

International Child Abduction: Modifying the 1980 Hague Convention on the Civil Aspects of Child Abduction and Proposals for a New United Nations Judicial Body

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Introduction

Due to increasing globalization and the ease of international travel, more international and cross-cultural marriages occur in society. At the same time, with a rise in divorce rates, important questions arise about the welfare of children born from international marriages. Child custody is inextricably linked with the marital unit and also with each individual caretaker. This article will focus on the rights of a child when he or she is forcibly removed from their country of residence. “Child abduction” for purposes of this paper will be defined as the taking of a child by one parent from his or her home state to another state, without the consent of the other parent. This is the definition that is propounded by the main Convention on this topic, The Hague Convention on the Civil Aspects of Child Abduction (“Hague Convention”).¹

In 2010, there were 1,022 reported international parental child abduction cases representing 1,492 children.² However, this number does not account for unreported cases; the I CARE Foundation estimates unreported cases equals between 100% and 125% of all reported cases.³ Once a child has been abducted, returning them to their country of residence can be very difficult. During 2012, there were 799 reported international child abduction cases filed with the U.S. Central Authority, representing a total of 1,144 children.⁴ In Japan, there are about 400 cases each year.⁵ United States politicians recognize the importance of these issues through congressional resolutions and statements by elected officials.

Research shows that abducted children are at risk of significant short and long term problems including “anxiety, eating problems, nightmares, mood swings, sleep disturbances and aggressive behavior. . .”⁶ Parents left behind also experience psychological and emotional issues including, “feelings of betrayal, sadness over the loss of their children, anger towards

¹ The Hague Convention on the Civil Aspects of International Child Abduction, opened for Oct. 25, 1980, T.I.A.S. No. 11, at 670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1993) [hereinafter Hague Convention].

² Carolyn Ann Vlk and Peter Thomas Senese, *Crisis in America: International Parental Child Abduction Today – 2013*, THE I CARE FOUNDATION (Feb. 25, 2013), <https://internationalparentalchildabductions.wordpress.com/2013/05/11/u-s-international-parental-child-abduction-rate-drops-by-15-in-2011-and-2012/>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ U.S. DEPARTMENT OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 10 (2010), <https://travel.state.gov/content/dam/childabduction/complianceReports/2010.pdf>.

the other parent. . .as well as financial strain when fighting for the return of a child.”⁷ On this issue, Senator John Kerry in 2012 said,

International child abductions aren’t faceless crimes, they’re real and they’re tragic. Over the last two years, I’ve gotten to know Colin Bower, a Massachusetts father who had full legal custody of his two young sons and whose life was ripped apart when they were abducted and taken to Egypt. We’re still fighting and working to get his boys home and reunite them with their dad . . .The international community must stand up and do all it can to make this right.⁸

The “best interests of the child” standard is often what courts will cite and refer to when hearing a child abduction case. According to *Albright v. Albright*, which will be discussed later, this standard considers where the child was raised, the parent’s lifestyle and work schedule and the parent’s ability to spend time with the child.⁹ Depending on these factors, the court makes a determination as to where is the best place for the child to be placed. In order to make the standard clearer, I argue that the Hague Convention should be modified to include a list of factors that the governing authority can use to determine the best interests of the child. Second, a new neutral United Nations body comprised of representatives skilled in international and family law should be created. This body will be the most effective authority to adjudicate cases of international child abduction. Furthermore, a smaller equally competent judicial body should be created to conduct an appeals process for child abduction claims.

First, the importance of the best interests of the child standard will be discussed in conjunction with human rights of the child as illustrated in several United Nations Conventions, such as the International Covenant on Civil and Political Rights.

Then, a detailed look into a few case studies will be presented. The case studies will illustrate the importance of a clear “best interests of the child” standard and a neutral body to adjudicate wrongful removal of a child. Lastly, I will discuss the best measure for success of the Hague Convention, and the important issue of domestic violence as it affects international child abduction cases. This article will not cover the important and related topic of determining child custody in the international context.

⁷ *Id.*

⁸ Press Release of U.S. Senator Barbara Boxer (Aug. 2, 2012), <https://www.boxer.senate.gov/?p=release&id=367>.

⁹ *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

I. Best Interests of the Child Standard

There are different standards for “best interests” as applied by states in the U.S. and as applied by the international community. In the U.S family law system, custody is often awarded based on the best interests of the child standard.¹⁰ Although the application of this standard varies from state to state and even jurisdictions within one state – the common considerations are: the place where the child was raised, school systems, parent’s work schedule and ability to care for the child, parent’s lifestyle and time spent with the child, etc.¹¹

However, in the international law context, such a standard has not been clearly developed. And this may prove troublesome after the European and Japanese case studies, which will be discussed later. Nevertheless, to understand the basis of a child’s human rights we can look to the preamble of the 1980 Convention on the Rights of the Child (“CRC”). The CRC preamble identifies general human rights that must be considered for the welfare of the child. The CRC preamble states generally that,

in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance. . . Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. . . the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.¹²

These rights provide a good foundation for what the best interests standard should aim to protect for children. If the international community can use this framework from which to develop a more clear best interests standard, it could better serve the international community when deciding child abduction cases. The specific factors that should be considered in each case will be described in detail in the next section.

