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International Child Abduction and Children's Rights: Two Means to the Same End

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INTERNATIONAL CHILD ABDUCTION AND CHILDREN'S RIGHTS: TWO MEANS TO THE SAME END

*Eran Sthoeger**

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INTRODUCTION

An English woman moves from her home in Cyprus back to England, taking her fourteen-year-old daughter from a first marriage, and a six-year-old son from her second (current) marriage with her, without the knowledge of her current husband. The current husband and father of the son then seeks the return of both children back to Cyprus, invoking his rights under the Convention on the Civil Aspects of International Child Abduction (Hague Convention), concluded under the auspices of the Hague Conference on Private International Law.¹ After it becomes evident that the daughter was unhappy in Cyprus and would

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1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

refuse to return, the mother claims that both children must remain with her in England; for if the court rules that her son must be returned to Cyprus, she would be forced to choose between staying with her daughter in England and accompanying her son to Cyprus. This “impossible” situation before the English courts² reflects the tough decisions that judges are routinely faced with when deciding whether a child should be returned to his or her place of habitual residence in cases of international child abductions under the Hague Convention.

Aside from the return, the abduction itself can have devastating effects on the child, not to mention on the left-behind parent.³ The latter may experience emotional hardship, and encounter practical difficulties in finding and retrieving the child.⁴ The removed child, in turn, is often abruptly torn from his or her familiar surroundings and experiences the trauma of being cut off from the left-behind parent.⁵ The child may also witness the ugly legal scuffle between his or her parents, and experience being routinely hidden from the authorities during his or her abduction.⁶

Parents who take their child to a foreign country without the consent of the other parent, thus exposing him or her to such hardships, differ in their characteristics and motives. Still, a couple of generalities can be stated. Statistical analysis suggests, for instance, that most abductions are engineered by the primary caretakers, who are usually the mothers.⁷ Similarly, statistics show that more often than not, the removing parent is “returning home,” and taking the child to the parent’s own country of nationality.⁸

Despite these generalities, abductors vary in their motives. For example, some wish to flee threats and violence, acting in the child’s best interests.⁹ Others resort to kidnapping due to feelings of “homesickness” felt for their home country. Some use abduction in order to inflict pain

2. *In Re C* (Abduction: Grave Risk of Physical or Psychological Harm), [1999] 2 F.L.R. 478 (A.C.) (appeal taken from Eng.).

3. NIGEL LOWE, INTERNATIONAL FORUM ON PARENTAL CHILD ABDUCTION: HAGUE CONVENTION ACTION AGENDA 2 (1999) [hereinafter LOWE, INT’L FORUM REPORT].

4. *Id.*

5. *Id.*

6. *Id.*

7. NIGEL LOWE ET AL., A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 21–23 (2006), Prel. Doc. No. 3, Part I (2007 update) (prepared by Nigel Lowe) [hereinafter LOWE ET AL., STATISTICAL ANALYSIS].

8. *Id.* at 23.

9. See Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT’L J.L. POL’Y & FAM. 191, 192 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 637–39 (2000) [hereinafter Weiner, *Domestic Violence*].

upon their partner.¹⁰ Still others might remove the child as a legal tactic, presuming that an ensuing custody hearing in a different jurisdiction—perhaps a jurisdiction where they have former ties—might work to their advantage.¹¹ Still, some of these removing parents, like many left-behind parents, are simply unaware that an international treaty to combat cross-border child abduction exists at all.¹² Thus, while the possible character and motives of abducting parents are diverse, the effects mentioned above follow from an abduction more often than not.

The Hague Convention aims to deter future abductors and demonstrate mutual respect for the laws of its member states, while presumably serving the best interests of the child.¹³ It operates as a jurisdictional mechanism by reinstating the status quo prior to the removal through the prompt return of the child to his or her place of habitual residence.¹⁴ This return, as clearly stated in the Hague Convention itself, bears no effect on the merits of any existing or future custody dispute between the parents.¹⁵ The Hague Convention demands that contracting states respect past or future decisions pertaining to custody decided in the place of habitual residence.¹⁶ Though the Hague Convention essentially solves matters of private international law (i.e., questions of proper forum and choice of law),¹⁷ domestic courts retain discretion to deny return on several technical and substantive grounds.¹⁸ These exceptions to return, provided for in the Hague Convention, necessitate a limited examination by courts of the relationships among both parents and the abducted child.

10. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 10 (1999) (referring to the “homesickness” of the abducting caretaker as motive for abduction); Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 428 (2006) (referring to the wish to inflict pain and suffering on the abductor’s partner).

11. ANDREW BAINHAM, *CHILDREN: THE MODERN LAW* 750 (3d ed. 2005); see also B.D. INGLIS, *NEW ZEALAND FAMILY LAW IN THE 21ST CENTURY* 536–37 (2007).

12. LOWE, *INT’L FORUM REPORT*, *supra* note 3, at 10.

13. See generally Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in *HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW* (discussing the Acts and Documents of the Fourteenth Session, Vol. III, 1980); BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 539, 543.

14. Hague Convention, *supra* note 1, art. 1; Pérez-Vera, *supra* note 13, ¶¶ 16–17, 19, 24, 35; BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 536–37, 544–47; *Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010).

15. Hague Convention, *supra* note 1, art. 19; *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

16. Hague Convention, *supra* note 1, art. 1; Pérez-Vera, *supra* note 13, ¶¶ 16–17, 19, 24, 35; BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 536–37, 544–47; see also *Abbott*, 130 S. Ct. at 1989.

17. See INGLIS, *supra* note 11, at 539–40.

18. See *infra* Part II.A.4.

In recent years, however, courts—and the majority of scholars writing on the issue—have questioned the narrow framework in which they are obliged to operate when deciding whether to return a child. They have looked at how adjudication proceedings under the Hague Convention coincide with human rights regimes, with a particular focus on the Convention on the Rights of the Child (CRC).¹⁹ As will be discussed, more and more writers have opined that in order to satisfy the obligations of the CRC, courts must expand the narrowly construed exceptions to an order of return.

This Article will examine whether these assertions have merit and whether an adjustment of the Hague Convention and the courts' application of it is required in order for states to comply with their human rights obligations. The starting point for this assessment will be an explanation of the basic premises and content of the Hague Convention and the CRC. Thus, Part I will present the basic contours of these two legal regimes. Part II will then present and analyze several of the arguments claiming that the Hague Convention is at odds with a proper understanding of human rights obligations, particularly as expressed by the CRC.²⁰ It will then counter these arguments, based on an analysis of the interaction between the two international treaties. Part III will discuss the best interests of a distinct category of flesh-and-bone children: those children statistically prone to be abducted in a given year. The discussion of the rights of these children leads to the conclusion reached at the end of Part III, that the Hague Convention's content and application is not at odds with the CRC.²¹

19. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see also* discussion *infra* Part II.

20. Part II.A.4 deals with issues related to gender violence. These issues, by their nature, initially raise questions relating to the abducting mother's rights rather than those of the child. As these issues often give rise to human rights concerns regarding the application of Hague Convention, they will also be analyzed.

21. Before proceeding, it should be noted that this Article is concerned with the normative question of the interaction between two legal regimes as a matter of principle. How any specific case should be decided in its unique factual setting is beyond the scope of this work. The normative framework analyzed in this Article, though, is of course intended to provide guidance for judges and practitioners confronted with real cases and to influence the academic debate on the topic.

I. THE RELEVANT CONVENTIONS: COMMON UNDERSTANDING AND CONTEMPORARY INTERPRETATION

A. *The Hague Convention and Its Application*

The Hague Convention was drafted in 1980 under the auspices of the Hague Conference on Private International Law. It was drafted against the backdrop of the growing phenomenon of interstate child abduction,²² in an age when divorce is increasingly more common and the ease of interstate travel has lifted many impediments to interstate marriages.²³ The drafters of the Hague Convention sought to deal with this reality by creating a mechanism for cooperation between the judicial and administrative branches of the parties to the Convention, in order to promote the swift return of children taken from—or unreturned to—their place of habitual residence. This mechanism recognizes past decisions in foreign jurisdictions and allows for future decisions of local authorities in those jurisdictions regarding the custody and future of abducted children.²⁴ This mechanism demonstrates mutual respect for the laws of the member states, and endeavors to deter those parents who may otherwise attempt to take the law into their own hands.²⁵ Currently, eighty-two states are parties to the Hague Convention, making it a relatively effective international treaty.²⁶

Article 3 determines the scope of application of the Hague Convention:

The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention²⁷

The article states that when a child is taken and not returned to his or her place of habitual residence (i.e., abducted in violation of the custody rights of the other parent as set out by the courts in the state of

22. Pérez-Vera, *supra* note 13, ¶ 24; LOWE, INT'L FORUM REPORT, *supra* note 3, at 2.

23. LOWE, INT'L FORUM REPORT, *supra* note 3, at 2.

24. Hague Convention, *supra* note 1, art. 1; Pérez-Vera, *supra* note 13, at ¶¶ 16–17, 19, 24, 35; BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 536–37, 544–47; *see also* Abbott v. Abbott, 130 S. Ct. 1983, 1989 (2010).

25. Pérez-Vera, *supra* note 13, ¶¶ 13–15, 18, 19; BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 539, 544.

26. Hague Convention, *supra* note 1, Status Tbl. (last updated Apr. 6, 2010).

27. *Id.* art. 3.

residence), the forum is obligated to order the child's return to the place from where he or she was removed, without delay.

A child is deeply affected by being removed from his or her habitual residence and taken to another location imposed on him or her by the abducting parent.²⁸ Although the best interests of the child are not found explicitly in the operative clauses of the Hague Convention, the preamble states that it seeks "to protect children internationally from the harmful effects of their wrongful removal or retention" and that the parties are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody."²⁹ As Elisa Pérez-Vera concludes, "[i]t is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child.'"³⁰

As such, one of the basic principles underlying the Hague Convention is the swiftness of the child's return in order to minimize the impact of the abduction on the child.³¹ The Hague Convention implies that return proceedings should not extend longer than six weeks.³² For this reason, a court tasked with a request for return under the Hague Convention must only consider, in a prompt and expedited manner, the most "essential issues" and facts it needs reach a decision on the request for return of the child.³³

For the Hague Convention to operate properly, each party must establish a "Central Authority," responsible for the cooperation needed to secure the objects and purposes of the Hague Convention in its state.³⁴ Among its specific functions, the Central Authority in the child's place of habitual residence or in any other contracting state, accepts and processes applications from parents alleging the abduction of their child.³⁵ The Central Authority then initiates proceedings for the return of the child to his or her place of habitual residence.³⁶ A parent alleging abduction of his or her child still maintains the right to bypass the Central Authority and pursue the return of the child by his or her own means.

28. Pérez-Vera, *supra* note 13, ¶ 24.

29. Hague Convention, *supra* note 1, pmb.; Pérez-Vera, *supra* note 13, ¶ 23.

30. Pérez-Vera, *supra* note 13, ¶ 25.

31. Hague Convention, *supra* note 1, art. 2; Pérez-Vera, *supra* note 13, ¶ 36; INGLIS, *supra* note 11, at 537–39; LOWE, INT'L FORUM REPORT, *supra* note 3, at 6.

