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## In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum

Hannah Loo

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# In the Child’s Best Interests: Examining International Child Abduction, Adoption, and Asylum

Hannah Loo\*

## Abstract

*In the past few years, the number of cases involving international child abduction has risen significantly. But the primary purpose of the Hague Convention on the Civil Aspects of International Child Abduction is to protect children against wrongful removal or retention by one parent against the will of the other parent. Under the Convention, the relevant courts are charged with determining where the child’s habitual residence is and whether the child should be returned to the left-behind country. However, in making this determination, courts have faced criticism due to the lack of consideration for the child’s best interests, an international principle typically mandated for any action concerning children. This Comment examines past scholarship on reconciling the child’s best interests principle and the Convention before furthering current understandings through the examination of two other international procedures involving children. This Comment offers another solution to the conflict between the child’s best interests principle and the Hague Convention on Child Abduction by drawing from the Hague Adoption Convention and the U.N. High Commissioner for Refugees Guidelines, both of which require a central authority figure to provide a neutral consideration of what is best for the child in the situation.*

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## I. INTRODUCTION

Consider the case of eight-year-old Leia Morin.<sup>1</sup> Leia's parents, Maribel Betancourt Vazquez and Rafael Morin Estrada, met in Monterrey, Mexico, and had two daughters, Leia and Isabella.<sup>2</sup> From 2001 to 2007, the family lived together in Dallas, Texas, until Maribel's deportation back to Mexico.<sup>3</sup> Rafael decided to stay in Dallas, but the children were sent with their grandmother to Monterrey to live with Maribel, and Maribel and Rafael agreed that the children would visit Rafael during their summer and winter breaks.<sup>4</sup> This agreement worked until 2010, when Leia visited Rafael and Rafael refused to send her back to Mexico.<sup>5</sup> Maribel filed a petition for Leia's return under the Hague Convention on the Civil Aspects of International Child Abduction, and despite clear evidence of spiraling violence and increasing drug cartel activity committed at Leia's school and neighborhood in Monterrey, Leia was ordered to be sent back to Monterrey.<sup>6</sup> Although there were reasons for Leia to live with her mother, as the court decided, there seems something intuitively wrong with knowingly sending a child to a place with rampant violence and drug activity.

This Comment presents an analysis of the child's best interests principle in several different contexts of international law concerning children. Though the child's best interests principle is notoriously vague in its lack of clear methods to determine a child's best interests, this Comment will examine similar situations involving the transfer of children across international boundaries before attempting to apply those situations to the Hague Convention on the Civil Aspects of International Child Abduction ("Child Abduction Convention"),<sup>7</sup> which aims to prevent international child abduction by one parent from the other. The underlying conflict of this Comment stems from criticism that Child Abduction Convention decisions do not adequately consider a child's best interests, despite the Convention on the Rights of the Child<sup>8</sup> mandating that the child's best interests be a primary consideration for any action involving children.

This Comment begins by introducing the current legal framework surrounding the child's best interests principle, including the U.N. Convention on the Rights of the Child (UNCRC), and the Child Abduction Convention. Section

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<sup>1</sup> Vazquez v. Estrada, No. 3:10-CV-2519-BF, 2011 WL 196164, at \*1 (N.D. Tex. Jan. 19, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*5.

<sup>7</sup> Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Child Abduction Convention].

<sup>8</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

III will explore how the child's best interests principle is considered under the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption ("Hague Adoption Convention"). Section IV will discuss the child's best interests principle in the context of the U.N. High Commissioner for Refugees Guidelines and in the treatment of unaccompanied minors in the U.S. Finally, Section V will attempt to draw from the child's best interests principle's application in similar international child arrangement scenarios to expand on the Child Abduction Convention by suggesting ways that the Child Abduction Convention might be better reconciled with the child's best interests principle, including an expanded role of a neutral Central Authority to represent the child.

## II. BACKGROUND

### A. U.N. Convention on the Rights of the Child and the Child's Best Interests Principle

The UNCRC is the most widely and rapidly ratified human rights treaty in history, with 196 states ratifying the treaty since 1989.<sup>9</sup> The UNCRC is also notable for being the first legally binding international instrument to incorporate a range of human rights, including civil, cultural, economic, political, and social rights.<sup>10</sup> The UNCRC attempts to focus on the whole child by treating the child as an individual as well as a member of a family and community, with rights and responsibilities correlated to his or her age and development stage.<sup>11</sup> The UNCRC "makes clear the idea that a basic quality of life should be the right of all children," and the widespread acceptance of the treaty indicates global commitment to children's rights<sup>12</sup> and an internationally accepted framework for children's rights.<sup>13</sup>

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<sup>9</sup> UNICEF, *Convention on the Rights of the Child: FAQs and resources* (May 30, 2014), <https://perma.cc/98AB-U9D6> (last updated June 24, 2016) [hereinafter *FAQs and resources*]; U.N. Treaty Collection, *11. Convention on the Rights of the Child* (Oct. 30, 2015), <https://perma.cc/SSA4-J8Q4> (last visited Oct. 23, 2016). Only the U.S. and Somalia have not ratified the Convention, but both have signed the Convention to show at least some commitment to UNCRC principles as customary international law. Ratification means that countries "accept an obligation to respect, protect, promote and fulfill the enumerated rights." Save the Children, *Children's Rights in Wales: U.N. Convention on the Rights of the Child*, <https://perma.cc/8P6D-YHJ6> (last visited Dec. 14, 2015); see also Eran Stoecker, *International Child Abduction and Children's Rights: Two Means to the Same End*, 32 MICH. J. INT'L L. 511, 519 (2011).

<sup>10</sup> UNICEF, *Convention on the Rights of the Child: Protecting Children's Rights*, <https://perma.cc/U6KG-KPJ2> (last updated May 19, 2014).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Save the Children, *supra* note 9.

The UNCRC consists of 41 articles detailing the different types of rights that children must have in order to develop their full potential.<sup>14</sup> A common approach to examining the UNCRC is to group the articles into survival and development rights (rights to resources, skills and contributions), protection rights (rights to protection from child abuse, neglect, etc.), and participation rights (freedom to express opinions and have a say in matters affecting the child), with five articles given special emphasis as guiding principles that underlie the requirements for additional rights to be realized.<sup>15</sup> The third of these guiding principles, Article 3 on the child's best interests, provides the source of criticism for the Child Abduction Convention. Article 3 is as follows:

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.<sup>16</sup> 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 measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.<sup>17</sup>

Notably, Article 3 states that the child's best interests must be a primary consideration for all actions affecting children.<sup>18</sup> The UNCRC additionally stipulates that the child's best interests principle must be the determining factor for specific actions, such as adoption (Article 21) and separation of a child from parents against their will (Article 9).<sup>19</sup> In total, "best interests" appears eight times in the fifty-four articles of the UNCRC, making it one of the most widely

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<sup>14</sup> See Children's Rights Alliance, *The United Nations Convention on the Rights of the Child*, Children's Rights Alliance, <https://perma.cc/H2HP-SUNS> (last visited Dec. 14, 2015).

<sup>15</sup> UNICEF, *Convention on the Rights of the Child: Rights Under the Convention on the Rights of the Child*, <https://perma.cc/6F8E-KD4F> (last updated Aug. 7, 2014).