¹⁰ *Id.*

¹¹ *Id.*

¹² Convention on the Rights of the Child, Art. 3(1), G.A. Res. 44/25(Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49 (1990); 28 I.L.M. 1448 (1989) [hereinafter Convention on the Rights of the Child].

II. United Nations Conventions

A. Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction holds that a child should be returned to his or her country of habitual residence when he or she is taken out of the country of habitual residence by a parent without the consent of the other parent.¹³ Regardless of which country the child now resides in, the Hague Convention provides for the child to be returned to her country of habitual residence when she has been taken away without the consent of one parent. By requiring a return of children taken out of their home country, the Hague Convention in effect, creates a cooperative system among states to return the child to the country of the child's habitual residence.

It is important to note at the out-set that the Hague Convention does not mention "best interests" of the child explicitly in determining whether the child will be returned. The standard that is employed however is similar to the best interests standard. The Hague Convention lists "the social background of the child" as a standard that operates in a way as the best interests standard. "In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."¹⁴ Nevertheless, the introduction to the Hague Convention notes that, "The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody. . ." ¹⁵ Therefore, while not precisely using the language "best interests standard," the Hague Convention does subscribe to a view that takes into account what would be best for the health and well-being of the child. Therefore, considering the language of the Hague Convention, theoretically because the standards are so similar, the applications of the standard should be markedly similar as well. We will discuss a few cases that will illuminate whether the standards are really similar in practice when applied to real cases.

In order to establish a prima facie case under Article 3(b) of the Hague Convention, the applicant will file a Hague application and the applicant must demonstrate two things: 1) the retention of the child was in breach of rights of custody attributed to a person under the child's state of

¹³ Hague Convention, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.* at art. 13.

residence before the removal and 2) at the time of removal, those rights were actually exercised or would have been exercised but for the removal.¹⁶ Even if an applicant establishes the prima facie case showing that the removal was wrongful, the application could be rejected under Article 13 if consent or subsequent acquiescence to the removal can be shown.¹⁷ The application could also be rejected if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.¹⁸ Article 13 states:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.¹⁹

Furthermore, the procedural requirement under Article 12 allows for discretion not to return a child if the application was made a year after the wrongful removal and the child is currently "settled" in his or her new environment.²⁰ The Hague Convention does not apply to anyone 16 years

¹⁶ *Id.* at art. 3.

¹⁷ *Id.* at art. 13.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at art. 12.

of age or older.²¹ However, under Article 13, if the child has attained sufficient “age and degree of maturity,” the court may deny return on account of the child’s views.²² Lastly, under Article 20, a child’s return may be refused if it would result in a violation of the fundamental rules relating to the protection of human rights and fundamental freedoms of the State addressed.²³

1. Procedural Interests vs. Human Rights Interests

The Hague Convention does allow for some discretion based on the court where the Hague application is being heard. However, at its core, the Hague Convention is a document of strict procedural nature. The reason it is procedural is because the Convention does not aim to make a determination of child custody. Instead, the Convention provides that “[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”²⁴ Also, Article 16 states that: “the judicial or administrative authorities of the Contracting State to which the child has been removed or . . . retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned. . . .”²⁵

At first glance, it seems that separating the custody battle from wrongful removal is good policy. However, a strict adherence to procedural mechanisms may threaten the fundamental rights of children.

There is a line of scholarship in international law, discussed below, that fears this procedural posture is threatened by the bias and lack of expertise of judges as well as a disregard for the human rights of children. As the case studies will illustrate, there seem to be two polarized viewpoints on this topic. On one side, there are advocates that say that abducted children should always be immediately returned to their country of residence. On the other end of the spectrum, there are those who claim that returning a child should be based on the best interests of the child and the mother as set forth in the exceptions listed in Article 13. Unfortunately, neither position seems to be in line with the spirit of the Hague Convention. The Hague Convention favors a subjective approach based on the individual child’s social background, emotional attachments and familial ties.

²¹ *Id.* at art. 4.

²² *Id.* at art. 13.

²³ *Id.* at art. 20. *See also* Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 701 (2004).

²⁴ Hague Convention, *supra* note 1.

²⁵ *Id.* at art. 16.

2. The Extent of Article 13 Exceptions

There are two problems with the best interests of the child and mother approach. First, the article 13 exceptions can be interpreted over-broadly with little oversight into their factual accuracy. Secondly, the Hague Convention alludes to the best interests standard using the “social background of the child” language and by incorporating the Article 13 exceptions but never makes explicit what it means. If the Hague Convention recognizes that there may be exceptions to a prompt return of children, then it should not only say so explicitly but also make the standards clearer. In order to disincentivize child abduction and allow the child to grow up in his or her home country, two important changes should be made to the current system. First, the Hague Convention should be modified to make explicit what the “best interests” of the child are. I will give suggestions as to what these considerations may look like. The preamble provisions of the Conventions on the Rights of the Child mentioned above would be a good starting point from which to form the best interests standard. Second, a neutral body should be created to adjudicate the wrongful removal of a child.