32. Hague Convention, *supra* note 1, art. 11; INGLIS, *supra* note 11, at 537.

33. INGLIS, *supra* note 11, at 539, 542.

34. Hague Convention, *supra* note 1, ch. II; Pérez-Vera, *supra* note 13, ¶ 90; INGLIS, *supra* note 11, at 538.

35. Hague Convention, *supra* note 1, art. 8.

36. *See id.* art. 7(f).

There are a number of exceptions to the general rule that abducted children must be returned that take into account the best interests of the abducted child.³⁷ If established, these exceptions grant the forum discretion—though not a duty—not to return the child to his or her place of residence.³⁸ The relevant exemptions are found in Articles 12, 13, and 20 of the Hague Convention. Article 12 reads as follows:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.³⁹

This article stipulates that in proceedings commenced within a year of the wrongful removal, the child is to be returned without discretion (unless another exception to return exists). However, when more than a year has elapsed, the court has discretion to override the presumption of return if it finds that the child is settled in his or her new environment. Thus, the Hague Convention recognizes that there comes a point in time when a child should not be removed from his or her surroundings for the second time, regardless of the wrongfulness of the initial abduction.⁴⁰

The most common exceptions to return are argued in accordance with Article 13 of the Hague Convention⁴¹:

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

37. Pérez-Vera, *supra* note 13 ¶ 25.

38. *Id.* ¶ 113.

39. Hague Convention, *supra* note 1, art. 12.

40. BAINHAM, *supra* note 11, at 760; INGLIS, *supra* note 11, at 598.

41. LOWE ET AL., *STATISTICAL ANALYSIS*, *supra* note 7, at 37.

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.⁴²

The meaning of a “grave risk” and the issue of a child’s objection to return will be thoroughly discussed later.

Finally, Article 20 refers directly to denial of return where matters of human rights—as recognized in the domestic legal system of the requested state—are concerned.⁴³ As explained by Elisa Pérez-Vera, the discretion to refuse return under this exception—again, not the duty to do so—if it would violate international human rights, pertains only to those rights that have been incorporated and internalized into the domestic legal system of the requested state.⁴⁴ Consequently, this article does not provide a basis to deny return on the conclusion that such a return is at odds with locally unincorporated international human rights norms.⁴⁵

It is widely accepted by national courts applying the Hague Convention that its objects and purposes necessitate a narrow interpretation of these exceptions.⁴⁶ This ensures an internationally consistent interpretation of the Hague Convention, which will help achieve its goals.⁴⁷ For this reason, courts in member states commonly take the approach that

42. Hague Convention, *supra* note 1, art. 13.

43. *Id.* art. 20.

44. Pérez-Vera, *supra* note 13, at 462, ¶ 118.

45. *Id.*

46. See *id.* at 434–35, ¶ 34; BAINHAM, *supra* note 11, at 750; INGLIS, *supra* note 11, at 538, 545, 579; see also *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); *In re C (Abduction: Grave Risk of Psychological Harm)*, [1999] 1 F.L.R. 1145 (A.C.) (Eng.).

47. Pérez-Vera, *supra* note 13, ¶ 34. In the words of Pérez-Vera:

The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child’s habitual residence—are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

Id.

only in unusual circumstances will the best interests of the child dictate a finding that the child should not be returned.⁴⁸ For example, not all dangers posed to the child in the place of habitual residence will lead courts to conclude that return is unwarranted; rather, a very high threshold of danger must be reached before finding that a child should not be returned.⁴⁹ Similarly, courts will place the burden of proof to establish an exemption from return on the abducting parent. Thus, the burden is on the parent who, in the eyes of the court, is attempting to enjoy the fruits of violating the custody laws of the child's state of habitual residence.⁵⁰

B. *The Convention on the Rights of the Child*

Approximately ten years after the conclusion of the Hague Convention, the CRC was finalized under United Nations auspices.⁵¹ The CRC is the first universal human rights treaty drafted to enhance and protect the rights of children.⁵² The CRC was opened for signature on January 26, 1990 and entered into force less than a year later, on September 2, 1990. To date, it is the most ratified human rights treaty, with 193 state parties.⁵³ Interestingly, the United States is not a party to the CRC, though it still adheres to the substantive principles relevant to the issue at hand, including the best interests principle.⁵⁴

As the preamble of the CRC demonstrates, the convention recognizes that the child is entitled to special care and assistance, while also enjoying other human rights enjoyed by all people.⁵⁵ It is a manifestation of the transition from a paternalistic view of the child as an "object" of law, to a perception of the child as a "subject" of independent rights, capable of forming, expressing, and at times even asserting his or her own

48. *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [34] (appeal taken from Eng.); *In re S. (A Minor) (Abduction: Custody Rights)*, [1993] Fam. 242, 251–52 (A.C.) (Eng.).

49. *Friedrich*, 78 F.3d at 1069; *In re C.*, [1999] 1 F.L.R. 1145; CA 2338/09 Plonit v. Ploni, ¶ 26 (June 3, 2009) (Isr.), available at <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf>; CA 7206/93 Gabai v. Gabai 51(2) PD 241, 250–53 [1997] (Isr.); BAINHAM, *supra* note 11, at 758.

50. Pérez-Vera, *supra* note 13, at 460, ¶ 114; see, e.g., CA 2338/09 Plonit v. Ploni, ¶ 26; CA 7206/93 Gabai v. Gabai 51(2) PD 241, 250–53 [1997] (Isr.).

51. See CRC, *supra* note 19.

52. TREVOR BUCK, INTERNATIONAL CHILD LAW 47 (2005).

53. See U.N. Treaty Collection, Status of the Convention on the Rights of the Child, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en (last visited Feb. 23, 2011).

54. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE, 10–12 (2006), available at <http://www.afccnet.org/pdfs/BenchGuide.pdf> (discussing the task of American Judges in determining the best interests of the child).

55. CRC, *supra* note 19, pmb1.; Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 400 (2002).

views and rights.⁵⁶ Based on this notion, the CRC is focused on four basic principles: the principle of equality and non-discrimination (Article 2); the principle of the child's best interests (Article 3); the principle of life, survival, and development (Article 6); and the principle of participation and respect for the views of the child (Article 12).⁵⁷

A number of articles of the CRC are of particular interest. Article 3 establishes a child's right for his or her best interests be taken into account in all proceedings relevant to him or her:

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures⁵⁸

Article 9 guarantees a child's right to family life, including a bar on separating the child from his or her parents:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

56. BUCK, *supra* note 52; LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS xvi (1995); Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 9–10 (Jonathan Todres, Mark E. Wojcik, Cris R. Revaz, eds., 2006) (“[C]hildren are to be recognized as individuals with their own voice.”).

57. Comm. Rts. Child, General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1(b), of the Convention 4–5, U.N. Doc. CRC/C/58/Rev.1 (Nov. 29, 2005); BUCK, *supra* note 52, at 58–61; SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 92 (1999).

58. CRC, *supra* note 19, art. 3.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.⁵⁹

Relatedly, Article 7 of the CRC obliges state parties to ensure that the child enjoys, "as far as possible, the right to know and be cared for by his or her parents."⁶⁰

Article 12 contains the child's right to participate and voice his or her own views in matters relating to him or her, particularly in legal proceedings:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁶¹

Finally, Articles 11 and 35 of the CRC urge states to adopt, or accede to existing, international agreements that combat the illicit transfer and abduction of children from one country to another, for any purpose:

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.⁶²

In this context it is worth mentioning that the Hague Convention was the principal international treaty on child abduction known to the negotiating parties who were drafting Articles 11 and 35.⁶³ Nevertheless,

59. *Id.* art. 9.

60. *Id.* art. 7.

61. *Id.* art. 12.

62. *Id.* art. 11; *see also id.* art 35.

63. DETRICK, *supra* note 57, at 207–10.

the fact that the CRC recognizes the need for arrangements such as those set out in the Hague Convention does not necessarily imply that the latter is in harmony with the former, in letter or in practice.

II. THE HAGUE CONVENTION—A NEED FOR CHANGE?

This Part will put forward various opinions as to whether the Hague Convention and CRC are in harmony or conflict with each other. Some scholars are of the opinion that conflicting human rights norms (chiefly those outlined in the CRC, but others pertaining to gender-related abuse as well) must lead to the re-evaluation of the traditional application of the Hague Convention. After laying out the claims made against the traditional application of the Hague Convention, the last Sections of this Part will question whether the Hague Convention is at all in conflict with human rights regimes.

Among courts and legal scholars, there are differing views on the ways human rights impact international child abduction cases. Human rights norms are often used as a legal basis to deny the return of children. Some courts, though, have refused to engage with certain human rights questions altogether on procedural grounds.⁶⁴ A different stance adopted by some courts maintains that the Hague Convention is merely a procedural mechanism, and therefore issues like the best interests of the child are irrelevant to decisions on return. Instead, these are issues of substance that are to be determined in the child's place of habitual residence.⁶⁵ In this view, no conflict exists between human rights and the Hague Convention because the Convention is applied in a "human rights vacuum" as strictly a matter of procedure.

Contrary to this view, it has been asserted, correctly to my mind, that this interpretation is in direct conflict with the clear wording of Article 3 of the CRC, which obligates state courts to consider the best interests of the child "in all actions concerning children" undertaken in courts of law.⁶⁶ Nothing would imply that the Hague Convention is an exception to the obligation provided for in Article 3, as a matter of *lex specialis* or otherwise.⁶⁷

64. *E.g.*, *S v. B (Abduction: Human Rights)*, [2005] EWHC (Fam) 733, [53]–[56], [2005] 2 Fam. 878, (Eng.).

65. *See, e.g.*, *Murray v. Dir., Family Servs.*, (1993) 116 F.L.R. 321, 339–40 (Austl.); *see also* CA 5332/93 D.G. v. E.G. 49(3) PD 282, ¶ 17, *translated in* INT'L CHILD ABDUCTION DATABASE (INCADAT), <http://www.hcch.net/incadat/fullcase/0355.htm> (last visited Feb. 23, 2011).

66. CRC, *supra* note 19, art. 3(1); Schuz, *supra* note 55, at 436.

67. The premise of both those who argue that the Hague Convention and its application infringes on human rights, and those who claim the opposite, is that both bodies of law bind

Other courts address the interplay between human rights and the Hague Convention directly, concluding that the policy considerations that lay behind the Hague Convention prevail over the human rights questions, even as the latter continue to bind the court.⁶⁸ Some have opined that because serving the best interests of the child is only one of the purposes of the Hague Convention, and its effectiveness relies on the

the courts of a state which is party to the CRC and the Hague Convention, when they adjudicate an application for return from another Hague Convention member state's Central Authority or national. Yet, one might advance the argument that the Hague Convention is *lex specialis* when it applies, rendering the *lex generalis* in the CRC inapplicable, and thus irrelevant to the return procedures under international law. This argument is without merit. In our case, the question of conflict between the two bodies of law is the matter in dispute. In such a situation, the customary methods of interpretation instruct us to harmonize the two bodies of law to the furthest extent possible. See Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331; Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n, 58th Sess., May 1–June 9 and July 3–Aug. 11, 2006, ¶ 14(17)–(21), U.N. Doc. A/CN.4/L.702 (July 18, 2006) [hereinafter Report of the Study Group of the International Law Commission].

