THE RELEVANCE OF RELIGIOUS LAW AND CULTURAL CONSIDERATIONS IN INTERNATIONAL CHILD ABDUCTION DISPUTES

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I. INTRODUCTION

Two main categories of cases in which religious law and cultural considerations1 might be relevant in international child abduction disputes can be identified. The first category involves situations where the law in the country of origin in relation to custody of children is based on religious law or cultural norms and conceptions which are not consistent with basic human rights or with the principle of the welfare of the child as understood in the country of refuge (“the religious law and cultural norms cases”). At the moment, such situations rarely arise in cases under the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”) because hardly any of the states which are party to this Convention apply religious law or non-Western cultural norms to custody disputes2 and because the contracting states are perceived to be states

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**The staff of the Journal of Law and Family Studies have used all resources at their disposal to verify the accuracy of citations to international sources. However, because some sources are not written in English, or translation was not available, the author of this Article stands for the veracity of all representations or citations.

1 For convenience, the phrase “cultural considerations” will be used to include religious considerations which are short of actual application of religious law in custody matters. Frances Raday, Culture, Religion, and Gender, 1 Int’l J. Const. L. 663, 667-68 (2003) (noting that culture and religion have much in common in the context of the defense against human rights principles).

which observe human rights. However, there have been a few cases involving Israel where this issue has arisen. While, as we shall see below, in all cases the claims of the abducting mother were based on inaccurate or misleading information about the Israeli legal system, we can glean from them some insights into the attitudes of some European judges towards the application of religious law and perceived different cultural norms in the requesting state. Moreover, there are a number of contracting states, where the predominant religion is Islam and, although family law is officially secular in those states, it is likely that its implementation might be influenced by religious norms. In addition, there are other countries that are considering acceding to the Hague Convention, in which Sharia law may be applied to Muslims. Thus, it is appropriate to consider the treaty, a joint consultative commission is set up comprising representatives from both states, who try to find solutions to international custody disputes, including abduction cases, involving nationals of the two countries. The decisions of the commission are not binding. Similarly in 2004, a judicial conference was held in Malta in which judges from a number of Muslim countries participated together with European judges to discuss methods of improving cooperation in cross-country family cases. For the conclusions and recommendations of this conference, see Declaration from the Malta Judicial Conference on Cross-Frontier Family Law Issues, Mar. 17, 2004, available at http://www.hcch.net/upload/maltadecl_e.pdf.


5 Currently, there are five such countries: Burkina Faso, Turkmenistan, Turkey, Uzbekistan and Morocco (which ratified on 1.6.10. See http://hcch-e-vision.nl/index_en.php?act=conventions.status&cid=24).


7 The Sharia law on custody of children is complex partly because of the differences between the various sects and schools of jurisprudence. Nonetheless, it is clear that custody is not determined by the best interests standard as understood in Western legal systems and that there is discrimination against women. For example, legal guardianship is invariably
scope for taking into account such factors within the Hague Convention. In the meantime, in non-Convention abduction cases, the United Kingdom (UK) and other western states are not infrequently faced with situations where they have to determine what weight should be given to the fact that the courts in the state of origin will apply religious or cultural norms, which appear to be inconsistent with international human rights principles and the best interests standard. These cases raise fundamental issues about the limits of cultural tolerance in a multicultural society.

The second category of cases involves situations where the parents belong to different religious or cultural communities, and the abducting parent claims that a return to the lifestyle of the left-behind parent will cause harm to the child or in some other way violate his own or the child’s rights9 (“the Mixed Marriage Cases”). Such a claim might be based on the content of that lifestyle10 or simply on the fact that returning the child will involve a radical change in the way of life to which he has become accustomed over a significant period of time.11 Needless to say, there could be situations which fall simultaneously into both categories. If there is a discrepancy between the child’s religious or cultural affiliation, and that of the tribunal and/or applicable law or norms in the state of origin, it is likely to exacerbate the concerns about inconsistency with the welfare of the child.12 “Mixed marriage” situations can of course arise both in Hague Convention and non-Hague Convention cases. While the legal framework for determining the issue will be different depending on whether the Convention applies, the underlying issues may be similar.

There are clear differences between the considerations relevant in the two types of case identified above and in their implications thereof. The first category involves macro issues such as comity between states,13 and the wider implications given to the father. Although the mother is usually given physical custody of young children, she will lose this if she remarries or does not live in accordance with Islamic religious teachings. Furthermore, the mother is obliged to live within a specific distance from the father and there is no possibility of her being given permission to relocate abroad. See Urfan Khaliq & James Young, Cultural Diversity, Human Rights and Inconsistency in the English Courts, 21 LEGAL STUD. 192, 217-19 (2001).

9 For example, where the child objects to return or where he will not be free in the foreign country to practice the religion which he is currently practicing.


11 See, e.g., FamA 1855/08, Plonit v. Plonit, (Jul. 1, 2008), Pador legal database (by subscription) ( isr) [hereinafter The Belgian Saga].

12 See Re J, [2005] UKHL 40, [2006] 1 A.C. 80, ¶ 33 (appeal taken from Eng.) (U.K.) (Baroness Hale makes clear in this seminal case that the connection of the child with the foreign country is an important factor and that religion and culture are relevant in determining this).

13 For a discussion of the relevance of comity in non-Convention cases, see Khaliq & Young, supra note 8, at 217-19.
of a policy of returning or not returning children to a particular country. In contrast, the second category focuses more on delineating the scope of the exceptions to the presumption of immediate return (in Hague Convention cases) and on balancing the harm caused by a return against that caused by non-return (in non-Convention cases). However, there are wider concerns that are common to both categories of cases. In particular, the tension between a euro-centric approach to human rights norms, and the need to take into account cultural perspectives and contexts in determining the scope of such norms, arises in both categories of cases. Accordingly, after a brief description of the normative legal framework applicable in abduction cases in the next section, a theoretical framework for this inquiry is provided, in which the relevant human rights norms and the different approaches to the relationship between culture and human rights in the context of child welfare are considered briefly. The two categories of cases will then be analyzed separately.