3. Albright “Best Interests” Standard

In 1983, the Mississippi Supreme Court laid out a set of factors in *Albright v. Albright* as to what the “best interests” standard framework should be.²⁶ Judges of course have discretion in choosing how heavily each factor will be weighed. A potential weakness of this approach is that it still leaves room for judicial bias. However, an appellate level review can check some of these concerns. The factors set out in *Albright* would be a good basis for a neutral UN body to use when determining whether an Article 13 exception applies. The guidelines are as follows: 1) age, sex & health of the child; 2) which parent had the “continuity of care” prior to the separation; 3) which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the parents’ jobs and what responsibilities the job entails; 5) the physical and mental health and the age of the parents; 6) emotional ties of the parent and child; 7) moral fitness of the parents; 8) the home, community and school record of the child; 9) the preference by law; 10) the stability of the home environment and employment of each parent; 11) other factors relevant to the parent-child relationship.²⁷ If judges are repeatedly held to this explicit list of factors to explain their reasoning in reaching their conclusion, there will be more of a

²⁶ *Albright*, 437 So. 2d 1003.

²⁷ *Id.* at 1005.

check on judicial decisions and presumably less potential for bias if the public can view why a particular conclusion was reached. Using an explicit set of factors will leave less room for simply returning the child to its original state of residence or sending the child to another state for some irrelevant reason.

It may be difficult for a judicial body to determine what the outer bounds are of the *Albright* standards. What does “moral fitness” mean? And concerns may arise over the possibility of undermining the spirit of the Hague Convention – to ensure the prompt return of children wrongfully abducted and to discourage such acts in the future. District courts of various states may differ on their interpretation of these standards. However, a singular neutral UN body would not be so susceptible. Unlike district courts of two different states, the judicial body will be able to take into account the appropriate law to apply as well as the facts from both parties on equal playing fields. And members of this group should be required to recuse themselves if a case from their home country were presented. Child abduction cases will benefit from consistent application of guidelines, because cases with similar facts will presumably have similar outcomes.

Undoubtedly, another pitfall of this approach is that even if a neutral UN body, such as a Child Protection Task Force, is formed, it may not have the competence to conduct such an in-depth and accurate fact-finding mission. The district and family courts of states may be in a better position to answer some of the questions raised in the *Albright* standard. It is worth pointing out however that we are dealing with a current system that has obvious biases and flaws versus a proposed system that could at least codify some of the best interests standards that the Hague Convention is lacking. Transnational cooperation and communication will be essential in this process and will be discussed further in measuring the success of the convention.

Second, one of the shortcomings of the Hague Convention is that it does not specify which country’s laws will apply in a particular child abduction case. Therefore, most cases of child abduction are tried in district courts of the state or country of the child’s home residence as well the district courts of the state of new residence. These courts often come to differing conclusions on whether the child should be returned to the country of residence. This leads to an increased risk of judicial bias in favor of the applicant’s home state. Part of the problem is an unclear standard of the best interests of the child, as discussed above. Another persistent problem is the lack of expertise of judges to hear and try cases of international child

abductions.²⁸ Most of the trial court's jurisdiction does not touch on international issues; judges are often presiding over cases without applying the Hague Convention on Child Abduction in the proper manner. Moreover, there is the possibility that the Central Authority of the sending or receiving state will reject a Hague application if they determine that the application does not meet the criteria of the Hague Abduction Convention without opportunity to appeal. This is where appellate level review is essential.

Therefore, the system is in need of a neutral decision-making body that can effectively advocate for the peaceful resolution of child abduction on the trial and appellate level. Two new United Nations entities should be formed to hear cases of child abduction by judges who are experts in family law in their respective countries and who also have a background in international law and affairs. The two entities would comprise of a trial court level and appellate level review process. Presumably, the decision-makers in these entities would be better equipped to handle cases of child abduction compared to judges who lack experience in international law. All states that are a party to the Hague Convention would be eligible to have standing in this court. The plurality of conflicting opinions that often arise in district courts of two different countries can be addressed. Applications can also be reviewed at the appellate level to check any abuse of discretion as well. What the abuse of discretion standard means in the international context will have to be determined in a further study.

III. Human Rights: Rights of the Child

Although the Hague Convention can be classified as a purely procedural instrument, it should take a more nuanced approach as to what standards will be applied to Article 13 exceptions. When determining these standards, it is important to build from a framework that will protect the rights of the child as outlined in the Conventions above. Sometimes, a desire to enforce procedural aspects of the Hague Convention can remove the child from the discussion. The child should always be the focal point in all discussions of international child abduction.