Viewing the Hague Convention as *lex specialis* does not mean that the CRC ceases to apply to proceedings affecting children. Simply stating that the Hague Convention is a sort of *lex specialis* does not obviate the need for reconciliation between the Hague Convention and the CRC. See Report of the Study Group of the International Law Commission, *supra*, ¶ 14(4)–(9). Moreover, the legal frameworks of both bodies of law suggest that neither intends to exclude the other. Not only is the promotion of the child's best interests, as discussed above, one of the objectives of the Hague Convention, but the experts of the parties to the Hague Conference on Private International Law clearly opined "that the best interest of the child lay at the heart of both Conventions." Hague Conference on Private Int'l Law, Oct. 30–Nov. 9, 2006, Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, ¶¶ 162–167 (Mar. 2007) [hereinafter Report on the Fifth Meeting], available at http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf (rejecting as unnecessary a proposal by Switzerland to expand the Hague Convention's exceptions in order to better serve, in its opinion, the best interests of the child). On the other hand, the drafters of the CRC made clear that the best interests of the child must be taken into account in "all actions concerning children." CRC, *supra* note 19, art. 3(1). Being fully aware of the operation of the Hague Convention, they could have chosen to treat child abductions as *lex specialis*, and exclude them from the application of the CRC generally, or Article 3 in particular, but refrained from doing so.

Finally, it should be noted that when states are obliged to comply with both the Hague Convention and the CRC, and questions of competing norms and their harmonization arise before judicial or quasi-judicial bodies created under one of the international regimes, these bodies may be inclined to ignore applicable norms from the competing regime, or give more weight to the norms of its own regime. See Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 *NORDIC J. INT'L L.* 27, 33 (2005); see also Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 *MICH. J. INT'L L.* 849, 857 (2004). National courts however, are not part of any regime and are in an optimal position to reconcile fairly between the two bodies of law.

68. *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [42] (appeal taken from Eng.).

fast return of children to their place of habitual residence, the child's best interests—though still a primary consideration—can only be considered in a limited fashion.⁶⁹ Courts further point to Articles 11 and 35 of the CRC itself, which call on states to enter international agreements pertaining to the illicit transfer and abduction of children across borders.⁷⁰ As previously mentioned, many see this as a mechanism that ensures respect for children's rights at large, even at the expense of the welfare of a specific child in a given case.⁷¹

But is this enough? If the child's best interests must be taken into account in every court proceeding, can a notion of the general welfare of children suffice to say that the Hague Convention is reconciled with the CRC and other human rights treaties? Interpreters of the CRC have indeed found that the phrase "all actions concerning children" is meant to apply broadly, not only to matters pertaining to a specific child, but also to policy level decisions affecting children at large.⁷² Yet, all of these interpretations take as a given that Article 3(1) entails, at its core, an individual dimension, and the best interests of the specific child must be taken into account in any legal proceeding affecting that child.⁷³ For this reason, it is correct to assert that the principle of the best interests of the child has an individual aspect to it, aimed at protecting the interests of a specific child in a court of law.⁷⁴ Indeed, representatives of the member states to the Hague Conference on Private International Law have recognized the relevance of the child's best interests when deliberating a return.⁷⁵ Therefore, if courts fail to consider the best interests of the particular child as a primary consideration, they will fail to meet their state's obligations under Article 3(1) of the CRC.⁷⁶

69. CA 2338/09 Plonit v. Ploni, ¶ 26 (June 3, 2009) (Isr.), available at <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf>.

70. E.g., *Murray*, 116 F.L.R. at 339 (Austl.).

71. CA 2338/09 Plonit v. Ploni, ¶ 27; BAINHAM, *supra* note 11, at 750; Kaye, *supra* note 9, at 195; Jude Reddaway & Heather Keating, *Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four Through the Principles of the Hague Convention?*, 5 INT'L J. CHILD. RTS. 77, 94, 96 (1997).

72. Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 1, 14 (Philip Alston ed., 1994); DETRICK, *supra* note 57, at 90; Michael Freeman, *Article 3: The Best Interests of the Child*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1, 46 (André Alen et al. eds., 2007); Elisabeth A. Mason, *The Best Interests of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 121, 122 (Jonathan Todres, Mark E. Wojcik, & Cris R. Revaz eds., 2006). The phrase itself is found in CRC, *supra* note 19, art. 3(1).

73. See, e.g., Alston, *supra* note 72, at 21.

74. See Schuz, *supra* note 55, at 436–37.

75. Report on the Fifth Meeting, *supra* note 67.

76. Schuz, *supra* note 55, at 436.

A. The Hague Convention's Incompatibility with Human Rights

1. The Best Interests of the Child

Based on this understanding of the best interests of the child, some claim that the application of the Hague Convention violates the best interests of the child requirement enumerated in the CRC. It has been asserted that courts applying the Hague Convention "have consistently refused to consider the argument that returning the child is not in accordance with his or her best interests and on occasion returned children with the knowledge that that return is not in accordance with their best interests."⁷⁷ As the argument goes, courts do this in light of the implicit recognition of the Hague Convention found in Articles 11 and 35 of the CRC.⁷⁸ Opponents of this approach contend that the recognition of the need to fight child abduction does not indicate that the Hague Convention is necessarily in line with the CRC, nor that the important objects of the Hague Convention should absolutely override the rights of the child.⁷⁹

Moreover, it is argued that, while return under the Hague Convention is not aimed at deciding custody, a return may nevertheless impact the final custody battle over the child, as the court deciding custody may consider the need for stability in the child's life and opt to leave him or her in the care of the local parent.⁸⁰ In addition, the return itself might affect the welfare of the child in a way that cannot be remedied by the court deciding the custody issue later in time.⁸¹

According to Ronna Schuz, the underlying assumption of the Hague Convention that the interests of the child are best protected in his or her place of habitual residence is not universally correct.⁸² She contends that the premise is valid only so long as courts in the place of residence respect the best interests of the child subsequently,⁸³ and, secondly, only when the place of the child's residence is the *forum conveniens* to hear the case.⁸⁴ Moreover, she asserts that even if the premise is true, it does not necessarily follow that it is in the best interests of the child to

77. *Id.* at 435; see also Report on the Fifth Meeting, *supra* note 67, ¶ 162.

78. CRC, *supra* note 19, arts. 11, 35; Schuz, *supra* note 55, at 437.

79. Schuz, *supra* note 55, at 437.

80. *Id.*

81. *Id.*

82. *Id.* at 437–38.

83. See John Caldwell, *Child Abduction Cases: Evaluating Risks to the Child and the Convention*, 23 N.Z.U. L. REV. 161, 176 (2008), and the view taken by the New Zealand Court of Appeal in *A v. A*, [1996] NZFLR 529 (CA), 17–18, where it was found that a "grave risk" will generally not exist when returning to a state that treats the best interests of the child as a paramount consideration.

84. Schuz, *supra* note 55, at 438.

actually reside in the place of residence pending the final settlement of custody rights.⁸⁵

Another contested underlying assumption of the Hague Convention is that a prompt return serves the best interests of the child.⁸⁶ With respect to this assumption, Schuz argues that the exemptions from return are so narrowly construed that they do not encompass all of the situations where a return might run contrary to the best interests of that child.⁸⁷ Moreover, as argued above, the general rationale of deterrence and the interests of children as a whole cannot suffice to justify a return that goes against the best interests of a specific abducted child standing before the court.⁸⁸

Schuz offers what she terms as an “alternative reconciliation” method of interpreting the two bodies of law. Under this scheme, a court must interpret the exceptions to return—especially the “grave risk” exception—in such a way that it will deny return when the return cannot be reconciled with the obligation to consider the best interests of the child as a primary consideration.⁸⁹ The argument relies on the contention that the drafters of the Hague Convention originally envisioned situations where a father abducts the child from the hands of the mother, the primary caretaker of the child.⁹⁰ But in today’s reality, where it is frequently the mother and primary caretaker who abducts the child, a return would not restore the status quo but rather create an entirely different situation for the child. This reality makes it more difficult to find that a return to the hands of the non-primary caretaker father—even if only temporary—coincides with weighing the best interests of the child as a primary consideration.⁹¹ Further, as some argue, the drafters did not intend for courts to return children where this decision would jeopardize their safety, or where the mother is fleeing domestic violence.⁹² In such situations, Schuz is of the opinion that courts have ruled to return a child solely in order to avoid undermining the Hague Convention. She and others believe this to be too narrow a reading of the objects and purposes of the Hague Convention.⁹³

Indeed, in recent years, judges applying different jurisprudences have expressed concern regarding the so-called outdated assumptions

85. *Id.*

86. *Id.* at 439.

87. *Id.*

88. *Id.*

89. *Id.* at 441.

90. *Id.* at 442; Weiner, *Domestic Violence*, *supra* note 9, at 608–09.

91. Schuz, *supra* note 55, at 438; *see also* Caldwell, *supra* note 83, at 164–65.

92. *See* Caldwell, *supra* note 83, at 164.

93. Schuz, *supra* note 55, at 446. Schuz also doubts whether the use of undertakings by courts is an effective remedy to maintain the welfare of the child upon return. *Id.* at 447–48.

underlying the Hague Convention.⁹⁴ These concerns triggered the Swiss delegation to the Hague Conference on Private International Law to suggest an amendment to the Hague Convention. The delegation suggested that the Hague Convention should deny return where the primary caretaker abducted a child, the caretaker cannot be reasonably asked to return with the child to the place of habitual residence, and placing the child back with the left-behind parent or in foster care in the place of residence would not be in the child's best interests.⁹⁵ The reasoning behind the failed Swiss proposal was that the current construction of the grave risk exception is too narrow, and courts should expand the notion of an intolerable situation found in Article 13(b) in order to deny return in a broader range of cases.⁹⁶

The arguments regarding domestic violence are elaborated below, yet it is worth mentioning here that these are usually accompanied by claims regarding the psychological dangers for children exposed to spousal abuse. These children are at a higher risk to develop emotional problems, including fear, insecurity, anxiety, low self-esteem, and guilt, which may lead to drug abuse or violent behavioral tendencies.⁹⁷ They may also suffer from impaired cognitive and motor development and delayed verbal development.⁹⁸

Thus, with respect to the best interests of the child, a child should not be returned when the return will not promote his or her best interests, nor provide any real benefit to the child. These arguments ultimately call for a broader interpretation of the grave risk exception by courts applying the Hague Convention, or for an amendment or protocol to the Hague Convention, in order to reconcile the two legal regimes.⁹⁹

2. The Right to Family Life

In addition to violating the best interests of the child, some claim that the application of the Hague Convention violates the right to family life enumerated in the CRC. As explained in Part I, a court can decide not to return a child where it has been shown that the left-behind parent

94. Caldwell, *supra* note 83, at 163–65.

95. Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 339–44 (2008) [hereinafter Weiner, *Intolerable Situations*]. The proposal was rejected by the Fifth Session and incorporated into Swiss law. See Report on the Fifth Meeting, *supra* note 67, ¶ 163.