<sup>16</sup> The original draft of the UNCRC stated that "the best interests of the child shall be the paramount consideration." However, after discussion of substituting 'the' for 'a' and 'primary' for 'paramount,' the text was adopted in its current wording. MICHAEL FREEMAN, *ARTICLE 3: THE BEST INTERESTS OF THE CHILD* 26 (André Alen et al. eds., 2007). For more discussion of the phrasing of Article 3, see CLAIRE BREEN, *THE STANDARDS OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 77–84 (2002).

<sup>17</sup> UNCRC, *supra* note 8, at art. 3.

<sup>18</sup> *Id.*

<sup>19</sup> UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* 15 (May 2008), <https://perma.cc/YRY6-J76D> [hereinafter UNHCR Guidelines].

recognized and important international standards regulating decisions regarding children.<sup>20</sup>

Despite these commitments to the child's best interests principle, there is no clear definition for "child's best interests" or what makes up a child's best interests. One suggested definition is "basic interests, for example to physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own."<sup>21</sup> However, while the definition of the child's best interests is contested, the importance of the principle is widely accepted. Article 3, in particular, is considered to have three potential roles to play in relation to children's rights: as an aid to construction and an element to be considered when implementing other rights, as a mediating principle assisting in resolving conflicts between different rights, and as a basis for evaluating the laws and practices where the matter may not be governed by other positive rights.<sup>22</sup>

The UNCRC is generally reviewed by the Committee on the Rights of the Child, an internationally elected body of eighteen independent experts, which monitors the UNCRC's implementation.<sup>23</sup> The Committee requires States Parties that have ratified the Convention to submit regular reports on the status of children's rights in their countries, with the first report within two years of ratification and then every five years after.<sup>24</sup> The Committee reviews the reports to note how States Parties are setting and meeting standards for protecting children's rights.<sup>25</sup> If existing measures are not enough, the Committee encourages States to take additional measures to develop special institutions for the promotion and protection of children's rights.<sup>26</sup> If necessary, the Committee can call for international assistance from other governments and organizations to force a U.N. member to comply with the UNCRC.<sup>27</sup>

The Child Abduction Convention, as currently applied, might be one such situation when additional international interpretation could be useful. As detailed in the UNCRC, the child's best interests principle should be a primary consideration in all actions concerning children. The Child Abduction Convention includes the child's best interests principle as a paramount consideration.

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<sup>20</sup> BREEN, *supra* note 16, at 79.

<sup>21</sup> FREEMAN, *supra* note 16, at 27 (citing John Eekelaar, *The Importance of Thinking That Children Have Rights*, 6 INT'L J. L. & FAM. 230-231 (1992)).

<sup>22</sup> *Id.* at 32.

<sup>23</sup> UNICEF, *Convention on the Rights of the Child: Monitoring the fulfilment of States obligations*, <https://perma.cc/Z3WL-HQVJ> (last updated Nov. 30, 2005).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *FAQs and resources*, *supra* note 9.

However, it seems to ignore the principle when making jurisdictional determinations over where the abduction case should be heard, leading to scholarly debate over whether the Child Abduction Convention violates the child's best interests requirement of the UNCRC. Section B will discuss the Child Abduction Convention, its elements and exceptions, and some of the ways in which the Child Abduction Convention is said to violate or not to violate the child's best interests principle.

## B. The Child Abduction Convention

The Child Abduction Convention was drafted by the Hague Conference on Private International Law and was unanimously approved by the twenty-three member states present at the Fourteenth Session of the Hague Conference in 1980.<sup>28</sup> The Child Abduction Convention was drafted against the backdrop of a growing number of international child abductions, with international marriages growing more popular due to the ease of travel. Today, the Child Abduction Convention has been signed by seventy-three countries, making it one of the most successful products of the Hague Conference.<sup>29</sup>

### 1. Purposes of the Child Abduction Convention.

The purposes of the Child Abduction Convention are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>30</sup> As such, a notable limitation of the Child Abduction Convention is that “[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”<sup>31</sup> More generally, the Child Abduction Convention is designed to restore the status quo prior to any wrongful removal or retention<sup>32</sup> and to deter parents from international forum shopping, thereby preventing any reward for international child abduction.<sup>33</sup> The Child

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<sup>28</sup> JEREMY D. MORLEY, *THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR FAMILY LAWYERS* 2 (2012).

<sup>29</sup> Hague Conference on Private International Law, *Status table: Members of the Organisation (Convention of 25 October 1980 on the Civil Aspects of International Child Abduction)*, HCCH, <https://perma.cc/CP7D-MAKA> (last visited Oct. 2, 2016); see also Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 271, 279 (2002).

<sup>30</sup> Child Abduction Convention, *supra* note 7, at art. 1.

<sup>31</sup> *Id.* at art. 19; see also H.R. Con. Res. 293, 106th Cong. (2000) (enacted) and Hague International Child Abduction Convention: Text and Legal Analysis, 51 *Fed. Reg.* 10494, 10507 (Mar. 26, 1986).

<sup>32</sup> *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005).

<sup>33</sup> MORLEY, *supra* note 28, at 5–6.

Abduction Convention, therefore, acts as a jurisdictional determination, with the court deciding where the best place to hear the underlying custody dispute is. In the U.S., the Child Abduction Convention was implemented through the International Child Abduction Remedies Act (“ICARA”), which provides definitions and details regarding how the U.S. enforces the Child Abduction Convention.<sup>34</sup>

## 2. Elements of a Child Abduction Convention claim.

Most Child Abduction Convention claims follow a similar factual and procedural path.<sup>35</sup> Once the parent realizes that his or her child has been abducted, the parent attempts to find the child within the country.<sup>36</sup> After realizing that the child is no longer in the country, the left-behind parent informs the Central Authority, a government-designated agency within each signatory country that handles child abduction issues within the home country.<sup>37</sup> The Central Authority and the left-behind parent file an application to initiate the process for the return of the child, which the Central Authority then forwards to the Central Authority of the new country where the abducting parent has taken the child in order to begin location proceedings in the new country.<sup>38</sup>

The elements of a Child Abduction Convention claim, when considered by a court, are laid out in Articles 3 and 4 and are briefly summarized as follows:

### *a) Habitual residence*

Neither the Child Abduction Convention nor the ICARA defines “habitual residence,” but courts tend to treat a question of habitual residence as a mixed question of law and fact subject to a fact-specific inquiry.<sup>39</sup> Habitual residence is determined as the home immediately before the removal or retention, and potential factors to be evaluated include the location of personal possessions and pets, whether the child has enrolled in school, and whether the child has established relationships in the new location.<sup>40</sup>

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<sup>34</sup> International Child Abduction Remedies Act, 42 U.S.C. §§ 11600-11 (2000) (current version at 22 U.S.C. §§ 9000-11 (2016)).

<sup>35</sup> Kilpatrick Townsend & Stockton LLP and National Center for Missing & Exploited Children, *Litigating International Child Abduction Cases Under the Hague Convention* 3 (2012), <https://perma.cc/6P8N-FCL3> (discussing how American courts have addressed “habitual residence”) [hereinafter *Litigating Under the Hague Convention*].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 3–4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 11–19.