There are several human rights treaties and Conventions in addition to the Hague Convention that are relevant to the human rights concerns involved in international child abduction. The treaties that are relevant are the International Covenant on Civil and Political Rights ("ICCPR"), Convention on the Rights of the Child ("CRC"), and the Convention for the

²⁸ See generally Keelikolani Lee Ho, Comment, *Need for Concentrated Jurisdiction in Handling Parental Child Abduction Cases in the United States*, 14 SANTA CLARA J. INT'L L. 596 (2016).

Protection of Children. The CRC provides a good basis from which to build what the best interests standard should be in the Hague Convention.

A. *International Covenant on Civil and Political Rights*

Article 23 of the ICCPR recognizes the rights of children after marriage dissolution, “In the case of dissolution, provision shall be made for the necessary protection of any children.”²⁹ Article 24 further clarifies the rights of the child as a minor and to acquire a nationality:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. . . . 3. Every child has the right to acquire a nationality.³⁰

It is important that the Hague Convention reflects the ultimate right of the child to acquire a nationality. If the international community is serious about protecting children, a procedural rule as provided in the Hague Convention should not override fundamental human rights.

B. *Convention on the Rights of the Child, 1990*

The CRC not only provides a good basis for the best interests of the child standard but also takes a preventative approach to abduction and a broader definition of “child.”³¹ The CRC provides that: “States Parties shall take measures to combat the illicit transfer and non-return of children abroad.”³² The CRC also states that, to achieve this end, “States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.”³³ The CRC also takes a preventative approach to child abduction, encouraging state parties to prevent abduction from the state of the child’s residence: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any

²⁹ International Covenant on Civil and Political Rights art. 23, adopted Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

³⁰ *Id.* at art. 24.

³¹ Convention on the Rights of the Child, *supra* note 12, at art. 11.

³² *Id.*

³³ *Id.*

form.”³⁴ State parties should become party to the Hague Convention in order for Article 11 to have the power to be implemented and enforced. Currently 94 states are party to the Convention. The more international support there is for abducted children, the more incentive there will be for state parties to work together, share information and resolve these disputes.

Furthermore, Article 3 clearly sets the best interests of the child as the standard that all children are entitled to in any decision-making process. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³⁵ This provision, if it is to hold meaning, should be applied to the Hague Convention. How the standard will be applied in the Hague Convention should be made clear in a manner similar to the *Albright* standard.

C. The Convention for the Protection of Children of 1996

The CPC reinforces the Hague Convention by highlighting the importance of returning children who are wrongfully removed.³⁶

There is an argument on the other side that the Hague Convention should not be modified but instead remain as is due to concerns about taking away from the procedural importance of the treaty. While it is important not to encourage child abduction, once abduction has occurred, there must be an effective method for adjudicating such disputes. More clear standards of the meaning of Article 13 and a separate UN body to adjudicate these disputes are two of the methods that could give more meaning to the Hague Convention. The Hague Convention, while 34 years old, is extremely important giving the alarming rate of abductions every year. However, the international community must be careful to address the human rights concerns of the child as a primary matter in the process.

³⁴ *Id.* at art. 35.

³⁵ *Id.* at art. 3.

³⁶ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children art. 50, Oct. 19, 1996, 35 I.L.M. 1391.

IV. Case Studies

A. United States Law and Policy

The Hague Convention provides that each state party to the Convention shall appoint a “Central Authority” to enforce the duties set forth in the Convention.³⁷ The U.S. Central Authority handles all Hague Convention applications seeking the return of children wrongfully removed to or retained in the United States or seeking access to children in the United States.³⁸ Rights of access are equivalent to visitation rights.³⁹ Specifically, the Central Authority aims to confirm the child’s location, determine the child’s welfare, try to resolve the issues through mediation and coordinate with appropriate government agencies, etc.⁴⁰

In 2012, Senate Resolution 543 reinforced the importance of international child abduction and encouraged states to become parties to the Hague Convention.⁴¹ The resolution also names Japan, India and Egypt as the worst offenders in the kidnappings of children from the United States to countries abroad.⁴² There should be more research on this statement; as of 2014, Japan ratified the Hague Convention, which indicates that there seems to be some movement among countries to ratify the Convention and take a more serious look at child abductions.

In *Abbott v. Abbott*, the United States Supreme Court ruled that a non-custodial parent has a “ne exeat” right to custody under the Hague Convention.⁴³ Tim Abbott, a British citizen and Jacquelyn Abbott, an American citizen litigated their divorce in Chilean courts.⁴⁴ Mrs. Abbott was awarded custody of their son, and Mr. Abbott received visitation rights.⁴⁵ Mrs. Abbott removed the child without permission from Chile to Texas.⁴⁶ The father filed a Hague application, and the district court denied the child’s removal because it did not constitute a breach of the father’s

³⁷ Hague Convention, *supra* note 1.

³⁸ 22 C.F.R. § 94.6 (2008).

³⁹ *See, e.g.*, Hague Convention, *supra* note 1, at art. 5 (providing that “rights of access” shall “include the right to take a child for a limited period of time to a place other than the child’s habitual residence”).

⁴⁰ *See* 22 C.F.R. § 94.6.