96. Weiner, *Intolerable Situations*, *supra* note 95, at 341–43.

97. Wills, *supra* note 10, at 453–54; see also Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 690 (2001).

98. Nelson, *supra* note 97, at 690.

99. Caldwell, *supra* note 83, at 169–73; Schuz, *supra* note 55, at 451.

has consented to or acquiesced in the wrongful removal.¹⁰⁰ Nevertheless, the wording of this exception, and subsequent judicial decisions interpreting it, do not consider the right of the child to maintain direct contact with both parents.¹⁰¹ In other cases, such as when a child is removed by a parent to his or her place of habitual residence from another country (and hence, no return can be ordered as the child is already in his or her place of residence), Schuz claims that that forum cannot always ensure the child's right to maintain regular contact with both parents. The access provisions found in the Hague Convention would not suffice to ensure contact either.¹⁰²

3. The Right to Be Heard

Another right claimed to be affected by the Hague Convention is the child's right to be heard, which is protected under the CRC. It is argued that Article 13, which allows courts to deny return under certain circumstances when a child objects to such return,¹⁰³ leaves it to the parent who objects to the return to articulate the child's wishes, while the court need not consider the wishes of the child on its own initiative.¹⁰⁴ The right of the child to be heard should allow, in theory, for a child to initiate proceedings for return to his or her place of residence, even when no such application was made by the left-behind parent.¹⁰⁵ It is even argued that to deem a removal wrongful under the Hague Convention when the child has not objected to it, can itself be considered a violation of the child's right to be heard.¹⁰⁶

As for the methods of obtaining the child's views, courts tend to do so through a welfare officer or psychologist working on behalf of the court, or through the parents. This, some say, does not suffice to truly represent the child before the court.¹⁰⁷ The tendency not to hear the child after the submission of an expert opinion to the court, since such a hearing would be moot, is claimed to abuse the child's rights as well. This is because the court should judge for itself the true opinion and the level of maturity of the child regarding the issue of return.¹⁰⁸

Though hearing the child directly is the desirable choice,¹⁰⁹ some claim that courts should appoint a child representative in cases when

100. Hague Convention, *supra* note 1, art. 13.

101. Schuz, *supra* note 55, at 413–14.

102. *Id.* at 414–15.

103. Hague Convention, *supra* note 1, art. 13, para. 3.

104. Schuz, *supra* note 55, at 418–19.

105. *Id.* at 420–21.

106. *Id.* at 418.

107. *Id.* at 421; *see also* Weiner, *Intolerable Situations*, *supra* note 95.

108. Schuz, *supra* note 55, at 421–24.

109. *Id.* at 432.

there is evidence that the child objects to return, when the child requests to return even though the parents did not file such a request themselves, or when questions arise regarding the determination of the place of residence, the existence of grave risk, or the parent's consent or acquiescence.¹¹⁰ In the complexities of Hague Convention cases, it is argued that child representatives will prove crucial in assessing the best interests of the child, in addition to his or her views on return and other rights.¹¹¹ Nevertheless, separate representation for the child is far less common than warranted, and thus, according to this view, in violation of the right to be heard.¹¹² In response, newly enacted Swiss law provides for children's counsel in all applications under the Hague Convention, due mainly to the fact that a child's interests are not always represented by his or her parents.¹¹³ As Merle H. Weiner points out, though appointment of an independent counsel might prolong court proceedings, this is preferable to the court expeditiously reaching the wrong decision.¹¹⁴

Moreover, some contend that a court should allow a child to express his or her views, even if they will not influence its decision, because it is beneficial to involve the child in the proceedings and facilitate his or her acceptance of the judgment.¹¹⁵ Though in some return cases, it could be argued that the child should be spared from court proceedings for his or her own benefit. Schuz claims that this line of thought should not be exaggerated, as the court can always adjust procedures for the benefit of the child's well-being, thus letting him or her fulfill the right to be heard.¹¹⁶

As for the weight to be given to a child's objections, the court has wide discretion under Article 13 of the Hague Convention to take into account the age and maturity of the child.¹¹⁷ In order to abide by Article 12 of the CRC, it is argued, courts should not take a stringent approach when assessing the weight to be given to a child's opinions on return.¹¹⁸ Thus, in cases where the child has expressed a strong view against return to the place of residence, his or her wishes should be respected, even

110. INGLIS, *supra* note 11, at 608–09; *see also* Elizabeth Pitman, *Making the Interests of the Child Paramount: Representation for Children in the Hague Convention on the Civil Aspects of International Child Abduction*, 17 *CARDOZO J. INT'L & COMP. L.* 515, 532–36 (2009) (describing the necessity of legal guardians in grave risk of harm cases adopting the “best interests of the child” standard); Schuz, *supra* note 55, at 431–32.

111. *See* Pitman, *supra* note 110, at 532–36.

112. *See* Schuz, *supra* note 55, at 432–33.

113. Weiner, *Intolerable Situations*, *supra* note 95, at 376, 382–83.

114. *See id.* at 398–99.

115. *See, e.g.*, PATRICK PARKINSON & JUDY CASHMORE, *THE VOICE OF A CHILD IN FAMILY LAW DISPUTES* 191, 212 (2008); Schuz, *supra* note 55, at 423.

116. Schuz, *supra* note 55, at 423–24.

117. CRC, *supra* note 19, art. 13.

118. Schuz, *supra* note 55, at 425–28.

when they conflict with the objects of the Hague Convention, or even his or her best interests.¹¹⁹

4. Domestic Violence and Gender Issues

Some have tried to demonstrate the problematic application of the Hague Convention with respect to matters of gender and domestic violence.¹²⁰ Thus, though domestic violence and gender related issues are not directly related to the CRC, this issue frequently comes up in proceedings under the Hague Convention. Miranda Kaye, for example, argues that as courts feel obliged to construe the exceptions to return narrowly, they are unsympathetic to the plea of a female abductor who alleges abuse and refuses to return with the child to his or her place of residence.¹²¹ At other times, courts will deem the mother's situation irrelevant to the issue of return.¹²² The mother in these cases, Kaye notes, will usually claim that returning the child without her will put the child at grave psychological risk, yet courts often reject the claim in laconic ways, reasoning that the mother is trying to achieve her goals by manipulating the law.¹²³ This attitude forces mothers to return with their children to the place of habitual residence, thus exposing the abused mother to further dangers.¹²⁴ Doing so, however, may also be considered a violation of the mother's right to security of person¹²⁵ and her right not to be subjected to cruel or inhuman treatment.¹²⁶ Courts would be well advised to make the connection between a mother's physical and psychological state and her ability to function as the child's caretaker.¹²⁷

To counter concerns that a mother or child will be endangered upon return to the country of an abusing father, Kaye contends that courts resort to ineffective undertakings (obligations on the part of the father to comply with the court's orders outside of the court's jurisdiction) or assume—without any real basis—that adequate legal mechanisms exist to protect their safety.¹²⁸ Furthermore, courts have belittled the impact that witnessing domestic violence perpetrated against the mother by the

119. *Id.* at 428.

120. Kaye, *supra* note 9; *see also* Caldwell, *supra* note 83, at 179–80 (arguing that New Zealand courts have recently started to consider Kaye's arguments).

121. Kaye, *supra* note 9, at 197.

122. Weiner, *Domestic Violence*, *supra* note 9, at 654–56.

123. Kaye, *supra* note 9, at 197–98.

124. Weiner, *Domestic Violence*, *supra* note 9, at 630.

125. *See* International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171.

126. *Id.* art. 7.

127. *See* Pollastro v. Pollastro, [1999] 118 O.A.C. 169, ¶ 34 (Can.); Weiner, *Domestic Violence*, *supra* note 9, at 652–53.

128. Kaye, *supra* note 9, at 198–202; Weiner, *Domestic Violence*, *supra* note 9, at 657, 678.

father may have on their mutual child, failing to find that such violence is grounds for denial of returning the child to the custody of his or her father.¹²⁹ Finally, Kaye claims that courts tend to “normalize” violence against women.¹³⁰ Instead of taking an active stance against what, in Kaye’s opinion, is becoming common abusive behavior, courts assert that denying return because the mother will be exposed to physical violence will drive a “coach and four” through the Hague Convention.¹³¹ All of these patterns demonstrate a lack of adequate consideration and action by courts interpreting the Hague Convention in the context of violence inflicted against mothers and their children.¹³²

Weiner thus concludes that a new exception to return should be added to the Hague Convention, to be applied when a parent is fleeing domestic violence.¹³³ According to this line of reasoning, broadening the scope of cases where return will not be ordered will not undermine the objects and purposes of the Hague Convention, as courts have already internalized the notion that a full-scale inquiry into the welfare of the child is unwarranted at that point in time.¹³⁴

It is noteworthy that recently, some courts have begun to take the arguments laid out in this Section into account in their judgments in abduction cases, reflecting a so-called shift to a “child-centered” paradigm.¹³⁵ For example, in *DP v. Commonwealth Central Authority*,¹³⁶ while interpreting a domestic regulation implementing a “grave risk” exception with language identical to the Hague Convention, the Australian High Court stressed a shift away from a narrow interpretation of the term:

There is, in these circumstances, no evident choice to be made between a “narrow” and “broad” construction of the regulation. If that is what is meant by saying that it is to be given a “narrow

129. Kaye, *supra* note 9, at 203; Nelson, *supra* note 97, at 688–89.

130. Kaye, *supra* note 9, at 203–05.

131. *Id.*

132. *Id.* at 205; *see also* Caldwell, *supra* note 83, at 179; Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 *TEX. INT’L L.J.* 41, 46 (2003) [hereinafter Silberman, *Patching Up*].

133. Weiner, *Domestic Violence*, *supra* note 9, at 694–703.

134. Schuz, *supra* note 55, at 425–26.

135. *See* Caldwell, *supra* note 83 (discussing the jurisprudence of the Commonwealth courts).

136. *DP v. Commonwealth Cent. Auth.*, (2001) 206 CLR 401 (Austl.).

construction” it must be rejected. The exception is to be given the meaning its words require.¹³⁷

Another example relates to the sufficient provision of evidence in abduction cases. Notwithstanding the need for prompt return, the Australian High Court has emphasized the need for a “thorough examination on adequate evidence of the issues arising on wrongful removal applications under the Regulations.”¹³⁸ In another case, the Court stated that “[p]rompt listing for hearing is one thing; an over-hasty and insufficient hearing is another.”¹³⁹ Finally, in *Walsh v. Walsh*, the United States Court of Appeals for the Fifth Circuit concluded that spousal abuse, even when no acts of violence were committed against the abducted child, amounts to a grave risk to the child under Article 13 of the Hague Convention.¹⁴⁰ This last understanding of the grave risk exception was cited as a possible valid interpretation by the United States Supreme Court in an *obiter dictum*.¹⁴¹

John Caldwell is therefore correct to take notice of the words of the United States Court of Appeals for the Eleventh Circuit stating that the Hague Convention “place[s] a higher premium on children’s safety than on their return.”¹⁴² This quote demonstrates a possible shift in the way courts in the near future will interpret the Hague Convention in light of substantive human rights considerations. Thus, an assessment of the validity of these human rights based arguments is of significant practical importance.

B. Consolidating the Two Legal Instruments: Is There Really a Conflict?

In the following Section, two arguments will be put forward to counter the claim that the Hague Convention and its traditional application violate human rights norms. The first argument is that the best interests of the child are relevant only to a limited extent under the Hague Convention, and thus understood, the child’s rights are not violated by the latter. The second argument directly questions the soundness of the human rights analysis presented in the previous Section.

137. *Id.* ¶ 44. Two other justices expressed their agreements with this interpretation of the exception to return. *Id.* ¶ 9 (Gleeson, C.J., concurring); *Id.* ¶ 191 (Callinan, J., concurring). See also Caldwell, *supra* note 83, at 172–73.