II. NORMATIVE AND THEORETICAL FRAMEWORK

A. The Law Relating to Abducted Children

The Hague Convention will apply where both the requesting and requested states are parties to that Convention. The court in the requested state is required by Article 12 of the Hague Convention to return a child, to whom the Convention applies, who has been wrongfully removed or wrongfully retained, unless one of the exceptions applies. Where the requesting state applies religious law or possesses cultural norms apparently inconsistent with human rights concepts in the requested state, the abductor is likely to try to resist a return order by relying on the Article 13(1)(b) grave risk of harm exception and/or the Article 20 violation of human rights and fundamental freedoms exception. Similarly, in Mixed Marriage Cases, the abductor will claim that there is a grave risk that returning the child will

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14 See, e.g., Re J, [2005] UKHL 40, [2006] 1 A.C. 80, ¶ 33 (appeal taken from Eng.) (U.K.) (“Lord Hoffman pointed out in the course of argument that if the UK returned children to non-Convention countries, even though there was no reciprocity, those countries would have no incentive to join” the Hague Convention). On the other hand, it might be argued that a policy of not returning children to a particular foreign country would prejudice the chances of that country returning children to the UK.

15 The child must be under sixteen and his habitual residence must have been in a contracting state (other than the requested state) immediately before the wrongful removal or retention. See Convention on the Civil Aspects of International Child Abduction, art. 4, Oct. 5, 1980, T.I.A.S. No. 11, 670, 19 I.L.M. 1501.

16 Id. at art. 13(b) (providing that the requested state is not bound to order return where the person opposing return establishes that “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.”).

17 Id. at art. 20 (providing that “[t]he return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”).
cause him harm or place him in an intolerable situation (Article 13(1)(b)) and/or, in
the case of a mature child, that the child will object to being returned (Article
13(2)).

In contrast, in non-Convention cases in Western legal systems, the decision as
to whether to return the child must be made in accordance with the individual
child’s best interests. In some countries there is a presumption that the child’s
welfare requires that he be summarily returned to the country of origin, but this can
always be rebutted.18

B. Human Rights Norms

There are four19 main internationally recognized human rights norms which
are relevant to the current debate: (1) best interests of the child, (2) the right to
respect for family life, (3) the right to a fair trial, and (4) the right to equal
treatment or the right not to be discriminated against. The sources of each right and
its connection to the present inquiry will be briefly explained below.

1. Best Interests of the Child

Reference to the best interests of the child can be found in a number of
international human rights instruments. The two most important provisions for
present purposes are Article 5 of the Convention on the Elimination of All Forms
of Discrimination Against Women (“Women’s Convention”), which obliges state
parties:

To ensure that family education includes a proper understanding of
maternity as a social function and the recognition of the common
responsibility of men and women in the upbringing and development of

18 For example, in Israel, the left-behind parent can apply for a habeas corpus order to
“release” the abducted child under § 15 of the Basic Law: Judicature. Where there has been
a breach of his parental rights, such an order will be made unless the abductor can show
that it would cause significant irreversible harm to the child. See HCJ 405/83 Kebli v.
Kebli 37 (4) PD 705 [1983] (isr). It has been held that this test is wider than the art.
13(1)(b) grave risk of harm exception. See CA 1648/92 Turner v. Meshulam 46 (3) PD 38
cases, see LOWE ET AL., supra note 2, at 430-56.
19 Of course, there could be cases where additional human rights norms will be
violated such as where the right to physical integrity of the abductor and/or child would be
threatened by persecution, abuse or cultural practices. One such example is female
circumcision. See Bruch, supra note 3, at 56-57. Similarly, where there is a threat the child
will be subjected to a forced marriage in the foreign country, there will be a breach of the
basic human rights norm that marriage shall only be entered with the free and full consent
of the parties. See Universal Declaration of Human Rights, art. 16(2), available at
Information about the prevalence of forced marriage of British nationals is available at
their children, it being understood that the interest of the children is the primordial consideration in all cases.\textsuperscript{20}

The second is Article 3(1) of the United Nations’ Convention on the Rights of the Child (“CRC”), which provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. . . .\textsuperscript{21}

It will immediately be noted that the Women’s Convention treats the best interests of the child as paramount, but the CRC only requires that the best interests of the child be a primary consideration. The latter formulation would appear to make this provision even more indeterminate\textsuperscript{22} than parallel provisions in national laws, which usually adopt the paramountcy standard,\textsuperscript{23} or at least require that decisions be made in accordance with the best interests of the child.\textsuperscript{24} A discussion of the reasons for choosing this phraseology is outside the scope of this Article.\textsuperscript{25} However, it should be noted that the apparent downgrading of the importance of the best interests of the child would appear to allow more scope for taking into account cultural considerations. Nonetheless, it can be argued that automatic allocation of custody on the basis of gender or religious affiliation, without even considering the welfare of the particular child, violates the provision.

\textsuperscript{20} The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the United Nations General Assembly on Dec. 18, 1979, and entered into force as an international treaty on Sept. 3, 1981, after the 20th country had ratified it. Today more than 100 nations have ratified the Convention. But, it should be born in mind that Islamic states and Israeli Islamic states have entered reservations to the Convention in order to avoid incompatibility with religious law. For a discussion of this phenomenon, see generally Rebecca J. Cook, Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women, 30 VA. J. INT’L L. 643 (1990).


\textsuperscript{23} See, e.g., Children Act § 1 (1989) (Eng.).

\textsuperscript{24} See, e.g., Legal Capacity and Guardianship Law, art. 25 (1962) (Isr.).

2. The Right to Respect for Family Life

Article 8(1) of the European Convention on Human Rights ("The European Convention") provides that everyone has "the right to respect for his private and family life, his home and his correspondence." Under Article 8(2), public authorities may not interfere with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights (ECHR) has held that "the mutual enjoyment by parent and children of each other's company constitutes a fundamental element of family life." Thus, states that have failed to ensure the return of abducted children have been held to be in breach of the left-behind parent’s right to family life. On the other hand, abducting parents’ claims that the return of the child violates both their rights, and the rights of the child have been rejected on the basis that the interference in the exercise of their rights is justified under Article 8(2). In the case of Eskinazi v. Turkey, the court stated that, in determining whether the interference was necessary within this paragraph,

[T]he deciding factor requires determining if the correct equilibrium that should exist between the concurrent rights of the child, her two parents

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27 Id. at art. 8(2).
28 B v. United Kingdom (No. 121), Eur. Ct. H.R. (ser. A) at § 63 (1987). JANE FORTIN, CHILDREN’S RIGHTS AND THE DEVELOPING LAW 60-69 (3d ed., Cambridge Univ. Press 2009) (suggesting that this provision has been used to protect parents’ rights rather than children’s, but points out that in recent years the European Court has taken into account the welfare of the child in determining whether interference with parents’ rights is necessary under Article 8(2)). It should be noted that the child’s right to contact with his parents is also protected by Article 9 of the CRC which provides that a child should not be separated from his parents unless it is determined that this in his best interests. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, art. 3.1 (Nov. 20, 1989), available at http://www2.ohchr.org/english/law/crc.htm.
between themselves, and those of the public order was handled within
the limits of the decision-making range the states enjoy in this area. 31

Thus, it appears that the ECHR left open the possibility that there might be cases
where return orders would not be justified under Article 8(2). 32 Presumably, the
fact that the abducting parent’s right to family life would not be respected in the
requesting state would be a relevant factor in the balancing exercise.