⁴¹ *See* S. Res. 543, 112th Cong. (2012).

⁴² *Id.*

⁴³ *Abbott v. Abbott*, 560 U.S. 1, 11 (2010).

⁴⁴ *Id.* at 5-6.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

“rights of custody” as defined by the Hague Convention.⁴⁷

The Fifth Circuit affirmed, and the Supreme Court reversed.⁴⁸ The Chilean family court granted Mr. Abbott direct and regular visitation rights, which automatically gave him joint right to decide his child’s country of residence, or a “ne exeat right” under Chilean law.⁴⁹ The Hague Convention defines “rights of custody” to “include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”⁵⁰ The U.S. Supreme Court held that Mr. Abbott had a right to “custody” under the Hague Convention.⁵¹ The fact that Mr. Abbott would have exercised his right “but for” wrongful removal is what Article 3(b) anticipates.⁵² Therefore, the Supreme Court remanded the case to the Fifth Circuit.⁵³ However, the case was eventually dismissed because the child, A.J. A., reached sixteen years of age.⁵⁴

However, the dissent focuses on the aspect of “visitation” granted to Mr. Abbott.⁵⁵ Custody had already been decided – Ms. Abbott was the custodial parent.⁵⁶ Mr. Abbott did not have the ability to make any vital care-taking decisions for his son.⁵⁷ Returning his son to Chile, even if it was not in the child’s best interests, would therefore go against the spirit of the Hague Convention.⁵⁸ It is true that Mr. Abbott has a right to visitation, as the dissent notes.⁵⁹ However, as a non-custodial parent, he cannot make decisions about the care that A.J. A. is entitled to receive or the country of his residence.⁶⁰ The purpose of the Hague Convention, as noted above, is not to determine custody; the purpose is to return the child to the country of primary residence where a proper determination of custody can be made.⁶¹

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 7, 22.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 11 (quoting from Hague Convention, art. 5(a), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89).

⁵¹ *Id.* at 15.

⁵² *Id.* at 13.

⁵³ *Id.* at 22.

⁵⁴ Bill Mears, *Child at Center of High Court Fight Over Custody Gets Closure*, CNN (Feb. 14, 2012), <http://www.cnn.com/2012/02/14/us/scotus-child-custody>.

⁵⁵ *Abbott*, 560 U.S. at 23-38.

⁵⁶ *Id.* at 26.

⁵⁷ *Id.* at 27.

⁵⁸ *Id.* at 24-33.

⁵⁹ *Id.* at 23.

⁶⁰ *See id.* at 27-33.

⁶¹ *See id.* at 24-40.

Where the lines in this case are drawn between “visitation” and “custody” is not clear. If a parent has a right to visitation, it does not seem fair to extend the definition to the more encompassing definition of “custody.” The Hague Convention defines rights of custody as the right to care for the child and in particular, the right to determine the child’s place of residence.⁶² Mr. Abbott, according to Chilean law did not have the ability to *determine* the place of residence; he only had an authorization power.⁶³ The dissent takes care to distinguish the two rights.⁶⁴ In addition to the legal analysis, we must analyze what this means for the child. Forcing A.J. A. to move back to Chile in his mid-teens would probably uproot his life and support system, and possibly require him to learn a new language. This would not be in his best interests, and unfortunately, the majority of the U.S. Supreme Court did not consider this aspect in their opinion.

The Hague Convention only applies to children under the age of sixteen years.⁶⁵ However, the Convention on the Rights of the Child applies to all under the age of eighteen.⁶⁶ There are important implications of the potential human rights violations that could occur for child abductions during this two-year gap. However, that is a separate topic that will not be addressed here. The European case study discussed below takes the position of the dissent in *Abbott*.

B. European Court of Human Rights

In this section, the rights and best interests of the child as well as the rights of the parental unit will be discussed. The 2010 *Neulinger and Shuruk v. Switzerland* case is relevant in this discussion.⁶⁷ In *Neulinger*, the European Court of Human Rights (“ECHR”) held that a child should not be returned to its habitual residence, even if that is required by the Hague Convention, if it is not in the best interests to do so.⁶⁸ Some important issues this case raises are: what does “best interests” refer to and what standards

⁶² *Id.* at 25 (citing Hague Convention, art. 5(a), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89).

⁶³ *Id.* at 34-35.

⁶⁴ *Id.*

⁶⁵ Hague Convention, *supra* note 1.

⁶⁶ Convention on the Rights of the Child, *supra* note 12, at art. 1.

⁶⁷ *Neulinger & Shuruk v. Switzerland*, No. 41615/07, 8 Eur. Ct. H.R. (2010).