138. *MW v. Dir.-Gen., Dep’t of Cmty. Servs.*, (2008) 244 A.L.R. 205, ¶ 118 (Austl.).

139. *De L v. Dir.-Gen., N.S.W. Dep’t of Cmty. Servs.*, (1996) 187 CLR 640, 660 (Austl.).

140. *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000).

141. *Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010).

142. Caldwell, *supra* note 83, at 188 (quoting *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008)).

1. The Limited Applicability of the Best Interests of the Child

This Section, in an attempt to reconcile the Hague Convention with the CRC, presents the argument that during a hearing on return under the Hague Convention, the best interests of the child are “a primary consideration,” but only in a limited sense. As mentioned briefly in the previous Section, when deciding whether to return a child, courts have balanced the objects and purposes of the Hague Convention—that of deterrence, respect for the laws of other sovereigns, and the best interests of children in general—against the apparent best interests or wishes of the specific child. Yet, some courts have recognized the weight—albeit limited—that human rights carry when considering a return under the Hague Convention.

This approach was adopted by the Supreme Court of Israel in a case decided in 2009.¹⁴³ The case involved an Israeli mother married to a French citizen, and their six-year-old son.¹⁴⁴ The mother came to Israel with the agreement of the father, in order to give birth to her second son.¹⁴⁵ While in Israel, the mother filed for custody over the six-year-old boy in a local family court.¹⁴⁶ The father, now in Israel, then filed a request for the courts in Israel to return the son to his place of habitual residence, Paris, where divorce and custody proceedings were underway.¹⁴⁷ While in Israel, the mother gave birth to the second son, to whom the Hague Convention was not applicable, because the newborn baby had never resided in France.¹⁴⁸ The Court upheld the return of the older brother to France and rejected the argument that applying the Hague Convention does not conform with the best interests of the child, as enumerated in the CRC.¹⁴⁹

As the argument goes, the drafters of the Hague Convention took account of the complexities of custody issues, such as the difficulties in obtaining evidence away from the child's place of habitual residence,¹⁵⁰ when they envisioned a scenario where the local courts in the country of the child's habitual residence would decide the permanent custody rights

143. CA 2338/09 Plonit v. Ploni, ¶ 26 (June 3, 2009) (Isr.), available at <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf>. At the time of judgment, the Author was a Legal Clerk for the chambers of the Honorable Justice Salim Joubran, writer of the opinion of the Court. The views expressed in this Article, however, are the private views of the Author.

144. *Id.* ¶ 2.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* ¶¶ 26–27.

150. *Id.* ¶ 26.

over the child.¹⁵¹ To effectuate this, states created a procedural mechanism to allow for the swift return of abducted children to their place of residence, in order to nullify any effects the wrongful removal might have on the child's welfare and legal status.¹⁵²

It is only when the custody dispute is decided that the best interests of the child should be heavily weighed, as these are at the core of the custody decision.¹⁵³ Thus, as time is of the essence in matters of return, the mechanism created under the Hague Convention is not a full-scale judicial procedure, but rather an initial judicial response to "put out the fire" until the courts in the place of residence can deal with the best interests of the child in their totality when deciding upon final custody over the child.¹⁵⁴ As B.D. Inglis points out, return does not mean that the child will ultimately live in the place of habitual residence and, likewise, a return does not necessitate that the child ultimately remain in the custody of the abducting parent. Nor does return mean that the child will be in the custody of the left-behind parent pending final resolution of the custody issue.¹⁵⁵ It merely places the child back in the place of habitual residence and before its courts.¹⁵⁶

At the initial stage, when the only matter to be determined is which court should further adjudicate the future of the child, the child's best interests should only come into play when the act of return itself may infringe on the child's interests. This refers only to the limited time between the return of the child and the commencement of proceedings before a court in the place of habitual residence capable of issuing interim measures protecting the best interests of the child if necessary.¹⁵⁷ It is only in this narrow time that the best interests of the child are "a primary consideration" in the forum deliberating a return order, as required by Article 3 of the CRC.¹⁵⁸ The restricted applicability of the best interests of the child entails fewer situations where these interests will be a key factor to deny the return of the child. With this in mind, there is little room for finding that a child should not be returned to the place of resi-

151. Hague Convention, *supra* note 1, arts. 1(b), 19; CA 2338/09 Plonit v. Ploni, ¶ 26; CA 5332/93 Gunzburg v. Greenwald, 49(3) IsrSC 282, ¶ 9–12 [1995] (Isr.), English version available at <http://www.hcch.net/incadat/fullcase/0355.htm> (last visited Feb. 23, 2011).

152. Pérez-Vera, *supra* note 13, ¶¶ 19, 35 (referring to a system of cooperation among judicial and administrative authorities without any bearing on the merits of the custody of the child in question); see also CA 2338/09 Plonit v. Ploni, ¶ 26; BAINHAM, *supra* note 11, at 750.

153. CA 2338/09 Plonit v. Ploni, ¶ 26.

154. *Id.*; CA 7206/93 Gabai v. Gabai 51(2) PD 241, 251 [1997] (Isr.).

155. See INGLIS, *supra* note 11, at 544 (discussing how a decision to return does not decide the state in which the child will ultimately reside).

156. *Id.*

157. CA 2338/09 Plonit v. Ploni, ¶ 26; CA 7206/93 Gabai v. Gabai 51(2) PD 241, 251 [1997] (Isr.); see also INGLIS, *supra* note 11, at 549, 604.

158. CRC, *supra* note 19, art. 3.

dence; only extreme situations where the return itself exposes him or her to a grave risk or an intolerable situation, or when a mature child makes a sound objection to the return itself (as opposed to his or her view on the custodial situation) would apply. Accordingly, the exceptions enumerated in the Hague Convention are narrowly tailored for the limited consideration of the best interests of the child in this context, but without disregarding the child's rights.

This argument, though satisfactory in a formalistic sense, does not directly address the claim that the two conventions are contradictory. Rather, it avoids the issue by limiting the application of the CRC and the best interests principle. The next Section will directly engage the correct understanding of the relationship between the two conventions, when both are fully applied.

2. Human Rights Norms Reanalyzed

Another avenue to address the aforementioned human rights concerns is by questioning the analysis upon which they are based. Though the relationship between a return order and the CRC is dependent first and foremost on the facts at hand in each case, this Section will argue that some considerations, neglected by those who attack the conformity of the Hague Convention with the CRC, must be added to the human rights evaluation. Ultimately, this leads to different conclusions regarding the alleged contradictions between the two bodies of law.

a. The Best Interests of the Child

The sharpest—and most common—criticism of the Hague Convention is that it does not allow for proper consideration of the best interests of the child as required under the CRC.¹⁵⁹ As opposed to the practical outcome suggested by applying Schuz's "alternative reconciliation" model, courts are obliged to consider the best interests of the child in legal proceedings as "a primary consideration," yet not as *the* primary consideration, and certainly not as the *only* consideration.¹⁶⁰ The language employed by the drafters is not coincidental. Elsewhere in the CRC, in Article 9(1) for example, the drafters explicitly referred to the best interests of the child as the only relevant consideration to separate a child from his or her parent.¹⁶¹ In Article 18(1) of the CRC, the best interests of the child are referred to as the "basic concern" of the parents.¹⁶² The travaux préparatoires of the CRC reveal that an initial draft containing the phrase

159. See *infra* Part II.B.1.

160. CRC, *supra* note 19, art. 3 (emphasis added).

161. *Id.* art. 9(1); Alston, *supra* note 72, at 13.

162. CRC, *supra* note 19, art. 18(1); see also Alston, *supra* note 72, at 13.

“paramount consideration” was rejected, as was a proposal containing the phrase “the primary consideration.”¹⁶³ Instead, the final wording of the article places the best interests of the child as merely one primary consideration among others in any given judicial decision concerning him or her, as stated by Philip Alston:

While this choice may be contestable in the context of custody decisions in which the principle is best known in domestic law, it could hardly have been otherwise in the context of an umbrella provision designed to be applicable in a very wide range of situations in which a vast array of competing considerations might arguably be both relevant and appropriate.¹⁶⁴

It follows that considerations outside of the specific child’s rights—such as general deterrence, or the existence of an effective mechanism promoting the best interests of children in general¹⁶⁵—can and must be balanced in legal proceedings under the CRC as primary considerations, as long as the best interests of that specific child are considered as a primary consideration as well.¹⁶⁶ Hence, a court should only find that a return places a child in an intolerable situation when it finds that the best interests of that specific child outweigh “the potential benefits all children receive from deterring international abduction.”¹⁶⁷

Furthermore, other viable primary considerations that are not always in line with the specific child’s best interests may be taken into account. For instance, the court may take into account the custody rights of the left-behind parent and his or her human rights, including his or her right to family life.¹⁶⁸ Moreover, though the Author agrees that respect for other states’ laws—another objective of the Hague Convention—should not trump the child’s best interests as such,¹⁶⁹ it still is a significant consideration. According to some theories of international law, state interests, such as respect for their own laws, are a key factor in state behavior, which includes the decision to comply with international

163. Alston, *supra* note 72, at 13.

164. *Id.*

165. *See supra* Part I.A.

166. Sec’y for Justice v. HJ, [2007] 2 NZLR 289 (SC), ¶ 50 (N.Z.); *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [42] (appeal taken from Eng.); INGLIS, *supra* note 11, at 595–96.

167. Weiner, *Intolerable Situations*, *supra* note 95, at 355.

168. International Covenant on Civil and Political Rights, *supra* note 125, art. 17(1); International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 19, 1966, 993 U.N.T.S. 3.

169. *See Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000) (stating that courts may consider, but are not obliged to follow, fellow signatories’ laws). This holding was later reiterated by the U.S. Supreme Court in *Abbott v. Abbott*, 130 S. Ct. 1983, 2009 (2010).

norms.¹⁷⁰ Enhancing the rights of all children by promoting a mechanism to deter potential abductors—as called for by the CRC itself¹⁷¹—is a worthy primary consideration. Ensuring member states' interests in maintaining the effectiveness of the Hague Convention can be viewed as a valid secondary consideration.

Schuz's alternative reconciliation model rejects such considerations, and leads to the conclusion that the objects and purposes of the Hague Convention could not legitimize a decision that infringes on the best interests of the child. In other words, a return cannot be ordered, unless it serves the best interests of the specific child.

These conclusions, as sympathetic as they may be, go beyond what is required of states and their courts under the CRC. The most that can be said is that courts would have to justify why a non-child-centered decision was rendered, the onus being on the court to prove why other considerations should prevail.¹⁷² Courts might reason that situations of international child abduction are unique, forming a group of children in need of special protection.¹⁷³ Thus, they prescribe a result not always in conformity with the best interests of the specific child before the court, though those interests were considered, to a certain extent, under the exceptions provided for under the Hague Convention.

Moreover, if the best interests of the child are the primary or only concern, as under Schuz's model, there is a risk that a Hague Convention return proceeding will be transformed into a full-scale custody hearing. This too is a consideration that is tolerated by the CRC. For example, according to Linda Silberman, if evidence that a return will cause the child "traumatic stress disorder" is deemed sufficient for denying return, the summary nature essential to a Hague return proceeding will be transformed into a full-scale custody hearing, that was otherwise meant to be adjudicated in the place of habitual residence.¹⁷⁴ But it is crucial to remember that a return is a temporary measure, with the goal of ensuring that the child's future is decided in his or her natural surroundings; it is not a decision about which parent is fit to retain custody over the

170. See Kenneth Abbot's account of the realist and institutionalist theories of international law, in Kenneth W. Abbot, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 363–66 (1999).