Furthermore, since the right to respect for family life is to be enjoyed equally
without discrimination on grounds of sex, 33 the fact that the abducting mother will
be discriminated against in the requesting state can also form the basis of a claim
that return will violate Article 8. In the Eskinazi case, the ECHR preferred to deal
deliberately issue under the rubric of the right to a fair trial.

However, in the case of Re J, 34 Baroness Hale expressly refers to the
possibility of such a claim. Her conclusion is that although the discrimination
against the mother in Saudi Arabia would amount to a violation of Article 8, this
violation per se did not render the English court in breach of that provision if it
returned the child to Saudi Arabia. 35 In coming to this conclusion, Baroness Hale
relied on both UK and ECHR case law to the effect that a sending state would only
be in breach of its European Convention obligations where the likely treatment in
the foreign state would involve torture, inhumane or degrading treatment,
punishment within Article 3 of the Hague Convention, 36 or particularly flagrant
breaches of other articles of the Convention. 37 Baroness Hale assumed, without

(extracts) (unofficial translation provided by the Israeli Central Authority). See also
minority judges held that the return order was a breach of Article 8(2)).
33 European Convention on Human Rights, art. 14, Nov. 4, 1950, available at
35 Id. See also EM (Lebanon) v. Secretary of State for the Home Department [2008]
UKHL 64.
EWCA (Civ) 1856 (appeal taken from Wales) (U.K.); Soering v. United Kingdom, 11 Eur.
Ct. H.R. (ser. A) at 439, ¶ 80 (1989). There is a considerable body of ECHR case law
concerning Article 3 in the context of deportation and extradition orders. See, e.g., Jabari v.
Turkey, (No. 40035/98), 2000-XII Eur. Ct. H.R.), where it was held that the deportation to
Iran of a woman, who had been found to have had an adulterous relationship in that
country, in respect of which criminal proceedings had been instituted, would violate Article
3 because she would be at serious risk of punishment by stoning there. It may be noted that
this jurisprudence is consistent with a pluralistic approach to culture in that the European
human rights norms are only imposed on other states where a primary value is being
violated.
EWCA (Civ) 1856 (appeal taken from Wales) (U.K.); Bankovic v. Belgium, 11 B.H.R.C.
435, ¶ 67-68 (2001). In the case of EM (Lebanon) v Secretary of State for the Home
explanation, that these conditions did not apply in this case. It is suggested that the question of whether a breach can be defined as “particularly flagrant” is subjective and that the answer thereto is likely to depend to a considerable extent on the world view of the particular judge.

3. The Right to a Fair Trial

Article 6 of the European Convention provides for the right to a fair trial in both civil and criminal cases. A country which fails to treat the two parties in litigation equally would appear to be in violation of this right.

The ECHR has held that while the provisions of the European Convention only apply to member states, there are situations where these states have to verify whether proceedings in non-member states are consistent with Article 6. Thus, in Eskinazi it was held that the Turkish authorities must verify that there would not be a flagrant denial of a fair trial in Israel before ordering return of the child. On the evidence before the court, the applicant had not established that there would be a flagrant breach of Article 6. In particular, the religious character of the rabbinical courts was not decisive, in view of the fact that these courts were an integral part of the Israeli judicial system and that their decisions are subject to review by the secular High Court of Justice.

Nonetheless, in situations where the abducting mother would be discriminated against in legal proceedings in the requesting state, it might be possible to show that there would be a flagrant breach of the right to a fair trial.

4. The Right to Equal Treatment

There are a number of international provisions providing for equal treatment in general and between the sexes in particular.

Department [2008] UKHL 64., the House of Lords held that deporting the mother back to Lebanon, where she would lose care of him to the father, under Sharia law, and be allowed only supervised visits would be a flagrant breach of the mother and child’s right to family life. The reason for this was that until now the father had shown no interest in the child and thus the only family life that the child had known had been with the mother. However, the House of Lords made clear that there would not be a flagrant breach of the right in every case where returning the child would result in application of Sharia law. Id. at paras. 39-42.

This may apply to past proceedings where there is a request to recognize or enforce a foreign decision. See, e.g., Pellegrini v. Italy, (No. 30882/96), 2001-VIII Eur. Ct. H.R. Or, this may apply to future proceedings in cases of deportation, extradition or return of an abducted child. See, e.g., Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439, ¶ 80 (1989).


Id.
Article 16 of the Women’s Convention provides that state parties shall ensure that women enjoy “[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”; 41 Provisions automatically granting custody to men would appear to violate this provision, although it might be argued that these provisions reflect the best interests of the children, in the light of prevailing cultural norms. Article 14 of the European Convention on Human Rights provides that “the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race . . . .” 42 While sometimes unequal treatment might in principle be justified by a legitimate aim, very weighty reasons will be required to justify overt discrimination on grounds of gender. 43 However, as with the right to family life, ordering a return to a country where the abductor would not be treated equally would only be in violation of the European Convention where there would be a flagrant breach of the prohibition against discrimination in the foreign country. As mentioned above, in the case of Re J, Baroness Hale held, without discussion, that a return to Saudi Arabia would not involve a flagrant breach of Article 14. 44 However, it is difficult to see how a law that expressly determines the outcome of the dispute solely on the basis of gender can be anything but flagrant discrimination.

C. Relationship Between Culture and Human Rights

Much of the literature that discusses the theory of cultural diversity distinguishes between three different approaches: universalism (monism),

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42 Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 26. Under Protocol 12, this Article is a free standing provision which need not be pleaded in conjunction with one of the other provisions of the Convention. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 22, 2000, Europ. T.S. No. 177. See also Article 5 of Protocol 7 which provides that “[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children . . . This article shall not prevent States from taking such measures as are necessary in the interests of the children.” Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 22, 1984, Europ. T.S. No. 117 (amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1994, Europ. T.S. No. 155).
A brief and simplified explanation of each approach and its implications for the current debate is presented below.