<sup>40</sup> *Id.*

*b) Wrongful removal or retention*

Removal or retention is wrongful where it is in breach of custody rights under the law of the country in which the child was habitually resident immediately before the removal or retention.<sup>41</sup> Article 5(a) broadly defines custody rights as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence,” and the Child Abduction Convention provides little guidance towards actually determining whether the petitioner has custody rights, leaving it to the law of the country.<sup>42</sup> Custody rights may arise by operation of law, by reason of a judicial or administrative decision, or by an agreement having legal effect under the law of the country of habitual residence, highlighting the seriousness of a habitual residence determination.<sup>43</sup>

*c) Exercise of custody rights*

The petitioner must also be exercising his or her custody rights according to the laws of the country where the child habitually resides. Determination of whether the left-behind parent has exercised custody rights is also a fact-intensive analysis.<sup>44</sup>

*d) Age of the child*

The Child Abduction Convention only applies if the child is below sixteen years of age.<sup>45</sup> Even if the child was under sixteen at the time of the wrongful removal or retention, the Child Abduction Convention ceases to apply as soon as the child turns sixteen.<sup>46</sup>

### 3. Exceptions to the Child Abduction Convention.

If all these elements are successfully met, a child must be returned to the country of habitual residence unless one of the five exceptions, set forth in Articles 12, 13, and 20, applies.<sup>47</sup> The drafters of the Child Abduction Convention struck a balance between the interests of children in not being wrongfully taken from their habitual residence and the need to protect individual children in specific, extreme cases.<sup>48</sup> All of the exceptions are construed narrowly, and even in cases where one of the defenses applies, the court still has discretion to return the

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<sup>41</sup> Child Abduction Convention, *supra* note 7, at art. 3.

<sup>42</sup> *Id.* at art. 5.

<sup>43</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 20. For more analysis, see *id.* at 21–25.

<sup>44</sup> *Id.* at 25.

<sup>45</sup> Child Abduction Convention, *supra* note 7, at art. 4.

<sup>46</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 26–27.

<sup>47</sup> *Id.* at 37.

<sup>48</sup> MORLEY, *supra* note 28, at 6.

child.<sup>49</sup> However, a court cannot refuse to return a child based on a child's best interests determination or on the merits of the underlying custody claim.<sup>50</sup> Brief descriptions of the five affirmative defenses follow, in order of least important to most important in the context of the child's best interests principle.

*a) Public policy defense*

The public policy defense is the least commonly used of the five affirmative defenses, and so far, no one has successfully argued that the return of a child might be contrary to the principles and rights under the UNCRC.<sup>51</sup> Article 20 states that a wrongfully retained or removed child must be returned unless return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." However, this refers only to rights that have been incorporated and internalized into the domestic legal system of the requested state.<sup>52</sup> The public policy defense does not provide a basis to deny return if the return would be at odds with locally unincorporated international human rights norms.<sup>53</sup> In Australia, this defense was held to mean that Article 20 should be invoked only when return orders would "utterly shock the conscience of the court or offend all notions of due process."<sup>54</sup>

*b) Consent or acquiescence defense*

Under Article 13(a), the court is not bound to return a child if the abducting parent establishes that the left-behind parent consented or subsequently acquiesced to the allegedly wrongful removal or retention.<sup>55</sup> Common arguments or actions used to determine consent or acquiescence include authorizations to travel, the nature of the removal, or other words or actions of the left-behind parents.<sup>56</sup>

*c) Mature child's objection defense*

Under Article 13, the court may choose not to return a 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,"<sup>57</sup> reflecting Article 12 of

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<sup>49</sup> Estin, *supra* note 29, at 280.

<sup>50</sup> *Id.*

<sup>51</sup> FREEMAN, *supra* note 16, at 19.

<sup>52</sup> Sthoeger, *supra* note 9, at 518.

<sup>53</sup> *Id.*

<sup>54</sup> FREEMAN, *supra* note 16, at 19 (citing *Director-General v. Bennett* (2000) 26 Fam LR 71 (Austl.)).

<sup>55</sup> Child Abduction Convention, *supra* note 7, at art. 13(a).

<sup>56</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 46–49.

<sup>57</sup> UNCRC, *supra* note 8, at art. 8. *See also* UNCRC, *supra* note 8, at art. 12 ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely

the UNCRC on a child's right to be heard.<sup>58</sup> However, the Child Abduction Convention does not specify what an appropriate age is, often leading to a fact-intensive inquiry of whether a child's views should be accounted for.<sup>59</sup> Courts have thus applied this exception at their discretion, leading to a wide variety of ages at which children's preferences have been heard and accepted. In the U.S., for example, courts have ordered the return of a fifteen-year-old child, despite the child's expressed preference to remain,<sup>60</sup> but denied a petition for return where five- and eight-year-old children objected.<sup>61</sup> New Zealand courts have accepted the objections of a nine-year-old girl,<sup>62</sup> but U.K. courts disregarded the objections of a fourteen-and-a-half-year-old girl,<sup>63</sup> showing the discretionary nature of this exception.

*d) Well-settled child defense*

Under Article 12, the court may choose not to order return if "it is demonstrated that the child is now settled in its new environment."<sup>64</sup> However, the well-settled defense does not apply if proceedings were commenced within one year of the wrongful removal or retention, and ultimately, even if the well-settled defense does apply, the court may nevertheless order the return of the child.<sup>65</sup> Neither the ICARA nor the Child Abduction Convention provide guidance on the factors to determine whether a child is well-settled, but American courts have suggested at least six factors to consider: the age of the child, the stability of the child's residence in the new environment, whether the child attends school or daycare consistently, whether the child attends church regularly, the stability of the abducting parent's employment, and whether the child has friends and relatives in the new area.<sup>66</sup>

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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").

<sup>58</sup> FREEMAN, *supra* note 16, at 18.

<sup>59</sup> *Id.* at 18–19.

<sup>60</sup> Casimiro v. Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713, at \*6 (N.D. Ga. Oct. 13, 2006).

<sup>61</sup> Reyes Olguin v. Cruz Santana, No. 03 CV 6299 JG, 2005 WL 67094, at \*10 (E.D.N.Y. Jan. 13, 2005). For more examples, see *Litigating Under the Hague Convention*, *supra* note 35, at 61–64.

<sup>62</sup> Secretary for Justice v. Abrahams, ex parte Brown [1992] [INCADAT cite: HC/E/NZ 492] (N.Z.).

<sup>63</sup> TB v. JB [2001] 2 FLR 515 [INCADAT cite: HC/E/UKe 419] (U.K.).

<sup>64</sup> Child Abduction Convention, *supra* note 7, at art. 12.

<sup>65</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 39–40.

<sup>66</sup> In re Koc, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001).

e) *Grave risk defense*

Under Article 13, a respondent may raise the defense that the child should not be returned because of a grave risk of “physical or psychological harm” or an “intolerable situation.”<sup>67</sup> American courts have applied the grave risk defense in cases when return would likely result in sexual abuse<sup>68</sup> or suicidal impulses due to prior trauma,<sup>69</sup> distinguishing between cases of “risk of harm” and “grave risk of harm.” Similarly, a British court held that there must be “clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial and not trivial.”<sup>70</sup>

Courts must also go further than simply recognizing the existence of a grave risk to justify denying return of a child to his or her habitual residence. In *Turner v. Frowein*,<sup>71</sup> the court held that, despite clear evidence of sexual abuse by the father against his son, a Child Abduction Convention petition cannot be denied unless the court has evaluated all potential placement options and legal safeguards that would ensure the child’s safety.<sup>72</sup> This additional determination places another burden on making a grave risk defense and could be another place in the Child Abduction Convention that contravenes the child’s best interests principle.