171. CRC, *supra* note 19, arts. 2, 11, 35.

172. Alston, *supra* note 72, at 13.

173. Freeman, *supra* note 72, at 66.

174. Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 239 (2000) [hereinafter Silberman, *Hague Child Abduction Convention*]; see also Silberman, *supra* note 132 (arguing that the "traumatic stress disorder" standard can transform a summary Hague proceeding into a full custody hearing).

abducted child.¹⁷⁵ Any inconvenience inflicted on the child in the short term must be weighed against the other objects of the Hague Convention, including his or her best interests in the long run, and only in rare occasions will it justify a denial of return.

Furthermore, the Hague Convention may serve the best interests of the child even when its operation does not at first appear to do so. For instance, return to a member state that will not necessarily apply the best interests of the child standard as such may still be in the best interests of the child. In particular, such situations can arise when the child is abducted to a state that is culturally and socially distinct from his or her place of residence. Article 13 of the Hague Convention reminds courts to bear in mind the social background of the child.¹⁷⁶ This obligation is in line with the CRC, which enumerates the right of the child to participate in cultural life.¹⁷⁷ Unfortunately, the Committee on the Rights of the Child has found that many states have not fully enacted the best interests principle in their family law.¹⁷⁸ Hence, it is impractical to insist that the state of habitual residence has done so as a precondition for an order of return.

Likewise, Article 12 of the Hague Convention grants courts the discretion to deny return if more than a year has passed between the date of abduction and the commencement of proceedings, as long as it can be shown that the child has settled into his or her new environment.¹⁷⁹ This exception serves the interests of those children who have settled into their new environment, albeit creating an incentive for abducting parents to cover their tracks, at least for one year.¹⁸⁰ Once more, this demonstrates that the drafters of the Hague Convention allowed for proper consideration of the best interests of the child in certain situations, where those interests were understood to outweigh other considerations.¹⁸¹

The conclusion that a specific child-centered decision is not always the right one under the CRC should not be altered because today's abductions typically involve the primary caretaker, who more often than not is the mother. The removal still affects the situation of the child prior to the abduction, since the child has been removed to different surroundings. Putting aside for a moment the issue of custody, returning a child to

175. *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993); CA 2338/09 *Plonit v. Ploni*, ¶ 26 (June 3, 2009) (Isr.), available at <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf>; CA 7206/93 *Gabai v. Gabai* 51(2) PD 241, 252 [1997] (Isr.); Pérez-Vera, *supra* note 13, ¶ 19.

176. Hague Convention, *supra* note 1, art. 13.

177. CRC, *supra* note 19, art. 31.

178. Freeman, *supra* note 72, at 52–53.

179. Hague Convention, *supra* note 1, art. 12.

180. INGLIS, *supra* note 11, at 599.

181. *Id.* at 598.

his or her familiar surroundings (school, friends, familiar language, etc.) would normally be in the child's best interests.¹⁸² Moreover, a return does not imply temporary custody for the other parent, since the primary caretaker could still enjoy his or her status in the place of habitual residence, pending the final outcome of the custody hearing. Whatever effects a return may have on the merits of the custody decision in terms of the child's need for stability, the same could be said of the act of abduction itself. The Hague Convention strives to nullify any effect the abduction might have, and therefore a child facing custody proceedings in his or her place of residence after a return would not be—theoretically speaking at least—in a different situation than he or she would be prior to the abduction.

The relationship between the child's best interests and the child's right to enjoy a family life is also of importance. The latter will be discussed in greater detail below, yet at this juncture one must keep in mind that denial of return for whatever reason will usually intrude on the rights of the child and the left-behind parent to enjoy family life together. While one can argue that the parent will still enjoy access rights to the abducted child, the same can be said for the abducting parent if he or she chooses not to return with the child to the place of residence, pursuant to an order or return. Since it is the abductor who is in breach of custodial rights under the laws of the place of residence, the onus should be on him or her to prove that return should not be ordered. Moreover, as previously mentioned, Article 9(1) allows for the separation of a child from his or her parent only if it is "necessary for the best interests of the child."¹⁸³ The Hague Convention is, in fact, in line with this requirement. The narrow scope of exceptions for return promises that a child will be separated from his or her left-behind parent only when absolutely necessary.

A final point on the best interests of the child regards the use of presumptions under the Hague Convention. The substance of the Hague Convention deals with private international law issues, by predetermining the *forum conveniens* and the substantive law to be applied to the custody dispute between the parents.¹⁸⁴ This predetermination was agreed upon to provide an effective legal framework to deal with the rising number of international abductions—called by some an "intractable problem."¹⁸⁵ Absent predetermined rules on the appropriate forum to

182. LOWE, INT'L FORUM REPORT, *supra* note 3, at 2.

183. CRC, *supra* note 19, art. 9.

184. INGLIS, *supra* note 11, at 535–36.

185. Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child: Contributions of the Hague Conference on Private International Law*, 3 ILSA J. INT'L & COMP. L. 665, 667 (1997).

adjudicate custody—in this case the courts of the place of habitual residence—member states find themselves in the very place they were prior to ratification of the Hague Convention: lacking a mechanism that allows for the prompt return of abducted children to their place of residence. Additionally, it is important to remember that exceptions, narrowly construed as they may be, are provided for in appropriate cases where the presumption leads to an undesirable result. But to ensure the continuing effectiveness of the regime, judges should continue to presume that it is in the best interests of the child to return him or her to the place of residence, until proven otherwise.¹⁸⁶

To summarize, it seems that the parties to the Hague Convention are correct to assert that the current legal framework provided by the Hague Convention, and the narrow scope of its exceptions, establishes a highly acceptable balance between the best interests of the child and other considerations that sufficiently enables courts to deny return in those rare situations, when such a decision is warranted to protect the best interests of the child.¹⁸⁷

b. The Right to Family Life

When deciding if consent or acquiescence applies to an allegedly wrongful removal, the Hague Convention does not explicitly consider the rights of the child to family life or to maintain contact with both parents. Nevertheless, it is not inconsequential, as one of the underlying objects of the Hague Convention is to override any effect that an abduction may have, and allow for issues of custody—encompassing within it the child's enjoyment of family life and relations with both parents—to be properly determined before a court of law. These questions are at the heart of the Hague Convention, and inherent in deciding if a parent consented to a removal, whether stated explicitly in the Hague Convention or not. The narrow scope of the return exemptions ultimately serves to promote the right to family life.

More importantly, it would be hard to maintain that a child could be returned to the place of habitual residence upon his or her own request, without a formal request made by the left-behind parent. This, of course, would be absurd and impractical, when that parent has shown his or her incapability or unwillingness to take care of the child pending a decision on custody, while at the same time the abducting parent wishes to stay put or does not intend to return with the child. Schuz argues that, at times, no official request is filed due to the left-behind parent's "passiv-

186. *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [39] (appeal taken from Eng.).

187. See Report on the Fifth Meeting, *supra* note 67, ¶ 166.

ity or lack of knowledge of his or her rights, fear of legal proceedings, or lack of financial resources.”¹⁸⁸ Yet the establishment of Central Authorities under the Hague Convention promotes the removal of procedural and financial obstacles, for instance, by allowing the left-behind parent to file a request of return with the local Central Authority in his or her home state, rather than filing the request abroad.¹⁸⁹

Moreover, parties to the Hague Convention are obliged to provide financial assistance to parents who cannot afford to represent their claims before the courts of that state.¹⁹⁰ Thus, a parent who wishes to retrieve his or her child is provided every opportunity to do so.¹⁹¹ Though theoretically a parent's waiver of his or her right to family life does not entail that the child has no rights regarding that parent, it is (unfortunately) the practical consequence of such a waiver, since a court allowing for a return of a child when a request by the left-behind parent has not been made would be neglecting its duty to protect the interests and well-being of that child.

Finally, on this point it should be noted that contrary to the claim presented above, when a child is abducted to his or her place of habitual residence, no issue could arise as to whether the court can ensure the rights of the child to enjoy his or her family life under the Hague Convention. Since under Article 3 of the Hague Convention a wrongful removal is one that violates the custody laws of the place of residence, the Hague Convention would not be applicable to such situations at all. Hence, this claim is irrelevant to suggest any animosity between the Hague Convention and the CRC.

c. The Right to Be Heard

Can a court's application of Article 13 of the Hague Convention violate the right of the child to be heard under Article 12 of the CRC? First, as per the argument that the child should be allowed to voice his or her opinion regarding return, even when such a request was not made by the left-behind parent, the same analysis presented above, regarding the right to family life, renders this argument without any practical significance. As explained above, a court cannot seriously consider returning a child to his or her place of habitual residence if the parent there is unwilling or

188. Schuz, *supra* note 55, at 420.

189. Hague Convention, *supra* note 1, arts. 8–11.

190. *Id.* art. 7(g).

191. It should be noted that the United States has filed a reservation regarding financial aid. See Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, United States Reservations to Articles 24, 26, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=status.comment&csid=652&disp=resdn (last visited Feb. 23, 2011).

unable to accept responsibility over the child. Secondly, though the child's wishes are normally raised by the abducting parent refusing return and not by the child, eventually courts are usually made aware and take note of the child's wishes directly or indirectly, thereby hearing the child's views. Nevertheless, the language of Article 13 of the Hague Convention may be lacking on this point, and should formally indicate that the child should be heard in a proceeding regarding return.

How can a court comply with the right of a child to be heard? It is important, once again, to examine the exact language of Article 12(2) of the CRC, which calls for the application of this right in judicial proceedings "either directly, or through a representative *or an appropriate body*, in a manner consistent with the procedural rules of national law."¹⁹² This article allows a court applying the Hague Convention to consider the views of the child not only by way of direct participation or through a representative appointed for the child, but also through other bodies under the procedures of that state. Hence, courts that tend to appoint social workers or expert psychologists in order to assess the views of the child are not acting against the clear meaning of Article 12, as some have suggested, because the article does not negate the possibility of using these methods to make the child's views known to the court.¹⁹³

Granted, appointing a representative for the child may be warranted in certain situations. However, the list of issues provided by scholars that warrant such an appointment would necessitate appointing a representative in practically every case where an order of return is contested by the abductor. Such a solution is neither practical, due to limited resources and time constraints,¹⁹⁴ nor legally required under the CRC.

The language of Article 12 indicates that the methods of letting the child voice his or her views are alternative methods, not cumulative. Therefore, a court would not breach the article if it chose to hear the child through a representative or an expert, without meeting with the child directly. Here, of course, the time constraints when deliberating return should urge the court to satisfy its assessment of the child's views by choosing just one of the methods enumerated in Article 12.¹⁹⁵ These constraints may also override the court's wish to hear the child in order

192. CRC, *supra* note 19, art. 12(2) (emphasis added).

193. See PARKINSON & CASHMORE, *supra* note 115, at 210 (discussing the various ways that states apply generally to assess the views of the child and noting that a number of states regularly do so indirectly); see also FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 423-24 (D. Marianne Blair et al. eds., 2d ed. 2009) [hereinafter FAMILY LAW IN THE WORLD COMMUNITY].