Cultural universalism is basically a fundamentalist approach, which holds that there is an overriding universally applicable set of values. Accordingly, practices that deviate from this standard are not morally acceptable. In the current context, this approach would seek to apply international human rights universally. Thus, a child should not be returned to a country in which the system for determining custody is different from and incompatible with those norms. In an extreme form, this approach would even preclude a return where the application of the best interests standard in the foreign country would be influenced by religious or non-Western cultural norms.

At the other end of the spectrum is cultural relativism, which denies that there are any overriding or absolute values. Rather, all values are seen as the products of the culture within which they developed. Thus, it is not possible to make moral comparisons between the values of different cultures. This approach, at least in its extreme form, reflects unlimited tolerance of cultural diversity. Under such an approach, the religious law or cultural norms prevalent in determining custody in the requesting state are seen as equally valid to those applicable in the requested state. Thus, the fact that the religious law or cultural norms of the requesting state are incompatible with the human rights norms of the requested state would, under this approach, be irrelevant in determining whether the abducted child should be returned.

Finally, cultural pluralism reflects a *via media* between the two other approaches. On the one hand, this approach accepts that there are many reasonable conceptions of good and right, which are all valid from a moral perspective. Yet, there also exist overriding primary values, according to which it is possible to assess the reasonability and moral validity of cultural practices. This approach does not ignore the cultural context of the practices but assesses the implication of the inconsistency with the primary value in light of that context. An illustration of this approach can be found in Michael Freeman’s article. In determining whether child female circumcision in countries such as Sudan and Somalia should be

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46 Alston explains that “[j]ust as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights.” Alston, *supra* note 25, at 20.

47 For a similar, but differently phrased approach, see W.J. Talbott, *Which Rights Should be Universal?* (Oxford Univ. Press 2005). This author advocates a middle-ground between moral wishy-washiness (relativism) and moral imperialism (universalism). *Id.* He argues that all moral opinions should be listened to, but that all moral opinions are not equally valid. *Id.* In particular, “when moral opinions are based on self-serving reasons, their validity is compromised.” *Id.* at 104.

be tolerated, Freeman identified preservation of physical integrity as a primary value. He then proceeded to assess the importance of the value of physical integrity to women in these countries, especially in the light of the fact that such preservation may result in their being social outcasts. This assessment involves weighing the justifications for the practice against its adverse physical and psychological effects.

Application of this approach to the child abduction scenario would require the court in the requested state to examine the extent to which the consequences of the application of religious law or cultural norms prevalent in the requesting state are incompatible with “primary values,” taking into account the cultural context. Assuming, for example, that equality between the sexes is considered to be a primary value, it would then be necessary to examine the justifications for rules which automatically grant custody of children above a certain age to the father. One such justification would be that, in light of the family structure in Muslim society and the father’s duty to educate the child, these rules do indeed promote the best interests of the children or at least do not clearly harm their welfare. Also, the rule has to be examined in light of the corresponding rule that children under a certain age will usually remain in the physical custody of the mother. Furthermore, in many cases it may not be clear that the result of the gender preference rule is any different from that which would be obtained under the best interests test. On the other hand, it would not seem possible to justify a cultural norm under which a mother who returned with her child would be subject to persecution by the local community or would not be protected from physical abuse by her husband. Here, arguments about women wanting to preserve the patriarchal nature of society would be difficult to sustain. Of course, there are many situations which are less clear-cut. For example, under Muslim law, the mother will automatically lose custody of a young child if she remarries or moves more than a certain distance away from the father. To Western eyes, such a rule infringes upon the mother’s basic right to family life and freedom of movement and severely limits her autonomy. However, if the cultural context is taken into account, this rule can perhaps be justified in light of the importance of the father and his family in the upbringing of even young children in Muslim society. Furthermore, who is to say that a strict rule, albeit discriminatory, is not better for the child than the drawn out and emotionally damaging relocation disputes which take place in Western courts?

49 Talbott, *supra* note 47, at 101-02 (Talbott also examines patriarchal institutions from the perspective of women).


51 See Talbott, *supra* note 47, at 87-112.

52 Recently a final decision was given by the Israeli Supreme Court, after an additional hearing, in a relocation dispute which had taken five years and was heard by four courts. FamA 9201/08, Ploni v. Plonit, (Oct. 20, 2009), Pador legal database (by subscription) (isr) (The anguish caused by the uncertainty of relocation litigation was mentioned by a number of judges at the Judicial Commonwealth Law Conference in
As these examples illustrate, the approach of cultural pluralism is easier to state than to apply. Inevitably, there is a subjective element involved in identifying which values are primary values and in determining to what extent cultural context can justify violation of such values.

This Article does not profess to offer any solution to the debate over the relationship between culture and human rights. Rather, in the following sections of this Article, the theoretical approaches described here are referred to as tools for analysis.

III. THE USE OF HUMAN RIGHTS NORMS AS A BASIS FOR REFUSING TO RETURN ABDUCTED CHILDREN IN THE RELIGIOUS LAW AND CULTURAL NORMS CASES

A. Introduction

As indicated above, Article 20 of the Hague Convention permits a court to refuse to return an abducted child “where return is not permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.” It appears from the language of Article 20 that, in the final analysis, whether return is permitted or not depends entirely on the internal human rights and constitutional law provisions of the particular requested state. Thus, there might seem to be little reason to discuss the scope of Article 20 in this context. Furthermore, if internal law on human rights and constitutional law are the determining factors, there would not seem to be any basis to distinguish between Convention and non-Convention cases.

It is suggested that these conclusions are misconceived because most internal human rights regimes are not absolute and contain a principle of proportionality or a similar doctrine. Thus, in the types of cases we are discussing, which do not usually involve risk of death or physical injury, the question of whether a return of the child is permitted by internal law, despite the human rights violations in the

August 2009 at Cumberland Lodge, and one of the resolutions of the conference was that methods be found to ensure timely resolution of such disputes. Furthermore, empirical research presented at the conference by Marilyn Freeman, see The Outcomes for Children Returned Following an Abduction, available at http://www.reunite.org/pages/outcomes_research.asp (last visited June 5, 2010); and N. Taylor, et al., Relocation Following Parental Separation in New Zealand: Complexity and Diversity, [2010] Int’l Fam. L. 97, highlighted the considerable difficulties and costs (for children and parents) involved in maintaining contact with the non-custodial parent after relocation.