Similarly, there are concerns that the grave risk defense does not adequately account for domestic and family violence issues.<sup>73</sup> The stereotypical abductor imagined by the original drafters was a noncustodial parent, primarily the father, abducting the child, but the more frequent pattern has been the caretaking parent, typically the mother, seeking to return to a former home after experiencing domestic violence.<sup>74</sup> However, the grave risk defense may still be denied if the abuse is against the parent and there is no clear evidence of abuse against the child. For example, in *Mendez Lynch v. Mendez Lynch*, the mother alleged that the father throttled her, hit her, and spit on her, among other instances of physical confrontations and abuse.<sup>75</sup> The father denied the allegations of abuse and ultimately, the court concluded that the mother had not met her burden of a grave

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<sup>67</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 49–52.

<sup>68</sup> *See generally* *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007).

<sup>69</sup> *See generally* *Reyes Olguin*, 2005 WL 67094.

<sup>70</sup> *FREEMAN*, *supra* note 16, at 18.

<sup>71</sup> 752 A.2d 955 (Conn. 2000).

<sup>72</sup> *Id.* at 964, 969.

<sup>73</sup> *Stoeger*, *supra* note 9, at 531.

<sup>74</sup> *Estin*, *supra* note 29, at 282; *see generally* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000).

<sup>75</sup> *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1350 (M.D. Fl. Aug. 13, 2002).

risk of harm, because there was no direct abuse of the children, and ordered the return of the child to the father.<sup>76</sup>

#### 4. Child's best interests under the Child Abduction Convention.

The child's best interests principle is not directly addressed by the Child Abduction Convention other than a line in the Preamble stating that "the interests of children are of paramount importance."<sup>77</sup> However, an application of the principle has been read into the Child Abduction Convention to attempt to reconcile it with the child's best interests principle in a few ways as follows.

*a) Assumption that the child's best interests are served by prompt return to the court of habitual residence*

One interpretation of the Child Abduction Convention that does not conflict with the UNCRC's child's best interests principle is that the Child Abduction Convention has an underlying assumption that the child's best interests are served by a prompt return to the court of habitual residence, which is best suited to determine the merits of the case.<sup>78</sup> As the argument goes, the underlying dispute to a Child Abduction Convention case is a custody dispute between the parents, which is typically decided by the court which would handle the parents' divorce—namely, the court of the country of habitual residence of the family. Indeed, most countries' Child Abduction Convention implementations accept this assumption as true, thereby avoiding further questions of the child's best interests.<sup>79</sup>

However, this assumption is not universally accepted and has been challenged repeatedly. Most notably, Rhona Schuz contends that the assumption is true only if the courts of the country of habitual residence respect the child's best interests principle and if the place of the child's residence is the forum *conveniens* to hear the case.<sup>80</sup> For example, the custody case may not ever be heard in court or the case may be skewed due to the results of the Child Abduction Convention case.<sup>81</sup> In such a case, determination of the Child Abduction Convention case might essentially constitute a determination of the merits, or as much of a determination of the merits as would ever happen, but one without the child's best interests at heart. An easy example would be if one parent were living

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<sup>76</sup> *Id.* at 1366.

<sup>77</sup> Child Abduction Convention, *supra* note 7, at Preamble.

<sup>78</sup> MORLEY, *supra* note 28, at 3, 5.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> Sthoeger, *supra* note 9, at 525-526 (citing Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 *TRANSACT'L. L. & CONTEMP. PROBS.* 393, 400 (2002)).

<sup>81</sup> MORLEY, *supra* note 28, at 8.

and working illegally in the U.S., while the other parent lived in Mexico. The parent in the U.S. may never return to Mexico due to the difficulties in attempting to return to the U.S., and therefore, a divorce or custody hearing may never occur, even if a court decrees that the case should be heard in Mexican court. Unfortunately, empirical studies on whether Child Abduction Convention cases are ultimately litigated in the country of habitual residence are unlikely to be highly conclusive, thus making it hard to actually determine how true or false the presumption may be.<sup>82</sup>

Furthermore, even if the assumption is true, it does not necessarily follow that the child's best interests are served by actually residing in the country of habitual residence pending the final determination of custody rights.<sup>83</sup> If the child was enrolled in school and was otherwise fairly well-settled in the new country, it may not be in the child's best interests to be pulled out from the new environment and returned to the old one if the child loses out on education or other benefits, as in the case of the Garning litigation concerning four daughters brought to Australia from Italy.<sup>84</sup> Another example is that of Russell Wood and Maya Wood-Hosig.<sup>85</sup> The mother took her two children to Switzerland from Australia, but the children were forced to return to Australia pending the final outcome of the custody case.<sup>86</sup> However, the father was unable to care for the children, resulting in the children being placed in foster care.<sup>87</sup> The mother was unable to return to Australia because of potential criminal action for the abduction, and by the time the Australian court issued their decision, the children had moved through several foster homes.<sup>88</sup> Ultimately, the children were allowed to return to Switzerland—the exact same arrangement as before the Child Abduction Convention proceeding began, but with significant distress and hardship.<sup>89</sup>

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<sup>82</sup> RHONA SCHUZ, *THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS* 50–52 (2013).

<sup>83</sup> *Id.*

<sup>84</sup> See Adiva Sifris, *The Hague Child Abduction Convention “Garnering” the Evidence: The Australian Experience*, 19 SW. J. INT'L L. 299 (2013), for a full discussion of the Garning litigation. Ultimately, after more than two years in Australia connecting with family and making new friends while the case was pending, the children were sent back to Italy to live with their father, while their mother remained in Australia.

<sup>85</sup> For a full discussion of this case, see Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 338–43 (2008).

<sup>86</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 Aug. 2006, 5208b, <https://perma.cc/S4UR-CR86> (last visited Oct. 23, 2016).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

Could the court then have an additional duty to consider the protective processes available in the home country before ordering return of the child and allowing resolution of the custody dispute in making a grave risk determination?<sup>90</sup> While these issues demonstrate further problems with the main underlying assumption of the Child Abduction Convention, courts do not presently have to consider protective processes before determining whether to return a child to his or her country of habitual residence.<sup>91</sup>

*b) Grave risk exception*

The grave risk exception is likely the closest to a child's best interests analysis currently built into the Child Abduction Convention. Under the grave risk exception, the court considers what challenges or situations the child may face should the child be returned to the left-behind parent and country.<sup>92</sup> By considering whether there would be a grave risk of physical or psychological harm or an otherwise intolerable situation, courts seem to go partway in considering what would be in the child's best interests.<sup>93</sup> Despite this, the ICARA was very clear that the grave risk exception "was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests."<sup>94</sup> Return of the child is to the country, rather than to a particular parent, so that the exception should only apply when the court is not satisfied that the country cannot provide sufficient protection.<sup>95</sup>

Despite these assumptions and interpretations, the question of the child's best interests principle under the Child Abduction Convention remains. Numerous scholars have written about the conflict between the child's best interests principle and the Child Abduction Convention;<sup>96</sup> this Comment is yet another. However, this Comment seeks to add another layer of understanding to the Child Abduction Convention by considering two other situations of children crossing international borders, in Sections III and IV below.