⁶⁸ Jeremy D. Morley, *The Hague Abduction Convention and Human Rights: A Critique of the Neulinger Case*,

https://www.iafl.com/cms_media/files/the_hague_abduction_convention_and_human_rights_a_critique_of_the_neulinger_case_revised.pdf.

did the ECHR use to determine best interests?⁶⁹

In *Neulinger*, Noam Shuruk was born to a Swiss mother, Isabelle Neulinger, and Israeli father, Shai Shuruk in 2003.⁷⁰ Ms. Neulinger settled in Israel in 1999; she married Mr. Shuruk in 2001 and gave birth to Noam in Tel Aviv in 2003.⁷¹ Noam has Israeli and Swiss nationality.⁷² Ms. Neulinger feared that her husband would indoctrinate Noam to the new ultra-orthodox Jewish group he joined in 2003.⁷³ There were also allegations of Mr. Shuruk's domestic violence against his wife.⁷⁴ In 2004, Ms. Neulinger was granted custody of Noam and Mr. Shuruk was granted visitation rights.⁷⁵ Mr. Shuruk's visitation was later modified to a reduced supervised visitation order.⁷⁶ When Noam's mother and father divorced in 2005, the guardianship distribution remained the same.⁷⁷ Ms. Neulinger secretly left Israel for Switzerland with Noam in 2005.⁷⁸ Mr. Shuruk filed a Hague application in 2006 as soon as Interpol Jerusalem located the child; the application was filed within one year as required by Article 12 of the Hague Convention.⁷⁹ Not surprisingly, the family court in Tel Aviv and the Lausanne District Justice of the Peace came to differing conclusions on the issue of whether the child should be returned.⁸⁰ The Swiss court concluded that while Noam had been wrongfully removed in violation of Article 3 of the Hague Convention, Article 13(b) applied because there was a "grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation."⁸¹

Ms. Neulinger argued that ordering Noam's return to Israel would violate the right to respect for family life as provided in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Articles 3 and 6 of that convention.⁸² Mr. Shuruk on the other hand, argued that under Article 3 of the Hague Convention, Ms.

⁶⁹ *Neulinger*, No. 41615/07, 8 Eur. Ct. H.R. (2010).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Neulinger breached his right to custody under Israeli law.⁸³ Under Israeli law, the right of “guardianship” includes the right to decide on the child’s residence.⁸⁴ This rule is similar to Chilean law as previously noted in the *Abbott* case. Procedurally, Mr. Shuruk met the requirements of the Hague Convention because the application was filed within a year of the wrongful removal.⁸⁵ The sole factor that the ECHR noted trumped all of the above considerations was the best interests of Noam.⁸⁶

The appellate level court in Switzerland had raised concerns of Mr. Shuruk’s living situation with roommates, the allegations of assault and domestic assault perpetrated on his second wife, his rights pertaining only to supervised visitation and the complex issue of Noam’s security and stability in an unfamiliar environment given that he had only spent the first two years of his life in Israel.⁸⁷ It was not the ECHR’s responsibility to take the place of more competent authorities in determining whether Noam would be exposed to such harm if he returned to Israel.⁸⁸ The ECHR’s job was to ascertain whether the domestic courts had respected Article 8’s right to family life, in the European Convention on Human Rights and served the child’s best interests.⁸⁹

In light of the particular facts of the case, the European Court of Human Rights was not convinced that it would be in the child’s best interests for him to return to Israel.⁹⁰ Furthermore, Ms. Neulinger would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel.⁹¹ Also, the Court held, by 16 votes to one, that there would be a violation of the right to family life provided in Article 8 in respect of both applicants if the decision ordering Noam’s return to Israel were to be enforced.⁹²

Furthermore, the Convention on the Rights of the Child provides that above and beyond the child’s right to maintain contact with both parents, the best interests of the child will be considered.⁹³ This CRC

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Convention on the Rights of the Child, *supra* note 12, at art. 9, § 3 (“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal

provision affirms the ruling in *Neulinger* if we take a broad interpretation of the exceptions in Article 13. The ECHR was not in the best position to conduct a fact-finding mission of Mr. Shuruk's lifestyle and related fitness of fathering Noam. The court instead relied on information gathered by the Swiss courts concerning this issue. The Joint Separate Opinion of Judges Jociene, Sajo and Tsotsoria points out that, "National courts, having the benefit of direct contact with the persons involved, are better placed to make such assessments and must be accorded a reasonable margin of appreciation."⁹⁴ There is undoubtedly a fundamental tension between how to determine the best interest of the child, who the appropriate body is to carry out that analysis and how the best interests of the child can remain at the center of such determinations.

Courts like the ECHR look to the best interests standard which may trump the parents' custody and rights of access (visitation rights) guaranteed by Article 4 and explained by Article 5 of the Hague Convention. The majority in *Neulinger* addresses the concerns raised in *Abbott* regarding the difference between visitation and custody. Nevertheless, if certain rights, such as visitation, are being negated by a nebulous and discretionary standard for best interests of the child, this calls for a modification of the standard to a clearer approach.

C. Japanese Case Study

There is a danger of state parties to the Hague Convention manipulating the system to the advantage of their own nationals. Japan recently signed on to the Hague Convention, the week of April 1, 2014.⁹⁵ There are about 400 cases of parents who violate the convention and take their children back to Japan each year.⁹⁶ Once the children have reached Japan, international authorities have little power to advocate for the child's return to the country of his or her residence. The danger arises when the country claims one of the exceptions in Article 13 of the Hague Convention as a reason not to assist in the prompt return of the child.

relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.").