53 See Alston, supra note 25, at 16 (asserting that this debate can never be resolved).
54 Weiner, supra note 50, at 711-12 (discussing the difficulty in interpreting the phrase “is not permitted” in Article 20).
57 See Khaliq & Young, supra note 7, at 221; Weiner, supra note 50, at 724.
foreign country, is likely to depend on the weight that is attached to the objectives of the mandatory return policy of the Hague Abduction Convention.\(^{58}\) In particular, courts’ assessments of the impact of domestic human rights law for the purpose of Article 20 are likely to be influenced by the extremely narrow way in which this article is interpreted by courts throughout the Hague world,\(^{59}\) as well as the fact that the defense is not often pleaded\(^{60}\) and rarely successful.\(^{61}\) In contrast, in non-Hague cases, the considerations are somewhat different and it would seem to be harder to justify a return to a state whose family law system is inconsistent with the human rights norms of the requested state.

This discussion will consider the two most likely bases for making a claim under Article 20 in cases concerning religious law or cultural norms. The first is that the requesting state will not apply the best interests standard in determining the future of the child (“the best interests claim”). The second is that the abducting parent will be discriminated against in custody proceedings in the requesting state (“the discrimination claim”). For the sake of analytical clarity, we will consider these two claims separately, but it should be acknowledged that they are invariably intertwined. Where there is discrimination against the mother, then the best interests standard, as understood in Western society, will not be applied.

John Eekelaar,\(^{62}\) commenting on the Abduction Convention shortly after it had been signed, expressed the view that it seemed unlikely that Article 20 would include situations where the family law principles of the requested state were

\(^{58}\) An analogy can be made with the asylum case where the human rights breaches in the foreign country have to be weighed against the right of a state to control immigration (see, e.g., Regina v. Special Adjudicator, ex parte Ullah, [2004] UKHL 26, ¶ 10, [2002] EWCA (Civ) 1856 (appeal taken from Wales) (U.K.)) and with the extradition cases where the breaches have to be weighed against the importance of bringing fugitives to justice (see, e.g., Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439, ¶ 80 (1989)).

\(^{59}\) Weiner, \(\text{supra}\) note 50, at 704-07 (suggesting reasons for the so-called “impotence” of Article 20). Weiner refers inter alia to the U.S. State Department statement that the defense should only apply when return of the child would “utterly shock the conscious of the court of offend all notions of due process,” a statement which, in her view, has no basis in the legislative history of the Convention. \(\text{Id.}\)

\(^{60}\) Hague Conference on Private International Law, \(\text{available at}\) http://www.incadat.com (last visited Mar. 12, 2009) (A search on the Hague Abduction Convention database “Incadat” for cases discussing Article 20, produced thirty-eight cases. In contrast, 297 cases came up in which the Article 13(1)(b) grave risk defense was discussed.).

\(^{61}\) The Statistical Surveys conducted by Professor Nigel Lowe show that in 1999 there were no cases in which a refusal to return was based even partly on Article 20 and, in 2003, there were eight cases where Article 20 was one of multiple reasons for refusal to return and that all of these cases were from Chile. A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, (Sept. 2008), \(\text{available at}\) http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf, at 38.

2010] RELIGION AND CULTURE IN CHILD ABDUCTION DISPUTES 467
different from those in the requesting state, such as “if the latter state operated a
system of preferred custody rights in one parent.”63 He further stated that it was
important that such situations not be included within Article 20 because family law
“in particular reflects different cultural patterns, and if the convention is to operate
successfully there must be mutual respect among states for these differences.”64
Thus, in his view, “[t]he child’s future should normally be determined according to
the cultural practices of the place of his habitual residence.”65 However, he goes on
to write that there may be circumstances prevailing in the requesting state that
would seriously endanger the future exercise of basic human rights and
fundamental freedom of the child or the parent accompanying him.66 Eekelaar’s
approach seems to be a classic statement of a pluralist approach to culture.
However, the example he gives begs the question as to the limits of cultural
tolerance. Why doesn’t an automatic preference for one parent as custodian of the
child seriously endanger the other parent’s right to be treated equally in a custody
dispute, or the child’s right to have his best interest treated as a primary
consideration? More than a quarter of a century has passed since these views were
expressed, during which time human rights in general, and children’s rights in
particular, have gained significantly increased recognition worldwide. Moreover,
there now exists some, albeit limited, jurisprudence on the interpretation of Article
20. Therefore, it is appropriate, to inquire whether, in the light of these
developments, Eekelaar’s analysis of the scope of Article 20 in the current context
can be accepted at the close of the first decade of the twenty-first century; and
whether there should be any difference between the approach in Convention and
non-Convention cases.

Below is an analysis of non-Convention case law in England concerning
Muslim countries, followed by an examination of how similar situations might be
treated under the Convention.

B. Non-Convention Cases Concerning Muslim Countries

The English courts have had to contend with the question of whether to return
abducted children to countries where Islamic Sharia law is applied strictly in
custody cases. Under English law, in the absence of any specific statutory direction
to the contrary, decisions concerning children are to be determined under the best
interests principle.67 However, it has long been accepted that the best interests
principle may require that an abducted child be returned summarily to the country
of origin without a full examination of the merits by the English courts.68 Thus, the
issue which arises in these cases is the relevance of the fact that the foreign country
applies Islamic law, under which custody is determined according to set rules that

63 Id.
64 Id.
65 Id.
66 Id.
67 Children Act, 1989 c. 41, § 1 (Eng.).
68 See, e.g., Re H [1966] 1 All E.R. 886 (Eng.); Re L [1974] 1 W.L.R. 250 (Eng.).
in certain circumstances discriminate against the mother, rather than on the basis of
the best interests of the particular child.

Two distinct and contradictory lines of case law have emerged from the
English Court of Appeals. As indicated below, the House of Lords did finally
decide between the divergent opinions, but the reasoning behind the two
approaches is so germane to the current discussion that it is appropriate to explain
them in some detail.