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<sup>90</sup> Brian S. Kenworthy, *The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children's Rights Aspects of the Hague Convention on International Child Abduction*, 12 *IND. INT'L & COMP. L. REV.* 329 (2002).

<sup>91</sup> International Child Abduction Remedies Act, *supra* note 34.

<sup>92</sup> Litigating Under the Hague Convention, *supra* note 35, at 49–60.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 66; *see also* FREEMAN, *supra* note 16, at 17. However, while the ICARA limits child's best interests determination in the U.S., European countries have other intervening laws protecting children's rights, such as the European Convention on Children's Rights. *See* FREEMAN, *supra* note 16, at 20, 23–24.

<sup>95</sup> FREEMAN, *supra* note 16, at 17.

<sup>96</sup> *See* SCHUZ, *supra* note 82; *see also* MORLEY, *supra* note 28.

*c) At the court's discretion*

There also seems to be some room for the adjudicating courts to institute a consideration of a child's best interests on their own, though unofficially and not specifically saying so. In *Re S*, the Child Abduction Convention claim involved two children, ages fourteen and twelve.<sup>97</sup> The mother was a British citizen while the father was from New Zealand, where the children were born.<sup>98</sup> The New Zealand courts refused to allow the mother to move back to England with the children, but she managed to take the children anyway.<sup>99</sup> The father instituted proceedings seeking return of the children and the child welfare officer reported that the children strongly objected to returning to New Zealand.<sup>100</sup> The court acknowledged that the children would likely be placed in a foster home situation because of their animosity towards their father.<sup>101</sup> The court also noted that the mother had remarried in England and that the children now had step-siblings.<sup>102</sup> Implicitly, the court appears to have incorporated and considered the children's best interests in recommending that the children have separate representation from their mother and by allowing the children to stay in England with their mother.<sup>103</sup> Though the court noted the highly unusual facts of the case before allowing the children's separate representation, it is unclear how much flexibility courts may have following *Re S*.

Section III next considers the child's best interests principle under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. This Convention applies in the context of international adoptions, a similar intercountry movement of children to international child abduction, but one in which the Central Authority has a greater role in considering the interests of the child. Section III examines the role of the Central Authority and other differences in the application of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in order to suggest areas of improvement for the Child Abduction Convention process.

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<sup>97</sup> *Re S (Abduction: Children: Separate Representation)* [1997] 1 F.L.R. 486 (Fam.) at [3] (Eng.).

<sup>98</sup> *Id.* at [4].

<sup>99</sup> *Id.* at [8]–[10].

<sup>100</sup> *Id.* at [12]–[13].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at [11], [8].

<sup>103</sup> Kenworthy, *supra* note 90, at 360–61.

### III. HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The Hague Adoption Convention was adopted on May 29, 1993 and entered into force on May 1, 1995 as the first formal international and intergovernmental recognition of international adoption.<sup>104</sup> The Convention has been ratified by ninety six countries, including the U.S.<sup>105</sup> It applies when

a child habitually resident in one Contracting State . . . has been, is being, or is to be moved to another Contracting State . . . either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.”<sup>106</sup>

The Hague Adoption Convention clearly states the importance of the child's best interests principle. In its Preamble, the Convention affirms that signatory States are “[c]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights.”<sup>107</sup> The objectives of the Convention, set forth in Article 1, are as follows:

a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law; b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction of, sale of, or trafficking in children; c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.<sup>108</sup>

In contrast to the Child Abduction Convention, even on the surface, the Hague Adoption Convention shows more dedication to the child's best interests principle. The Hague Adoption Convention has a clear commitment that the child's best interests be considered, starting in its Preamble.<sup>109</sup> The Hague

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<sup>104</sup> Notesong Srisopark Thompson, *Hague is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L. J. 441, 442 (2004).

<sup>105</sup> Hague Conference on Private International Law, Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, <https://perma.cc/EGV6-SVCT> (last visited Oct. 3, 2016).

<sup>106</sup> Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 2, May 29, 1993, 32 I.L.M. 1134, <https://perma.cc/HB7R-8T27> [hereinafter Hague Adoption Convention].

<sup>107</sup> *Id.* at Preamble.

<sup>108</sup> *Id.* at art. 1.

<sup>109</sup> *See generally id.* at Preamble.

Adoption Convention also requires a determination of the child's best interests in Article 4, stating that an adoption within the scope of the Convention is allowed only if "the competent authorities of the State of origin . . . have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests."<sup>110</sup> The Convention emphasizes the Central Authority's role in determining whether adoption is in the child's best interests in Articles 16 and 21, compared to the Central Authority's relatively hands-off role in Child Abduction Convention cases.<sup>111</sup> In the Child Abduction Convention context, the Central Authority helps prepare and process applications for a child's return, provides information about available options and resources, and contacts the Central Authority in the foreign country for help in locating the child.<sup>112</sup>

The Hague Adoption Convention has had its own practical problems, including designations of Central Authorities as required by the Convention or states using the Convention to effectively take over the intercountry adoption systems.<sup>113</sup> However, the Hague Adoption Convention does not appear to run into the same challenges regarding the child's best interests principle as the Child Abduction Convention. This could be attributed in part to the fact that the Hague Adoption Convention was adopted after the UNCRC, giving the Convention more opportunity to build in the child's best interests principle and better ideas towards implementing it. Though a number of UNCRC Articles and principles apply to the Hague Adoption Convention situation, Articles 20 and 21 are particularly relevant—requiring, respectively, that signatory governments ensure alternative care for children deprived of their family environments and that states' adoption systems ensure the child's best interests are the primary consideration in intercountry adoptions.<sup>114</sup>

However, the Hague Adoption Convention has also been ratified by more countries (ninety-five to the Child Abduction Convention's seventy-three) and has spawned far less litigation, in part because the Child Abduction Convention's natural process places the burden on courts to decide, compared to the Hague Adoption Convention's burden on the Central Authority prior to any adoption. Although it may not be realistic to expect an abducting parent to seek approval of the country's Central Authority, perhaps there is something to be learned from

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<sup>110</sup> *Id.* at art. 4; Bureau of Consular Affairs, *Understanding the Hague Convention*, <https://perma.cc/3MPG-4UXZ> (last visited Oct. 3, 2016).

<sup>111</sup> Hague Adoption Convention, *supra* note 106, at arts. 16, 21. *See* Estin, *supra* note 29, at 285–86.

<sup>112</sup> MORLEY, *supra* note 28, at 19.

<sup>113</sup> Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 365–66, 390 (2007).