⁹⁴ *Neulinger*, No. 41615/07, 8 Eur. Ct. H.R. (2010).

⁹⁵ *The Hague Convention (The Convention on the Civil Aspects of International Child Abduction)*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/fp/hr_ha/page22e_000249.html (last visited Apr. 7, 2016).

⁹⁶ Julian Ryall, *Activists Say Japan Will Try To Bend Rules of Child Abduction Convention*, SOUTH CHINA MORNING POST (Apr. 2, 2014), <http://www.scmp.com/news/asia/article/1463285/activists-say-japan-will-try-bend-rules-child-abduction-convention>.

Brian Thomas, a British national and joint founder of the Japanese arm of the U.S.-based Children's Rights Council, married a Japanese national and their son Graham Hajime was born in 1990 in Japan.⁹⁷ Thomas returned from work one day to find their home locked and empty. He hasn't been able to see his son since 1993. Graham's mother claims that she was subject to domestic violence. Thomas says, "In this sort of situation, there is a clear need to have an outside expert assess a situation and to make a decision on what is really going on."⁹⁸

Japan's foreign ministry has set up a central authority to locate children who have been removed from the country of habitual residence and brought to Japan in accordance with Article 6 of the Hague Convention. The ministry will first try to encourage the parents to settle the dispute voluntarily. In the alternative, Japanese family courts in Tokyo and Osaka will conduct hearings and issue rulings.⁹⁹ It seems like "best interests" of the child will be determined by family courts in Tokyo and Osaka. Although the article never mentions best interests, it is assumed that that is the standard by which family courts will carry out the hearings and rulings.

The Japanese government seems more sensitive to a woman when she claims that she was subject to domestic violence, as seen in Graham's case.¹⁰⁰ In these cases, judges are more likely to side with the woman. Although this is a sensitive topic and protecting the mom and child in cases of domestic violence is important, we also have to look into the potential for abuse in the system. When fathers like Thomas are deprived of seeing their children through no fault of their own, there has to be a better way to reach a determination that is fair to both parents and in the best interests of the child as well.

As Thomas points out, much of the bias comes from within the state – either the state in which the child or mother in a national or the state that the abducted child currently resides in.¹⁰¹ This case is another example where creation of a separate UN body dedicated to resolving international child abduction torts would be useful. A neutral body would assumedly be more willing to conduct a fair fact-finding mission into the exceptions claimed under Article 13. At the same time, it would also be helpful if the exceptions in Article 13 were outlined in further detail.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

V. Measuring Success of the Hague Convention: What is the Best Method?

A. *Best Interests of the Child*

The *Neulinger* case held that even if the Hague Convention requires the child to be returned to his or her country of origin, if it is not in the best interests of the child then the child does not need to be returned.¹⁰² The Japan case study took a similar approach.

On its face, this approach seems to uphold the best interests of the child. But it could be dangerous because the standard, as it stands today in the Hague Convention is so discretionary. Two cases with similar facts may not be treated the same. This could also give the abducting parent the incentive to abduct and the left-behind parent may be found on the defense of a custody battle in the abducting parent's home country.

Where will the best interests of the child be upheld? The Convention is a jurisdiction-selection treaty, which means that questions of a child's residence should be made in the country of her habitual residence. The potential reasons for this could be to deter child abduction, reduce forum shopping and protect the best interests that can only be decided in the home country. Although this may be a real concern, it oversimplifies the issues. In a case where there is a real threat of domestic violence or grave risk to the child, clear standards and a competent authority should be available to decipher the claims. If the Hague Convention is modified, a neutral judicial body to resolve disputes will be more adept in determining the best interests of the child. Regardless of the pitfalls of the current system, the best interests of the child standard is the most reliable way to assess whether the Convention is actually fulfilling its purpose.

B. *Rate of Return*

The rate of return measure may seem contradictory to the best interests of the child method when determining success of the Convention. Rate of return, undoubtedly is a more objective method that does not take into account the facts of each case. Each year, more than 1,000 children are abducted from U.S. homes and taken to a foreign country by a parent.¹⁰³ The Sean and David Goldman International Child Abduction Prevention

¹⁰² *Id.*

¹⁰³ Bring Sean Home Foundation, *President Signs Goldman Act into Law*, <http://bringseanhome.org/tag/goldman-act/> (last visited Oct. 2, 2016).

and Return Bill was signed into law on August 8, 2014.¹⁰⁴ As Congress explained in the law's findings: "Only about half of the children abducted from the United States to countries with which the United States enjoys reciprocal obligations under the Hague Abduction Convention are returned to the United States."¹⁰⁵ Furthermore, children in countries that are not parties to the Hague Abduction Convention, presumably have a lower return rate.