The first approach (“the Thorpe approach”) presumes that the peremptory
return is in the best interests of the child unless there is evidence of some specific
harm that will be caused to the child in the foreign country. Evidence that the law
applicable to custody disputes in the foreign country is different from the law in
the UK is not a sufficient basis for refusing return. This approach is based on the
importance of comity and the need to combat child abduction, both of which will
be undermined if there is a review of the family justice system in the foreign state.
Lord Justice Thorpe stated this expressly in reference to both Hague Convention
and non-Convention cases:

I have no doubt that the number and the diversity of the states that
have joined the Hague club have made it impossible to formulate
minimum standard requirements of other family justice systems before
recognizing accession. As a matter of logic, if we make no investigation
and in litigation permit no criticism of the family justice systems
operating in member states, I am extremely doubtful of the wisdom of
permitting the abducting parent to criticize the standards of the family
justice system in the non-member state of habitual residence, save in
exceptional circumstances such as . . . persecution or ethnic, sex or any
other discrimination.69

Some of the judges who adopted this approach attempted to reconcile it with the
principle of the paramountcy of the welfare of the child by claiming that the
Islamic perception of the welfare of the child is just as valid as the UK perception,
and that it is appropriate for the welfare of children brought up in Islamic countries
to be determined by that law.70 This approach appears to adopt a form of cultural
relativism that refuses to question the value-system of a foreign culture.71

69 Re E [1999] 2 F.L.R. 642 (U.K.) (notably, his Lordship seems to ignore the
element of discrimination against women found in Islamic law.).

70 See, e.g., comment of Nolan L.J. that “it is implicit in [§ 1(1)(a) of the Children Act
of 1989] that the paramountcy of the child’s welfare is to be observed consistently with the
law to which the child is subject.” Re S, [1994] 1 F.L.R. 297, at 305 (U.K.); Re E [1999] 2
F.L.R. 642 (U.K.) (Thorpe L.J.’s reference to the Islamic law as a system which “is
conceived by its originators and operators to promote and protect the interests of children
within that society and according to its traditions and values.” Re E [1999] 2 F.L.R. 642, at
649.

71 Khaliq & Young, supra note 8, at 212.
In contrast, the second approach takes the view that return will only be in the best interests of the child where his future will be determined in accordance with the best interests standard, as understood in the UK.\textsuperscript{72} Thus, where the abductor shows that the foreign law is different from the UK law, and that this difference may be detrimental to the welfare of the child, summary return should not be ordered. At first sight, this approach seems to be one of cultural universalism in which issues relating to the welfare of the child are to be determined in accordance with UK perceptions of welfare alone.

However, although the second approach was expressly preferred by the House of Lords in \textit{Re J},\textsuperscript{73} Baroness Hale’s clarification of the relevance of cultural considerations in determining whether the system of law in the foreign country might be detrimental to the welfare of the foreign child is more akin to a pluralistic approach. Thus, while making it clear that in non-Convention cases the decision whether to return the child summarily is determined solely by the best interests principle,\textsuperscript{74} she states that:

> It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed we do not have any fixed concept of what will be in the best interests of the individual child . . . Once upon a time, it may have been assumed that there was only one way of bringing up children. Nowadays, we know that there are many routes to a healthy and well adjusted adulthood. We are not so arrogant as to think that we know best.\textsuperscript{75}

Her Ladyship then explains that differences between the legal system in the foreign country and that in the UK cannot be irrelevant, but the importance of such differences will depend on the facts of the individual case. Thus, for example, it is very relevant whether there is a genuine issue as to whether it is in the best interests of the child to live in one country. She goes onto to clarify,

> If those courts [in the foreign country] have no choice but to do as the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there, then

\textsuperscript{72} Re JA [1998] 1 F.L.R. 231, at 243 (U.K.) (Ward L.J. said that it would be “an abdication of the responsibility and an abnegation of the duty of this court to the ward under its protection to surrender the determination of its ward’s future to a foreign court whose regime may be inimical to the child’s welfare.”).


\textsuperscript{74} \textit{Id.} at ¶ 28. And that the philosophy underlying the Hague Convention and possible implications of return or non-return on the chance of the foreign country joining that Convention are irrelevant. \textit{Id.} at ¶ 29.

our courts must ask themselves whether it will be in the best interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give the judge pause . . .; it may be a decisive factor. On the other hand, if it appears that the mother would not be able to make a good case for relocation, that factor might not be decisive. There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any differences between the legal systems here and there should carry little weight.76

This approach seems appropriate in non-Convention cases. While the Court might have to hear considerable evidence in order to determine the practical implications of the differences between the two laws for the particular child, there is no other way that the Court can be true to the principle of the paramountcy of the child’s welfare. Summary return without investigation clearly carries the risk of detriment to the child. Similarly, automatically refusing return on the basis of difference between the foreign law and the local law ignores the fact that the harm caused to the child by not returning him to his habitual residence may be greater than the actual damage caused by the foreign legal system. Furthermore, if after investigating foreign law the court comes to the conclusion that summary return is in the child’s best interests, despite the human rights violations in the foreign country, the principle of proportionality will be satisfied.

However, at first sight, such an approach would not seem suitable for Hague Convention cases because the need for a detailed investigation is inconsistent with the philosophy and mechanism of the Hague Convention, and there is no room for the court to consider the best interests of the child in Hague Convention cases. Therefore, the following section will consider the extent of the scope for refusing to return children under the Hague Convention in religious and cultural norms cases, in the light of the relevant Convention jurisprudence.

C. Convention Cases—the Article 20 Case Law

1. The Religious Law Cases

The only case known to the author, which held that the defense in Article 20 was established because the court in the requesting state would not determine custody in accordance with the best interests of the child is the Spanish case of Re S.77 In this case, the Spanish court received evidence from the Israeli Consul of Honour in Spain, who was the uncle of the abducting mother, that an Israeli Rabbinical Court would not allow the mother to have contact with her daughter because she would be declared “a rebellious wife.” On the basis of this evidence, which was completely false and unfounded, the court held that the Article 20

76 Id. at ¶ 39.
77 S. Audiencia Provincial, Apr. 21, 1997 (R.G.D., No. 244, p. 3116).
exception applied and refused to return the child. 78 The decision is understandable on the information before the first instance court, and the Israeli High Court of Justice, which later discussed the case, 79 agreed that Article 20 would apply if the evidence was correct. However, it is difficult to understand why the Spanish courts did not overturn the decision on appeal once the true facts became known. 80 Also, the reliance of the Spanish courts on the opinion of the Consul of Honour, who did not have any qualification of expertise in Jewish law, may be questioned. 81

For the purposes of the present discussion, it is important to note that, according to the false opinion given by the Israeli consul, the reason for non-application of the best interests standard was to punish the mother for her misconduct. Moreover, not only would she not receive custody, but would also lose all her rights in relation to the child. Thus, the case should not be viewed as authority for the proposition that Article 20 will be established in a case where there are non-punitive reasons for the non-application of the best interests standard in the foreign country, and/or where the abductor would not lose all rights in relation to the child.