<sup>114</sup> UNCRC, *supra* note 8, at art. 20 and 21.

the Hague Adoption Convention's reliance on the Central Authority. The U.S. Central Authority, the Office of Children's Issues in the Bureau of Consular Affairs under the Department of State, handles both Child Abduction Convention cases and Hague Adoption Convention requirements.<sup>115</sup> But the Hague Adoption Convention has more issues when it comes to who should decide what is in the best interests of the family and whether, in adoption cases, to allow single-person adoptions, adoptions by gay and lesbian couples, or interracial adoptions.<sup>116</sup>

There is another clear difference between cases under the Hague Adoption Convention and the Child Abduction Convention: consent. In adoption cases, and as required by the Hague Adoption Convention, consent has been clearly obtained from the persons, institutions or authorities whose consent is necessary for adoption, and such parties have given their informed consent freely.<sup>117</sup> One of the central premises of the Child Abduction Convention is that the case is filed because consent was not given, though if a parent tries to change his or her mind and claim that consent was not given, the Consent or Acquiescence Defense provides an opportunity to prove that informed consent was in fact given.<sup>118</sup> However, this difference should not invalidate any lesson that could be carried over from the Hague Adoption Convention to the Child Abduction Convention. At the root of both Conventions is the same question: what residence is in the best interests of the child, and how do we determine what is in the child's best interests?

#### IV. U.N. HIGH COMMISSIONER FOR REFUGEES AND UNACCOMPANIED MINORS IN THE U.S.

Another example of this question is the situation of refugee children under the U.N. High Commissioner for Refugees Guidelines. These guidelines consider the child's best interests principle by suggesting best interests determinations and assessments, but actual implementation of child's best interests consideration has been limited. For simplicity and for the purposes of comparison, this Section will focus on unaccompanied minors and refugee children in the American context, which does not include a child's best interests determination despite the similarities with the Child Abduction Convention and Hague Adoption Convention in addressing international movement of children.

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<sup>115</sup> Estin, *supra* note 29, at 286.

<sup>116</sup> Bridget M. Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 655, 690-92 (2001).

<sup>117</sup> Hague Adoption Convention, *supra* note 106, at art. 4.

<sup>118</sup> *Litigating Under the Hague Convention*, *supra* note 35, at 45-49.

### A. U.N. High Commissioner for Refugees (UNHCR)

Under the UNCRC, refugee children, either accompanied or unaccompanied, shall “receive appropriate protection and humanitarian assistance.”<sup>119</sup> The UNHCR was created to protect refugees and safeguard the rights and well-being of refugees.<sup>120</sup> As part of the UNHCR’s goals of promoting children’s rights, the UNHCR and its partners support the strengthening or establishment of comprehensive child protection systems, which should include mechanisms to determine and consider a child’s best interests.<sup>121</sup> The UNHCR offers its own guidelines on the child’s best interests principle and distinguishes between a best interests determination (BID) and a best interests assessment (BIA).<sup>122</sup> A BIA is an essential step before any action affecting an individual child of concern to UNHCR, except in three scenarios when a BID is instead appropriate and must be conducted: identification of durable solutions for unaccompanied and separated refugee children, temporary care arrangements for unaccompanied or separated children in exceptional situations, or possible separation of a child from his or her parents against their will.<sup>123</sup> Specifically, a BIA is needed in the context of a child being considered for resettlement, but only with one parent, which seems like a parallel to most Child Abduction Convention claim contexts.<sup>124</sup> Benefits of a BID include ensuring specific protection and care to a child deprived of such protection from his or her family, ensuring a child’s right to be heard and weighed according to his or her age, maturity, and evolving capacities, and providing a comprehensive assessment of a child’s maturity, among others.<sup>125</sup>

The BID process includes specific procedural safeguards, including adequate child protection, involvement of persons with different relevant expertise, and systematic documentation of each step of the procedure.<sup>126</sup> A multi-disciplinary, gender-balanced BID panel is composed of three to five people with professional experience in child development and protection, and each person sits as an

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<sup>119</sup> UNCRC, *supra* note 8, at art. 22.

<sup>120</sup> UNHCR, About Us: Office of the United Nations High Commissioner for Refugees, <https://perma.cc/YCJ6-3XM9> (last visited Oct. 15, 2015).

<sup>121</sup> UNHCR Guidelines, *supra* note 19, at 9.

<sup>122</sup> *Id.* at 22.

<sup>123</sup> *Id.* at 22–23.

<sup>124</sup> UNHCR, *UNHCR Field Handbook for the Implementation of UNHCR Bid Guidelines* 1 (2011), <https://perma.cc/5UGH-88AC> [hereinafter UNHCR Field Handbook].

<sup>125</sup> UNHCR Guidelines, *supra* note 19, at 23–24.

<sup>126</sup> *Id.* at 48.

independent expert.<sup>127</sup> Whenever possible, the panel should also be established in cooperation with national or local child welfare authorities, potentially including Central Authorities, or organizations and NGOs with child-specific mandates familiar with the population of concern.<sup>128</sup>

Interestingly, the primary consideration for BID decision-makers is to determine what option is best suited to securing the attainment of the child's rights, which is then considered to constitute the child's best interests.<sup>129</sup> Although all relevant circumstances must be accounted for and the best interests of the child may be balanced with the rights of other persons (for example, placing a child with tuberculosis in a foster family who may be affected),<sup>130</sup> the UNHCR BID process shows a clear commitment to the child's best interests principle despite acknowledging that it may have to be compromised occasionally.<sup>131</sup> This seems to be perfectly in line with the UNCRC's declaration that the child's best interests be not just a primary consideration, but an exclusive one.<sup>132</sup> And although BIDs are not required for the majority of actions involving children, the less-formal BIA still seems as useful in assessing a child's best interests.<sup>133</sup> A BIA does not require the same strict procedural safeguards, but the assessment should still be documented, and, importantly, the child still has the opportunity to express his or her views.<sup>134</sup>

The U.S. has taken steps to include and meet the child's best interests principle, though unfortunately not quite in response to the international laws discussed in this Comment.<sup>135</sup> In family law, courts balance the parent's interest for family integrity, the state's interest in protecting the minor, and the child's interest in safety and a stable family environment to determine what the best interests of the child are.<sup>136</sup> However, in relation to asylum-seeking by unaccompanied minors, the U.S. restricts child's best interests considerations to procedural matters and not necessarily to asylum applications directly, despite the UNHCR's own procedure that clearly accounts for child's best interests

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<sup>127</sup> *Id.* at 53.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 67.

<sup>130</sup> *Id.* at 76.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 67.

<sup>133</sup> *Id.* at 22–23.

<sup>134</sup> *Id.*

<sup>135</sup> See Section IV(2) *infra* for a discussion of the steps taken by the U.S. to include the child's best interests principle.

<sup>136</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 143 (2006).

analyses.<sup>137</sup> In the following Section, this Comment will discuss the situation of unaccompanied minors in the U.S. as an example of how UNHCR guidelines have been recognized, but not accepted.

## B. Unaccompanied Minors in the U.S.

Another instance of international child movement is that of unaccompanied minors attempting to cross the border, typically from South or Central America into the U.S., for reasons including escaping violent communities or abusive family relationships in their home countries or finding work to support their families in their home country.<sup>138</sup> Thousands of children are apprehended each year, including asylum seekers, survivors of trafficking, and children travelling to reunite with family, though the journey may not be in the child's best interests.<sup>139</sup> Such situations may be closer to those under the Child Abduction Convention, with no consent or only partial consent for entry into America and no aid to be expected, than to adoption cases, where steps to obtain permanent residency for the child are mandated.

