appel & Holden, 1998; Edleson, 1999). Treating domestic violence as separate and apart from other forms of family violence also runs counter to recommended family law practice. For example, the National Council of Juvenile and Family Court Judges (NCJFCJ) has observed that “judges are now almost universally under a statutory obligation to consider domestic violence as a factor when determining the best interests of children” (Dalton et al., 2006, p. 9). The Council’s Model Code on Domestic and Family Violence presumes that it is in the children’s best interests to reside with their non-violent parent in a location of that parent’s choice, within or outside the state where the family lives (NCJFCJ, 1994).

Although courts in our study generally avoid linking domestic violence with grave risk, this trend is not universal. For example, in *Ostevoll v. Ostevoll* (2000), the children’s father was physically abusive to their mother, he rarely permitted her to leave the family residence, and when she did leave, he accompanied her. She was permitted to take the children outside the residence only when she went to church. In accepting the grave risk defense, the *Ostevoll* court wrote that while other courts may focus only on whether children have been physically abused, such a view is “myopic” and that grave risk determinations should involve considering whether children witnessed domestic abuse (*Ostevoll*, 2000, p. 52-53). Unlike other cases we studied, *Ostevoll* relied upon social science literature. We found only two other instances where courts looked to social science literature for support in accepting a grave risk defense (*Tsarbopoulos v. Tsarbopoulos*, 2001; *Walsh v. Walsh*, 2000).

Evidentiary standards further limit use of the grave risk exception. Most exceptions in the Convention (consent, child maturity, and whether a child is settled in the new environment) must be proved by a preponderance of evidence—the usual standard in American civil proceedings, including family law disputes. However, the grave risk and human rights defenses must be proved by clear and convincing evidence—a significantly greater burden than the preponderance standard. Because of these differing standards, abused women arguing grave risk face a more difficult path to retaining custody of their children than do women arguing another exception. The Convention does not dictate the use of these differing burdens of proof.

## CONCLUSION

This research contributes to our understanding of how U.S. courts have interpreted the Hague Convention. By showing that this interpretation frequently leads to court decisions against the interests of even severely battered women and their children, our research also adds to the body of legal and social welfare scholarship revealing structural biases against battered women in a variety of official settings (Buel, 2003; Czapanskiy, 1993; Kohn, 2007; Lindhorst & Padgett, 2005). Such scholarship includes studies showing that prosecutors’ heavy caseloads are associated with lower numbers of guilty verdicts against batterers (Belknap et al., 2000); that family violence was accepted only relatively recently as a legitimate factor in determining custody (Cahn, 1991); that battered women may be arrested for engaging in defensive tactics following an attack by their intimate partner (Henning & Feder, 2004); and that welfare workers do not properly implement procedures for domestic violence victims (Lindhorst, Meyers, & Casey, 2008).

As the weight of social science evidence and U.S. public policy brings about expanded understanding of the well-being of children, court rulings in Hague Convention cases may change over time as well. Judicial recognition that exposure to adult domestic violence poses a grave risk and intolerable situation to children may grow. For now, however, there is little logic to the arguments made in the cases we studied that exposure to domestic violence in the home does not, in and of itself, constitute a grave risk to children.

Our findings also suggest the need for specialized continuing legal education for judges and lawyers that is focused on international abduction cases involving domestic violence. The development of a National Bench Guide that incorporates ours and other research findings could address domestic violence and its implications for decisions in Hague Convention cases. Just as important, our results suggest the need for continued research on child abduction and its relationship to domestic violence.

We have little systematic information on the parents who have abducted their children into the United States from other countries and almost no understanding of their motives, experiences, or the outcomes of their cases apart from official published decisions. The research described in this article focused on parents who brought their children into the U.S.; it did not address those parents who flee the U.S. and go to other countries after being victims of domestic violence here. Further research is needed on both types of “taking” parents and their children to identify key barriers and facilitators to a safe resolution of their disputes.

Finally, although it would be difficult to amend the Hague Convention and secure worldwide ratification, this research can contribute to clarifying its proper application where domestic violence is present. Our findings can also contribute to a new Convention protocol or a revision of ICARA. Taken together, these actions can help ensure that the Hague Convention does not pose an additional barrier to women as they seek to protect themselves and their children from violence.

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