The only other known case in which the Article 20 defense was claimed on the basis of non-application of the best interests standard in the requesting state is the Eskinazi case. 82 In the Eskinazi case, a mother, who had abducted her daughter from Israel to Turkey, petitioned the ECHR claiming that the return order of the Turkish courts violated her rights and that the Turkish courts should have invoked the Article 20 defense. She argued that the Israeli Rabbinical courts, in whom jurisdiction to hear the custody dispute was vested, in practice give preference to religious considerations over the advice of experts, despite the fact that they are obliged by statute to apply the best interests standard. The mother also argued that the Turkish court decision was in violation of her right to a fair trial and her right to family life under the European Convention of Human Rights, inter alia, because she would be discriminated against in the Rabbinical Courts. 83 Her claims were

78 Id.
79 HCJ 4365/97 Tur Sinai v. The Minister of Foreign Affairs and Others 53 (3) PD 673, ¶ 40 [1999] (isr) (This case involves a petition brought by the left-behind father against the Israeli authorities for an order requiring them to intervene in order to change the decision of the Spanish court. The petition was refused because, in the Court’s view, the authorities had done everything they could.).
80 The Spanish Appellate Court was clearly still influenced by the opinion of the consul, even though it does refer to conflicting expert opinions. Furthermore, that court wrongly interpreted the Israeli Rabbinical Court’s decision to award custody to the father as evidence of the correctness of the consul’s opinion. HCJ 4365/97 Tur Sinai v. The Minister of Foreign Affairs and Others 53 (3) PD 673, ¶ 40 [1999] (isr), ¶ 25-26.
81 Id. at ¶ 17.
83 Id. (see parts B and C of the decision). Similar claims were rejected by an English court in the case of Re S, [2000] 1 F.L.R. 454 (U.K.) inter alia because “it is not appropriate to treat Israel as a case separate and apart from the other signatories to the Hague Convention because of the dual system available in that country.” Id. at 463.
supported by expert opinion from a leading Israeli academic, Professor Ruth Halperin-Kaddari, who alleges that in the Rabbinical Courts there is bias against women, and that religious considerations are sometimes given priority over the best interests of the child. However, it should be noted that this opinion provides little support for the mother’s claims because while it shows that women do not fare well in Rabbinical Courts in relation to obtaining a divorce and in relation to financial matters, it ignores the fact that custody is awarded to women in around two-thirds of cases. Moreover, in this particular case, Jewish law’s arguably discriminatory ‘tender years’ presumption in relation to children under six, and gender identity presumption in relation to older children, would have worked in favor of the mother. The rejection of the mother’s claims by the Turkish court was upheld by the ECHR, largely because of the jurisdiction of the secular Israeli High Court of Justice to review decisions of the Rabbinical courts.

Similarly, in the case of Neulinger & Shuruk v. Switzerland, the majority of the ECHR First Section judges rejected the mother’s claim that the Swiss return order violated her rights under the European Convention on Human Rights. She had claimed her rights were violated because the father now belonged to an Ultra-Orthodox Hassidic group, which she described as fanatical, and because she would not be able to prevent the father from imposing on the son a radical religious lifestyle. The mother did not invoke Article 20 directly and her allegations were

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84 I am grateful to Professor Ruth Halperin-Kaddari for letting me have copies of her opinion and the protocol of her oral testimony.
85 Notably, this claim was of little relevance here because there was no clear disparity between the level of religious education the child would be given by the two parents.
87 Under this presumption, all minor girls are to be in the custody of their mother and boys in the custody of their father from the age of six and onwards. It should be emphasized that these presumptions can be rebutted on the basis of the best interests of the child. See generally Eliay Shochetman, On the Nature of the Rules Governing Custody of Children in Jewish Law, 10 THE JEWISH LAW ANNUAL 115 (1992) (explaining the Jewish law rules governing custody of children).
88 However, it is worth noting that the arguments of a Muslim mother in a similar situation would appear somewhat stronger. While the Sharia Courts in Israel are also mandated by the Legal Capacity and Guardianship Law to apply the best interests standard, it seems that in practice they give effect to Muslim law rules on custody on the basis that these reflect the best interests of the child. See YAD ZAHALKA, THE SHARIA COURTS: BETWEEN ADJUDICATION AND IDENTITY 66 (Hebrew, Israel Bar Association 2009). As noted above, these rules discriminate against women in various ways. See Khaliq & Young, supra note 7. Cf. A. Moussa Abou-Ramadan, Recent Developments in Child Custody in the Sha’aria Court, THE FAMILY IN LAW Vol. 2, 69 (2008) (Hebrew) (claiming that in most cases Sharia Courts in Israeli do decide in accordance with the best interests of the child, having ruled that Islamic law recognizes this principle).
90 Id. Both before the Swiss Court (Tribunal Fédéral Suisse [ATF] [Swiss Federal Tribunal] Aug. 16, 2007, 5A.285/2007, Arrêts du Tribunal Fédéral Suisse [ATF] | (Switz.))
not aimed directly at the Israeli court system. However, her claim that there was no
guaranteed legal action against the influence of the child’s father and the
movement to which he belongs clearly implies that the Israeli court system would
not protect her right to have a say in relation to the education of her child.