A classic story is that of Edgar Chocoy, a sixteen-year-old from Guatemala.<sup>140</sup> Edgar's grandparents raised him in Guatemala City, where he was recruited into a gang at age ten.<sup>141</sup> At age fourteen, Edgar fled to the U.S. because gang members threatened to kill him if he tried to retire.<sup>142</sup> Despite Edgar's prediction that gang members would murder him if he returned, the immigration judge sent him back to Guatemala.<sup>143</sup> Seventeen days later, the first time he ventured outside after his return, Edgar Chocoy was shot in the back of the neck and killed.<sup>144</sup>

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<sup>137</sup> *Id.* at 153.

<sup>138</sup> Office of Refugee Resettlement, Fact Sheet: U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children's Program (Jan. 2016), <https://perma.cc/FLC6-MUWB>.

<sup>139</sup> National Immigrant Justice Center, Fact Sheet: Children Detained by the Department of Homeland Security in Adult Detention Facilities 1 (May 2013), <https://perma.cc/95MY-83T3>.

<sup>140</sup> Bruce Finley, *Bound for Better Life, Deported to Despair*, DENVER POST, June 13, 2004, <https://perma.cc/4BN3-TPBX>; Sergio De Leon, *Guatemalan Youth Slain 17 Days After Being Deported from U.S.*, LA TIMES, May 9, 2004, <https://perma.cc/LB6L-Q637>.

<sup>141</sup> De Leon, *supra* note 140.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Finley, *supra* note 140.

The basic process for unaccompanied minors in the U.S. typically involves temporary housing and deportation proceedings against the child.<sup>145</sup> Within 72 hours after arrest by the Department of Homeland Security, unaccompanied children are placed into the care and custody of the Office of Refugee Resettlement Division of Unaccompanied Children's Services (ORR),<sup>146</sup> which generally functions pursuant to child welfare principles and contracts with child welfare agencies around the country to detain children.<sup>147</sup> A child is considered "unaccompanied" if, according to the Homeland Security Act, the child is under the age of 18 and neither a parent nor legal guardian is with the juvenile at the time of apprehension, or within a geographic proximity to quickly provide care for the juvenile.<sup>148</sup>

Administrative removal proceedings occur before the Executive Office for Immigration Review, an agency of the Department of Justice, which places the child against a DHS trial attorney before an immigration judge.<sup>149</sup> Notably, approximately 90% of children lack representation in these proceedings due to the scarcity of pro bono resources, but are subjected to the same burden of proof as an adult alien facing deportation.<sup>150</sup> Juan Gonzalez, for example, was a six-year-old unaccompanied minor who travelled into the U.S. from Mexico to meet his parents who had previously crossed over illegally.<sup>151</sup> Juan could barely see over the court's wooden benches, but, unknown to him, he faced being deported back to Mexico without his parents.<sup>152</sup>

The 1997 *Flores* settlement was a step towards including child's best interests considerations in the context of unaccompanied minors in the U.S. Stemming from a 1985 class action suit against the INS, the suit challenged how the INS processed, apprehended, detained, and released children in its custody.<sup>153</sup> Under the terms of the agreement, a juvenile is defined as a person under 18 who is not emancipated by a state court or convicted and incarcerated due to a conviction for a criminal offense as an adult.<sup>154</sup> The *Flores* agreement, now largely codified at

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<sup>145</sup> Christopher Nugent, *Whose Children are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006).

<sup>146</sup> *Id.*

<sup>147</sup> National Immigrant Justice Center, *supra* note 139, at 1.

<sup>148</sup> *Id.* at 2.

<sup>149</sup> Nugent, *supra* note 145, at 222.

<sup>150</sup> *Id.*

<sup>151</sup> Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 25, 2012, <http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html>.

<sup>152</sup> *Id.*

<sup>153</sup> *Reno v. Flores*, 507 U.S. 292, 294–96 (1993).

<sup>154</sup> *Id.*

8 CFR §§ 236.3 and 1236.3, also requires that juveniles be held in the least restrictive setting appropriate to their age and special needs and that juveniles be released from custody without unnecessary delay to a parent, legal guardian, adult relative individual specifically designated by the parent, licensed program, or an adult who seeks custody and whom DHS deems appropriate.<sup>155</sup> Juveniles should not be detained with an unrelated adult for more than 24 hours, and unaccompanied minors must receive a list of attorneys for potential legal representation.<sup>156</sup> The *Flores* agreement applies to all children or juveniles detained by DHS and thereby sets national policy regarding the detention, release, and treatment of children in custody.<sup>157</sup>

However, problems persist in the detaining of children, contrary to UNHCR guidelines and to the *Flores* agreement. For example, children can be transported to facilities wherever and whenever a bed opens up, regardless of distance from family or advocates, in the name of placing children in more appropriate settings, but violating rights to assistance or care.<sup>158</sup> Additionally, the *Flores* agreement's "least restrictive setting" requirement is often ignored by exploiting the "emergency" or "influx" exceptions, and non-delinquent aliens end up not properly separated from juvenile offenders and adults.<sup>159</sup> The treatment of unaccompanied minors in the U.S., though not directly governed by international law and the child's best interests principle, can nevertheless fall within the scope of the principle, especially in the case of refugees. In some countries, for example, the UNHCR Guidelines discussed above have been extended to all unaccompanied minor aliens, not just refugees.<sup>160</sup>

The INS Guidelines for Children's Asylum Claims explicitly disregards the child's best interests principle for asylum law, stating that the principle "is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition."<sup>161</sup> Although the Child Abduction Convention again operates under a different premise (single parent approval compared to tacit

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<sup>155</sup> *Id.*; Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 870–71 (2004).

<sup>156</sup> Seugling, *supra* note 155, at 871; Samantha Casey Wong, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 857 (2013).

<sup>157</sup> National Immigrant Justice Center, *supra* note 139, at 2.

<sup>158</sup> Nugent, *supra* note 145, at 224.

<sup>159</sup> Claire L. Workman, *Kids are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 231–32 (2004).

<sup>160</sup> *Id.* at 237–38.

<sup>161</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators 2 (Dec. 10, 1998), <https://perma.cc/X8X9-TMFJ>.

parent approval), it is notable that in either application of the Child Abduction Convention or in cases of unaccompanied minors seeking asylum, the child's best interests principle is only used procedurally and not substantively. Yet both the UNCRC and UNHCR suggest guidelines or require that the child's best interests be considered substantively, leaving room for growth in Child Abduction Convention applications for the child's best interests principle.

#### V. RECONCILING THE CHILD'S BEST INTERESTS PRINCIPLE: LESSONS FROM INTERNATIONAL LAW

Past analyses of the child's best interests principle in the Child Abduction Convention have focused on strengthening the child's right to be heard, requiring guardians ad litem to represent the child,<sup>162</sup> expanding the grave risk exception,<sup>163</sup> or adopting transnational and global principles from the UNCRC such as the age requirement, the child's best interests principle in relation to the grave risk of harm exception, and the right of participation relating to the mature child objection defense.<sup>164</sup> Some of these suggestions have been adopted by individual countries—Switzerland, for example, notably provides children with counsel for all applications under the Child Abduction Convention.<sup>165</sup> Swiss law also notably interprets the grave risk exception to mean that return should be denied if the primary caretaker who abducted the child could not reasonably be asked to return with the child to the place of habitual residence and if placing the child back in the place of residence would not be in the child's best interests.<sup>166</sup> In Europe generally, the European Court of Human Rights ruled that the European Convention on Human Rights requires that before courts can order the return of an abducted child to his or her habitual residence, courts must establish that it is in the best interests of the child and the child's family to do so.<sup>167</sup> Unfortunately, the U.S. does not have such an additional intervening law for child's best interests determinations.