194. *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [57] (appeal taken from Eng.).

195. CRC, *supra* note 19, art. 12.

to encourage his or her feelings of participation and acceptance, important as they may be.

To this equation, it is necessary to add that courts must consider whether the best interests of the child favor sparing the child from directly taking part in proceedings that may have a negative psychological effect on the child.¹⁹⁶ In such situations, a court may reasonably choose to avoid hearing the child directly, keeping in mind that a children's expert is not necessarily any less competent than a judge in assessing the child's views in light of the child's age and maturity, especially a very young one.¹⁹⁷

In addition, though the child must be heard under the CRC, his or her opinion is not determinative. In fact, this is what led Baroness Hale of Richmond to the conclusion that appointment of "separate representation in all cases, even in all child's objections cases, might be to send them the wrong messages."¹⁹⁸ The language found in Article 13 of the Hague Convention resembles that of Article 12(1) of the CRC. Whereas in Article 12(1) of the CRC, the views of the child should be given "due weight, in accordance with" his or her age and maturity, Article 13 of the Hague Convention orders the court to "take account" of a child's objection to return if he or she is of appropriate "age and degree of maturity."¹⁹⁹ Schuz has opined that courts have taken too stringent an approach in assessing a child's age and maturity, to the effect that the child's views are usually not a key factor. Linda Silberman and Nigel Lowe, however, are wary of the jurisprudence of some courts that take into account the views of children as young as eight years old, or even four years old, while the drafters of the Hague Convention intended courts to consider the views only of children just below the sixteen-year-old age limit.²⁰⁰

Whatever the case may be, Article 12 of the CRC recognizes that the age and maturity of a child affects the weight courts should give to the child's views. For this reason, courts are right to be suspicious of children unwilling to return to their place of habitual residence, especially when it serves their best interests. In fact, such an opinion expressed by a child could be considered as evidence of the child's immaturity and bad

196. PARKINSON & CASHMORE, *supra* note 115, at 195–96, 208–09.

197. *Id.* at 211–12, 215–16.

198. *Id.*

199. Compare CRC, *supra* note 19, art. 12(1) with Hague Convention, *supra* note 1, art. 13.

200. Silberman, *Patching Up*, *supra* note 132, at 56; LOWE, INT'L FORUM REPORT, *supra* note 3, at 12.

judgment.²⁰¹ This point is emphasized by what Patrick Parkinson and Judy Cashmore term the difference between “voice and choice,” meaning that the child’s view is not decisive in a given legal dispute concerning him or her.²⁰² Rather, the right to be heard entails that the child’s views should be taken seriously—and that the child feels that his or her views are important to the process—but the decision will be based on all of the relevant information and the needs of those involved.²⁰³

Given the above analysis, a stringent approach to assessing the age and maturity of a child not wanting to return would be within the confines of Article 12 of the CRC. Moreover, as argued before, the child’s objection may also impact the right to family life that would be enjoyed by returning to the place of residence. Therefore, courts would be correct to deny return only when a mature child is of a firm and strong opinion against return (though it should be stressed that the child’s views on the issue of custody are irrelevant at this juncture).

Another point argued was that defining a removal as “wrongful” when the child is not opposed to it, is itself a breach of Article 12 of the CRC. Such an assertion is ungrounded, as neither the views of the parents nor the child are relevant to the definition. As Article 3(a) of the Hague Convention makes clear, what renders the removal wrongful are the laws of custody applicable in the place of the child’s habitual residence. These objective laws are applied to assess the removal and obligate all individuals under the jurisdiction of that state, regardless of their opinion on the substantive issues of law.

Moreover, it should be kept in mind that the Hague Convention is an international treaty that settles specific issues of jurisdiction—a matter regularly determined by domestic legislation and rules of private international law. This is done by deciding that the place of the child’s habitual residence—the *forum conveniens*—will resolve the matter of custody.²⁰⁴ Parents, as well as their children, are confounded by these laws on a regular basis. Though it is true that a custody hearing may proceed in the child’s place of residence *in absentia*, this should be the exception and not the rule, as it infringes on the child’s best interests and his or her right to be heard.

201. See PARKINSON & CASHMORE, *supra* note 115, at 201–02 (describing the connection between the child’s age and maturity and his or her ability to assess their own best interests).

202. *Id.* at 198–201. This is also reflected in the jurisprudence of the European Court of Human Rights in *C. v. Finland*, 46 Eur. Ct. H.R. 24, ¶¶ 40, 54, 57, 58 (2008). See also FAMILY LAW IN THE WORLD COMMUNITY, *supra* note 193, at 424.

203. PARKINSON & CASHMORE, *supra* note 115, at 199.

204. INGLIS, *supra* note 11, at 542.

d. Women's Rights and Children's Rights: Domestic Violence

As expressed earlier, some commentators are of the view that courts should be more sympathetic toward abducting mothers alleging domestic violence as a reason for denying a return. In an attempt to assess this argument as a matter of principle, putting aside the highly contested question of the effectiveness of undertakings and issues of factual findings,²⁰⁵ some further considerations should be illuminated.

First, it is important to remember that an order of return entails the return of the child to the state of residence, but not necessarily to the father's house or vicinity for that matter.²⁰⁶

Furthermore, it may be that denying the return of a child, in order to allow him or her to stay with the mother (who wishes to stay where she currently is for valid reasons), actually infringes on the rights of the child. For example, in cases where the child is not an alleged victim of abuse, and his or her best interests are served by returning to familiar surroundings, a denial of return based on the condition of the mother is in effect preferring the rights of one individual over that of the other.

Another example is when claims of domestic violence perpetrated against the mother stand against the explicit wish of the child to return to the place of habitual residence. Such was the issue in *S v. S* before the High Court of New Zealand,²⁰⁷ a case of a physically and psychologically abused wife who fled with her three children from Australia to New Zealand. The mother argued that the children were exposed to the abuse, though not abused directly by the father, and should be kept away from their father who may resort to abusing them in the future—an argument accepted by the lower court.²⁰⁸ She also claimed that due to her mental state, and lack of family support, she could no longer protect the children's best interests in Australia.²⁰⁹ The children, however, forcefully expressed their desire to return to Australia and expressed no fear of their father.²¹⁰ In light of the explicit wishes of the children, the High Court reversed the earlier decision of the Family Court and ordered the return of the children to Australia.²¹¹ The Court of Appeal later affirmed the decision and reasoning of the High Court.²¹² Whatever the right decision was in that case, it

205. See Caldwell, *supra* note 83 (reaching the conclusion that these arguments essentially concern the fact finding assessments of courts and not legal analysis).

206. Hague Convention, *supra* note 1, art. 1(a).

207. *S v. S*, [1999] 3 N.Z.L.R. 513 (H.C.) (N.Z.). For an analysis of this case see INGLIS, *supra* note 11, at 605–08.

208. *S v. S*, [1999] 3 N.Z.L.R. at 516, ¶¶ 29–40.

209. *Id.* at 524, ¶¶ 21–28.

210. *Id.* at 526, ¶¶ 1–4.

211. *Id.* at 527, ¶¶ 35–36.

212. *Id.* at 536.

demonstrates that taking into account the rights of the abducting mother in such cases does not always go hand-in-hand with the best interests of her child or with the duty to consider the child's views. Thus, in certain cases, protecting the rights of the mother, important as they may be, negates not only the objects and purposes of the Hague Convention, but the rights of the child under the CRC as well.

This also inevitably infringes on the rights of the left-behind parent.²¹³ Indeed, many jurisdictions apply a presumption that a spouse-abusing parent is unfit to retain custody of a joint child.²¹⁴ Yet, as with any presumption, the abuser can overturn it and prove that he is still fit to parent, and therefore has not forfeited his custody rights by abusing his spouse. Hence, even a spouse-abusing parent has the right to custody over his child, unless otherwise determined by a court that is capable of fully assessing the relationship among both parents and the child; meaning, in other words, a court in the place of habitual residence.²¹⁵

As for assessing the effectiveness of other legal systems, it would be hard to request a foreign court to perform an in-depth analysis of the capabilities of the legal system in the place of habitual residence to protect a mother and a child from an abusive parent in every given case. As the use of undertakings has become more frequent—at least in common law jurisdictions—courts inevitably pass judgment on the measures available for the protection of women and children in the place of habitual residence, prior to a decision denying return.²¹⁶ On the one hand, this might encourage states to improve their internal capabilities to protect endangered women; such actions may eventually negate the incentive for international child abduction in cases of domestic violence. On the other hand, by doing so, courts risk the possibility that the authorities in the state of residence will be found inadequate to ensure the safety of those under its jurisdiction, thus jeopardizing international comity and notions of reciprocity between jurisdictions.²¹⁷ Such a conclusion in turn, may invite a retaliation.

213. See *supra* Part II.B.2.

214. Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 751–55 (2003); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 54, at 9–10.

215. Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 84 (2008).

216. Report on the Fifth Meeting, *supra* note 67, ¶ 227; see also *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) (discussing the potential benefits and problems with undertakings). For an example of the need to assess the efficiency of other jurisdictions, see *Blondin v. Dubois*, 189 F.3d 240, 248–49 (2d Cir. 1999); *Turner v. Frowein*, 752 A.2d 955, 969 (Conn. 2000).

217. INGLIS, *supra* note 11, at 541; LOWE, INT'L FORUM REPORT, *supra* note 3, at 11; Nelson, *supra* note 97, at 691–93; Karin Wolfe, *A Tale of Two States: Successes and Failures*

tory anti-return decision by the courts in that state when deliberating a return to the former state in future cases, thus endangering the functioning of the Hague Convention.²¹⁸

As discussed above, though comity among member states is only a subsidiary consideration when balanced against the best interests of the child or the protection of the abducting parent, it is imperative to the effectiveness of the Hague Convention. Seeing as comity serves as the backbone behind the Hague Convention's effectiveness, other considerations should rarely allow for courts to pass judgment on the worthiness of foreign legal systems. Therefore, it is essential that courts considering return act under the presumption that the courts in the place of habitual residence are capable and willing to protect those that fall under their jurisdiction and reduce any existing risk, unless proven otherwise in the specific facts of that case.²¹⁹

It should be kept in mind that in practice, no system is entirely successful at protecting those under its jurisdiction. Though the legal systems in one state might generally be more effective than those in another, certainty is never guaranteed, and all systems have their faults. Therefore, a reasonably well-functioning legal system should be assumed to be able to guarantee the safety of those who come before it alleging physical and psychological abuse. To avoid superficial assessments of the effectiveness of other legal systems, courts cannot be expected to go further than a *prima facie* analysis of the capabilities of other legal systems to provide for adequate protection to children and mothers returning to the place of habitual residence. Only in rare circumstances, as stated by Lord Donaldson, should a court find that the

of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany, 33 N.Y.U. J. INT'L L. & POL. 285, 329–30 (2000).

218. *Blondin*, 189 F.3d at 248–49; *Turner*, 752 A.2d at 972–73; W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 323 (1990); see also *Steffen v. Severina*, 966 F. Supp. 922, 927 (D. Ariz. 1997) (providing an example of how courts look for and rely on “mirror” cases in the jurisprudence of the courts in the place of habitual residence); *Nelson*, *supra* note 97, at 682.