While it is helpful to have a frame of reference in terms of numbers, the numbers should not drive good legal analysis and policy. Each case of removal is different; taking a purely numbers approach may lose sight of the human rights and best interests of the child. Therefore, best interests of the child and the upholding of the child's human rights should be the primary measure of success. The rate of return is an important, although less helpful, measure of success.

VI. Effect of Domestic Violence on Child Custody and the Best-Interests Analysis

It is worth noting that both case studies from Europe and Japan involved allegations of domestic violence. How does domestic violence play into the best interests analysis and the *Albright* standard? Domestic violence is a complex problem involving many physical, emotional and financial factors. Starting with the American approach, a majority of states require courts to consider domestic violence in custody decisions in the best-interests analysis.¹⁰⁶ There is a new trend to use evidence of domestic violence as a rebuttable presumption against awarding custody to the abusive parent.¹⁰⁷ Twenty-eight U.S. states consider domestic violence as a factor and 22 states have presumptions against custody awards to an abusive parent.¹⁰⁸

When evaluating a Hague application, the proposed UN body should take the rebuttable presumption approach. If domestic violence is left as

¹⁰⁴ Robert G. Spector & Melissa A. Kucinski, *International Family Law*, 49 ABA/SIL YIR 147 (2015) ("On August 8, 2014, the President signed the Sean and David Goldman International Child Abduction Prevention and Return Act of 2013.").

¹⁰⁵ Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, P.L. 113-150, August 8, 2014, 128 Stat. 1807.

¹⁰⁶ American Bar Association, *Custody Decisions in Cases with Domestic Violence Allegations*, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf (last visited Oct. 2, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

only one factor in an integrated analysis, it may be disregarded altogether or not given appropriate weight. The reality is that abusers are often granted custody in an alarming number of cases.¹⁰⁹ Presumed perpetrators should meet the clear and convincing evidence standard for overcoming the presumption. The North Dakota *Riemers* case illustrates a proper application of the rebuttable presumption approach.¹¹⁰

In *Riemers*, evidence of domestic violence is a specifically enumerated factor for the court to consider in awarding child custody.¹¹¹ The husband failed to prove that his abuse and extreme cruelty towards his wife was overcome by his child's best interest to see him.¹¹² One incident of a pattern of behavior creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. Additionally, the fact that the abused parent suffers from the effects of abuse is not sufficient to deny that parent custody.¹¹³

It is necessary to connect the dialogue of domestic violence in this context to the "necessary protection of any children" under the ICCPR and the preamble of the CRC entitling children the right to grow up in an atmosphere of "happiness, love and understanding."¹¹⁴ If the international community truly wants to protect and uphold these rights, there should be more of an effort to clearly delineate the standards that courts will use to determine the best interests of the child standard, especially when presented with claims of domestic violence.

In a scenario of mutual domestic violence, since domestic violence cuts across many of the *Albright* factors, it may be difficult to determine where the child's best interests lie. This is an important question that merits more research and will not be covered here.

Conclusion

Judge Xue Hanqin posed an important question at the American Society of International Law (ASIL) Annual Meeting in 2014, "What is the

¹⁰⁹ Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 662 (2003).

¹¹⁰ *Peters-Riemers v. Riemers*, 644 N.W.2d 197 (N.D. 2002).

¹¹¹ *Id.* at 204.

¹¹² *Id.*

¹¹³ *Id.* at 205.

¹¹⁴ International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

ultimate goal of international law?”¹¹⁵ Should it be, she continued, to “striv[e] for the beauty of the rules” or “to find the proper solutions for the parties[?]”¹¹⁶ These are particularly relevant questions in the context of child abduction.

The Hague Convention is quite simple in its purpose. It provides for resolutions of child abductions by not rewarding abductions and providing for the return of children to the country of their habitual residence before resolving any child custody or related disputes.¹¹⁷ However, as international lawyers, we must ask ourselves if this is really peaceful resolution of international affairs. When parents who are angry from being torn from their children often with no means of redress file Hague applications, are we evaluating the applications in a standardized and meaningful way? If we can answer yes to this question, then that is wonderful. But if there is some disconnect between the law and the application of the law, hopefully some of the proposals in this paper and serve to close that gap.

With growing numbers of transnational marriages, concerns regarding child abductions will likely increase. Peaceful resolution of international disputes such as child abductions depends on the collaboration and mutual understanding among states. While the child’s country of primary residence may be best equipped to make factual determinations, the potential for bias is great. States should work together with the UN to modify the Hague Convention to set clearer standards on Article 13 exceptions and the “best interests” standards. Furthermore, a neutral UN body comprised of a group of rotating members from various states party to the Hague Convention should convene to hear cases of international child abduction. A reliable framework for appellate review of wrongful removal cases will also be helpful. These two proposals have the potential to be a good faith effort towards the peaceful resolution of international affairs that Judge Xue speaks of.

¹¹⁵ *Proceedings of the Annual Meeting (American Society of International Law)*, 108 THE EFFECTIVENESS OF INTERN’L LAW 385, 391 (2014).

¹¹⁶ *Id.*

¹¹⁷ Hague Convention, *supra* note 1.