However, other proposals have faced pushback, also in the name of the child's best interests, such as the argument for a stronger right to be heard. Along

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<sup>162</sup> 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, 526–27 (2009); Workman, *supra* note 159, at 226, 242, 247.

<sup>163</sup> SCHUZ, *supra* note 82, at 441.

<sup>164</sup> Allison M. Scott, *From a State-Centered Approach to Transnational Openness: Adapting the Hague Convention with Contemporary Human Rights Standards as Codified in the Convention on the Rights of the Child*, 11 IND. J. GLOBAL LEGAL STUD. 233, 252–56 (2004).

<sup>165</sup> Weiner, *supra* note 74, at 344, 376, 382–83.

<sup>166</sup> *Id.* at 343; Stoecker, *supra* note 9, at 526 (citing Weiner, *supra* note 74, at 608–09).

<sup>167</sup> MORLEY, *supra* note 28, at 6–7; Neulinger and Shuruk v. Switzerland, 2010-V Eur. Ct. H.R. 193 (2010).

with the typical considerations that the child may be unduly influenced by one parent, and accounting for maturity and age of the child, some courts may also recognize that it may be in the child's interest not to be directly involved in acrimonious proceedings that may involve choosing one parent over the other. Despite these arguments and analyses, these proposals are only theoretical due to the continuing debate over whether there truly is a serious problem with the Child Abduction Convention and the child's best interests principle such that a solution is actually necessary and required. Should the day come when a solution is necessary, one that draws directly from other implementations of the child's best interests in international law may be useful.

The reasoning and scenarios for the Child Abduction Convention, the Hague Adoption Convention, and the UNHCR guidelines on refugee children are distinct. To start, the Child Abduction Convention applies when one parent gives consent and one parent does not; the Hague Adoption Convention applies when both sets of parents, the ones adopting and the ones giving up the child, have consented; and in cases of unaccompanied asylum refugees, there appears to be tacit consent that the child try their luck or no consent at all, if the child's parents are no longer in the child's life. The Child Abduction Convention seems to be almost a middle ground between the other two sets of rules, yet it lacks commitment to the child's best interests principle, which seems to fall behind in priority to the parents' interest.

One potential solution, similar to the Hague Adoption Convention and UNHCR Guidelines, would be to expand the grave risk exception to also consider whether return to the home country might be a challenge to the moral interests of the child as well as the child's cultural and ethnic background.<sup>168</sup> While this does push the grave risk exception more towards a best interests analysis, there may be room in the grave risk exception to consider types of harm beyond merely physical or psychological harm, or even beyond the current limit on psychological harm, which tends to be abuse. There does not appear to be a case that has successfully argued a type of psychological harm other than the traditional standards of abuse, but this is not dispositive to a potentially expanded definition of psychological harm in the grave risk exception context.

However, a stronger solution might be to expand the role of the Central Authority in the Child Abduction Convention process. Currently, the role of the Central Authority is largely limited to assisting the left-behind parent in filing the

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<sup>168</sup> Consider, for example, the English case of *Re M* [1996] 2 F.L.R. 441 (Eng.). The question was whether to return a 9-year-old boy to his Zulu parents in South Africa or for him to remain in London with his foster mother, a white Afrikaner. The boy wished to remain with his foster mother, but the court ordered his return to South Africa, specifically for a Zulu development. After a few months, the parents sent the boy back to London to live with his foster mother, as per the boy's wishes.

appropriate documents to initiate the process for return of or access to the child.<sup>169</sup> Instead of relying on a presumption that the child's best interests are served by return to the country of habitual residence, perhaps there is room in the Child Abduction Convention's implementation for the same sort of BIA or BID analysis as under UNHCR guidelines, but conducted by the Central Authority as with the Hague Adoption Convention, as a step towards a new presumption. In an ideal world, the Committee on the Rights of the Child would resolve the conflict inherent in the Child Abduction Convention by implementing a clear balance test of when and how to consider the child's best interests. But to do so, the Child Abduction Convention would likely need to recognize that a determination on jurisdiction is sometimes a determination on the merits, thereby placing a greater burden on courts to get the decision right the first and only time. Though the Child Abduction Convention was enacted to solely adjudicate jurisdiction and not the merits in order to prevent the perverse incentive of international forum shopping, perhaps a balance towards a new presumption, drawing from other international laws involving children, is possible.

The Central Authority in Hague Adoption Convention cases is tasked with making a final determination on whether adoption is in the child's best interests,<sup>170</sup> and although the Convention itself does not explicitly state how the Central Authority must make such a determination, there appears to be relatively little outcry on how good or bad a job Central Authorities are doing.<sup>171</sup> Of the countries that have ratified both the Child Abduction Convention and the Hague Adoption Convention, some countries use the same Central Authority for both, meaning that the Central Authority is already equipped to conduct best interests determinations.<sup>172</sup> While the Central Authority should likely not be able to interfere and refuse to file a Child Abduction Convention claim, the Central Authority might have the lowest barrier to incorporating a child's best interests determination in the Child Abduction Convention process. Furthermore, although the UNHCR BIA or BID process is not handled through a Central Authority, the BID panel is suggested to include government officials with backgrounds in child protection or related areas, which suggests some potential overlap with Central Authority officials.<sup>173</sup> While such an implementation largely relies on the strengths and abilities of the individual Central Authorities to

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<sup>169</sup> Litigating Under the Hague Convention, *supra* note 35, at 3.

<sup>170</sup> Hague Adoption Convention, *supra* note 106, at art. 6.

<sup>171</sup> Based solely on my research and review of Central Authorities in the Hague Adoption Convention context.

<sup>172</sup> For full lists of designated Central Authorities, see Hague Conference on Private International Law, Status Table 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, <https://perma.cc/6W3V-6BSE> (last visited Oct. 3, 2016); Hague Conference on Private International Law, *supra* note 105.

<sup>173</sup> UNHCR Field Handbook, *supra* note 124, at 66.

implement processes for child's best interests determinations, it can build off an existing framework to create a uniform implementation rather than attempting to implement child's best interests considerations through the courts.

Unfortunately, despite criticisms of conflict between the Child Abduction Convention and the child's best interests principle, the issue does not appear to be one that draws international attention or widespread calls for a solution. Should that day arrive, solutions that build off of established procedures, such as the grave risk exception or BID processes, may have the least burden of implementation and, one can hope, the highest likelihood of reconciling the Child Abduction Convention and the child's best interests principle for good.

## VI. CONCLUSION

Despite the Child Abduction Convention's glossing over of the child's best interests principle, it is clear that the UNCRC should, and does, have some influence over international child abduction cases. A comparison to other international regulations relating to children and also governed by UNCRC principles reveals potential to strengthen the implementation of the child's best interests principle while staying true to most, if not all, of the Child Abduction Convention's original intents. However, application of the Child Abduction Convention must adapt to the times, and more up-to-date solutions may involve overturning old presumptions that may not hold true any longer. Drawing solutions from the Hague Adoption Convention and the UNHCR may additionally burden courts or implementing authorities in Child Abduction Convention cases, but for the sake of children, the ultimate losers in any sort of custody dispute, the challenges may be well worth the trouble.