219. *Croll v. Croll*, 229 F.3d 133, 149 n.4 (2d Cir. 2000) (Sotomayor, J., dissenting); *Blondin*, 189 F.3d at 248–49; *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996). This very notion was stated accurately by Lord Donaldson of the English Court of Appeals:

It will be the concern of the court of the State to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done.

C v. C (Minor: Abduction: Rights of Custody Abroad), [1989] 1 WLR 654, 664 (A.C.) (Austl.) (as reiterated in *In re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 F.L.R. 1145 (A.C.)).

power of the courts in the place of habitual residence are insufficient to protect the child or the parent.²²⁰

The views expressed above do not imply that courts should not be sensitive and responsive to claims of domestic violence put forward by mothers who have abducted their child to another state. They simply stress that such considerations have differing consequences on the interests and rights of the abducted child. For this reason, it might be correct to assert that the best way to protect the rights of the child is to allow only a narrow consideration of such allegations and deny return only when it has been demonstrated that the child will be exposed to a “grave risk” upon return, or that the legal system in the child’s place of residence is clearly incapable of protecting the child upon return.

e. Effective Mechanisms to Counter International Abductions

Finally, a general point relating to the child’s rights under the CRC should be made. Though the mere existence of Articles 11 and 35 of the CRC does not render moot the need to reconcile human rights and the Hague Convention, it does account for an obligation upon states to conclude agreements that provide for effective mechanisms to counter international child abductions. This may imply, firstly, that a party to the CRC has an obligation toward a specific child before its courts to provide him or her with a remedy against his or her abduction. In addition, it may oblige the state to maintain the effectiveness of the Hague Convention in general—a goal understood to be achieved by a presumption of return—so as to provide “appropriate . . . measures”²²¹ against child abduction *ex ante*, as the CRC itself requires of state parties. And so, the existence of these two articles in the CRC should be added to the balancing of a child’s rights and push the equilibrium toward an order of return.

The analysis above demonstrates that certain human rights considerations are lacking from the arguments made against the conformity of the Hague Convention with the CRC. Adding these considerations to the delicate balancing of rights involved in abduction cases leads to the conclusion that the Hague Convention, as traditionally applied by courts, and as a matter of principle,²²² does not violate the rights enumerated in the CRC.

220. See *C v. C*, [1989] 1 WLR at 664; see also *Croll*, 229 F.3d at 149 n.4; *Blondin*, 189 F.3d at 248–49; *Friedrich*, 78 F.3d at 1068. For an example of such a case where the legal system of the place of residence was deemed insufficient to protect the child from the father’s violent tendencies, see *Walsh*, 221 F.3d at 221.

221. CRC, *supra* note 19, art. 35.

222. The exception being a lack of formal mention that a child should always be heard directly or indirectly. See Section II.A.3.

III. RETURN AND THE PARTICULAR RIGHTS OF ABDUCTED CHILDREN AS A GROUP

The arguments and counterclaims put forward in Part II demonstrate the key issues that must be taken into account in cases of child abduction. All would agree that time is of the essence when deliberating the return of a child.²²³ On the other hand, to conduct a true legal analysis of all the child's relevant rights and their proper weight and interplay with one another—an analysis that must also rely on the proper compilation and assessment of factual evidence in order to fully assess the best interests of the child—is anything but an uncomplicated and swift process.²²⁴ If a court chooses to analyze the best interests of the child, after appointing the child a separate representative, hearing his or her opinion directly, and assessing all other relevant rights, including those pertaining to an abducting mother alleging violence in some cases, it could hardly do so in swift and prompt proceedings as called for by the Hague Convention.²²⁵ It is this result of prolonged deliberation, and its effect on a definitive group of children, that will be the focus of this Part.

As discussed above, Article 3 of the CRC encompasses both a “general” scope, allowing for the consideration of the best interests of children whenever those are affected in the broad sense, and an “individual” scope (i.e., the obligation to consider the best interests of the particular child standing before a court of law).²²⁶ As further discussed above, both of these dimensions of the best interests principle come into play in decisions regarding return and the balance between the various relevant considerations.²²⁷ Yet, between the interests of one child and those of children in general, lay the interests of a substantial group of children in need of special protection—these are the children actually abducted every year, to whom the Hague Convention also applies.

Statistical reports conducted for the Hague Conference on Private International Law provide a rough estimate of the number of children that make up this group.²²⁸ This statistical analysis examined applications for

223. *In re M and another (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288 (H.L.), [42] (appeal taken from Eng.); INGLIS, *supra* note 11, at 537, 547–49; LOWE, INT'L FORUM REPORT, *supra* note 3, at 19; Schuz, *supra* note 55, at 399–400.

224. See Silberman, *Patching Up*, *supra* note 132, at 53 (arguing that the “traumatic stress disorder” standard can transform a summary Hague proceeding into a full custody hearing); see also Silberman, *Hague Child Abduction Convention*, *supra* note 174, at 239 (demonstrating that inquiring into the long-term best interests of the child is a lengthy process and essentially similar to a full custody hearing).

225. *In re M and another*, [2007] UKHL 55 at [42]; Hague Convention, *supra* note 1, pmbl.; INGLIS, *supra* note 11, at 537, 547–49; Schuz, *supra* note 55, at 399–400.

226. See *supra* Part II.B.

227. See *supra* Part II.B.2.

228. LOWE ET AL., STATISTICAL ANALYSIS, *supra* note 7, at 21.

return filed before or by Central Authorities in member states during the years 1999 and 2003. In 1999, roughly 1060 such applications were filed. This number rose to 1355 in 2003.²²⁹ The surveyed applications in 1999 and 2003 involved up to 2030 and 2211 children respectively.²³⁰ These figures do not account for applications of return filed directly by left-behind parents in the courts of the member states, suggesting that the number of applications for the return of children abducted across member states' borders is actually higher.²³¹ Nevertheless, for the purposes of the argument advanced in this Part, this last figure of 2211 children can be assumed to represent—albeit roughly—the number of children abducted across international borders who will be subjected each year to proceedings of return under the Hague Convention.²³²

The best interests of these 2211 children will be affected for the worse if the question of return under the Hague Convention becomes a full-scale examination of a single child's best interests, thus denying the entirety of the group a prompt, quick, and timely return to their place of residence following an obstructive abduction. This group of children's best interests should be considered as a "whole" and as a "primary consideration" every time the best interests of a particular child facing return are considered. In the event that the individual's best interests are served by a denial of return, the interests of these 2211 children could nevertheless justify a return under the CRC, in order to maintain the effectiveness of the Hague Convention regime, alongside the other relevant considerations discussed in the previous Part.

Furthermore, on the normative level, before concluding that the exceptions to return found in the Hague Convention should be expanded in order to comply with human rights, one must consider the counterweight that the interest of these 2211 children in a swift return carries. Considering these children as a definitive group bearing rights, the decision to return becomes a situation of conflicting interests between many children, rather than a conflict between one child and some abstract and perhaps less weighty notion of children's interests in general. Indeed, the drafters of Article 3 of the CRC were aware that, at times, serving the best interests of one child will inevitably come at the expense of the best interests of another child.²³³

Moreover, according to Freeman, Article 3(2) of the CRC operates as a "backstop provision," meant to protect categories of children ne-

229. *Id.* at 10–11. Note that the increase in applications is also a result of an increase of Parties to the Hague Convention itself.

230. *Id.* at 11.

231. *Id.*

232. Note that one can add access requests under the Hague Convention to this figure.

233. Freeman, *supra* note 72, at 62–64.

glected by the CRC.²³⁴ Freeman's examples of such vulnerable groups—such as gay or street children—present different questions for the parties to the CRC than the issue at hand.²³⁵ Nevertheless, children abducted across international borders are put in a unique and possibly destructive situation,²³⁶ and are therefore in need of special consideration and recognition when assessing their best interests. Consequently, the best interests of the group of children exposed to child abduction every year are of considerable weight, not only based on the merits of each child composing the group, but also based on the entirety of this group of children as such.

Therefore, taking the interests of the defined group of abducted children in a prompt and effective mechanism for return into account as a “primary consideration,”²³⁷ enhances the conclusion reached in the previous Part: The narrow scope of the exception to return in the Hague Convention should not be expanded—consequently impairing the promptness and effectiveness of the mechanism—in order to better serve the best interests of approximately 2200 children directly affected by the mechanism in a given year.²³⁸

CONCLUSION

In the difficult case presented in the introduction, the trial judge concluded that separating the six-year-old boy from his big sister, and possibly from his mother, would cause him serious psychological harm, and therefore he should not be returned to Cyprus.²³⁹ The Court of Appeal reversed the decision and ordered the younger brother returned to Cyprus, where his father lived.²⁴⁰ Keeping in mind that a stringent test should be applied when finding that the return will expose the child to a grave risk, the court was of the view that the trial judge over-emphasized the consequences of returning the child to Cyprus in favor of the older sister and the mother. The Court of Appeal found that these latter consequences should not deflect the right of the brother “to have his future decided in the State of his habitual residence. Although his mother is

234. *Id.* at 66.

235. *Id.* at 66–67.

236. LOWE, INT'L FORUM REPORT, *supra* note 3, at 2.

237. CRC, *supra* note 19, art. 3(1).

238. LOWE ET AL., STATISTICAL ANALYSIS, *supra* note 7, at 11.

239. *In re C* (Abduction: Grave Risk of Physical or Psychological Harm), [1999] 2 F.L.R. 478 (A.C.) (appeal taken from Eng.).

240. *Id.*

English, he is a Greek-speaking Cypriot boy brought up in Cyprus with a paternal as well as maternal family.²⁴¹

One can agree or disagree with the conclusions of the Court of Appeal. Still, it seems that the Court of Appeal's final judgment is more in line with the narrow application of the exceptions of return advocated for in this Article, and the considerations supporting that position.

In any case, any decision reached by the Court of Appeal would have impinged on the wishes and rights of at least one of the individuals involved in the abduction, be it the mother, the father, or either child. Indeed, this was demonstrated in another case involving the possible separation of brothers before the Supreme Court of Israel.²⁴² After concluding that the older brother must return to his place of habitual residence in France, even if the mother opts to stay behind with her newborn infant, Justice Joubbran made the following remarks:

[T]his case, as [are] many cases brought under the Hague Convention, is a difficult one, as the Court is faced with hard questions, and must decide between two possibilities, each problematic in its own way. Such cases are a reminder that the law is limited by its nature, and that the welfare of the two brothers in this case is first and foremost in the hands of their parents and the latter's ability to provide for an arrangement that will better their children as much as possible, while the parents undergo divorce proceedings. Nevertheless, as this Court is called upon to adjudicate the case in hand, it seems that returning the older brother to France for now is the lesser of two evils, under the assumption that the French courts will assess the child's best interests and other rights in their full scope, when ultimately deciding upon the custody dispute between the parents.²⁴³

Inevitably, behind every proceeding under the Hague Convention lay the hardship of a torn family. Hopefully, enhancing the effectiveness of the Hague Convention regime, which does give due weight to human rights considerations, will succeed in deterring parents from child abduction in the future.

241. *Id.*

242. CA 2338/09 Plonit v. Ploni (June 3, 2009) (Isr.), available at <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf>; see *supra* Part II.B.1.

243. *Id.* ¶ 35.