Moreover, one of the dissenting judges not only accepted the mother’s claims,
but took them a step further. Justice Steiner of Austria described the majority’s
rejection of the mother’s claim that she would not be able to exercise any influence
over the religious upbringing of the son as “theoretical optimism.”91 The reason
given by Justice Steiner for this view is that, in the Israeli legal system, matters of
personal status are only justiciable before religious courts which apply traditional
religious rules “sometimes significantly different from those with which are
familiar with [sic] in Europe.”92 This assertion is patently unfounded and
demonstrates complete ignorance as to the nature of the Israeli legal system93 and
of the facts in this particular case. It was the secular Family Court which had
jurisdiction over all matters relating to the upbringing of the child in this case.

and before the ECHR, the mother relied on the defense of grave risk of harm to the child. It
should be noted that Professor Bucher incorrectly claimed that there was no wrongful
removal in this case. A. Bucher, The New Swiss Federal Act on International Child
Abduction, 4 J. PRIVATE INT’L L. 139, 141-42 (2008). The parents in this case had joint
guardianship over the child. Tribunal Fédéral Suisse [ATF] [Swiss Federal Tribunal] Aug.
16, 2007, 5A.285/2007, Arrêts du Tribunal Fédéral Suisse [ATF] | (Switz.). Thus, even
though the mother had sole physical custody and the father had limited visitation rights, she
did not have the right to remove the child unilaterally from Israel. In addition, there was a
ne exeat order in force, which the court had refused to cancel. Id. Further, Bucher’s
assertion that it was established that the father posed a danger to the mother and the child is
incorrect. While there was a restraining order against the father, he had complied with this
and the supervised contact with the child had taken place without any problems. Neulinger
id. at ¶ 4.2).

91 Another judge, while reluctant to agree with Justice Steiner’s views on the central
issue of religion, expressly agreed with her assessment of theoretical optimism. Neulinger
dissenting).

92 Id. at 90 (J. Steiner, dissenting).

93 Both secular and religious courts have jurisdiction over issues relating to children.
In any particular case, the court first seised will have sole jurisdiction. All issues of custody
and education are determined in accordance with the best interests of the child as mandated
by the Legal Capacity and Guardianship Law of 1962, which applies also to religious
tribunals. While there is some evidence that the Rabbinical Courts may give priority to
religious considerations, it should be emphasized that such courts usually decide in
accordance with social work reports and with recognized welfare criteria. See Frishtik &
Adad, supra note 86. In addition, where there is religious disparity between the parties,
they will try to find middle ground. For example, where the father is ultra-orthodox and the
mother is secular, they tend to order that the child attend a “moderate” state religious
educational establishment. See id.; see, e.g., Decisions of the Great Rabbinical Court (Case
No. 1-23-2950), available at http://www.rbc.gov.il/judgements/index.asp; see also Petach
Tikvah Regional Rabbinical Court (Case No. 1-53-2294), available at
Furthermore, this court had already shown its willingness to protect the mother and the child by issuing an injunction forbidding the father from entering the mother’s apartment or the child’s school and providing for supervised visitation, which had been complied with by the father.

Again we see the importance of courts ensuring that they have reliable information about the exact nature and scope of the religious law and cultural norms applicable in the requesting state. In this respect, it is pertinent to point out that in cases under the ECHR, the requesting state does not have party status. In addition, although the left-behind parent may file evidence as a third party, he is not eligible for legal aid (as is the applicant abductor) and may not be able to afford legal representation.

On a deeper level, Justice Steiner’s explicit suspicion of any legal system that is different from those in Europe, her identification with secularism, and her clear contempt for ultra-orthodox religious movements can be seen as manifestations of cultural universalism.

2. The Best Interests Claim

Insight can be gained into the likely attitude of courts toward Article 20 claims, based on non-application of the best interests standard in the foreign country, from examining the Article 20 cases, which have discussed the claim that the ordering of a return, without considering the best interests of the child, involves a breach of the fundamental principles of the requested state. The distinction between this issue and that under discussion is that in the decided cases, the Article

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94 Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009). In this case, evidence filed by the State of Israel, which included evidence concerning the way the case had been dealt with by the Family Court and welfare authorities, was removed from the Strasbourg Court file because of lack of status (information obtained from the father’s lawyer).

95 Id. The lawyers representing the father before the ECHR acted pro bono, but were unable to continue to do so before the Grand Chamber and thus the father was not represented in those proceedings.

96 Id. (J. Steiner, dissenting). Justice Steiner refers to the “principles of tolerance and secularism that prevail in the States Parties to the Convention.” At the International Conference of the Israeli Law and Society Association on the topic of “Secularism, Nationalism and Human Rights: Law and Politics in the Middle East and Europe” held in December 2009 in Tel Aviv, many speakers, including Professor Joseph Weiler of New York University, explained that secularism is not neutral, as it is often thought to be. Rather it is simply another system of beliefs and values, akin to that of the various religions.

97 Id. (Justice Steiner said: “when one considers the path followed by the father which led him to join an ultra-orthodox religious movement, one is entitled to have very serious doubts about the real possibilities for the mother to influence choices that are based more on religious precepts than on the child’s interest.”).

20 attack is against the law of the requested state, which seeks to return the child under the Abduction Convention’s mandatory return mechanism without considering his best interests. Yet, our inquiry relates to situations where the Article 20 attack would be based on the fact that the requesting state will not apply the best interests standard. Despite this distinction, the approach of the courts to the status of the best interests standard is clearly relevant to the current discussion.

An excellent analysis of the claim that the Hague mechanism is inconsistent with the best interests standard in the context of Article 20 can be found in the Constitutional Court of South Africa’s decision in Sondrup v. Tondelli. The Court explained that there was no conflict in principle between the Hague Convention and the principle of the paramountcy of the best interests of the child, which is entrenched in the South African constitution. This is because the objective of the Hague Convention is to promote the interests of children and because the long-term interests of children would be best met in the country of habitual residence. However, in practice, the operation of the Convention might be inconsistent with the Constitution, where return does not serve the short-term interests of the child. Nonetheless, the Court concluded that such an inconsistency could be justified under the proportionality principle in light of the objectives of the Hague Convention. Furthermore, any inconsistency could be severely limited by interpreting the Article 13 and Article 20 exceptions in light of the paramountcy principle, rather than as narrowly as in other countries that do not have to comply with a similar constitutional provision, and imposing conditions to safeguard the welfare of the child.

This decision reiterates the familiar point that the Abduction Convention is based on the assumption that the best interests of the child are usually served by having issues of custody and access determined by the courts of the country of habitual residence. However, this decision, unlike most others that refer to this premise, recognizes that it is not necessarily correct where return is not consistent with the short-term interests of the child. The author has previously argued that the premise will not necessarily be correct where the court in the country of habitual

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100 See Sondrup v. Tondelli 2001 (1) SA 1171 (CC) (S. Afr.). This analysis is very similar to that of the current author in the context of the potential inconsistency between the Hague Convention and the best interests principle in the CRC. See Rhona Schuz, The Hague Child Abduction Convention and Children's Rights, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 440-49 (2002).

101 Sondrup v. Tondelli 2001 (1) SA 1171 (CC) at ¶ 29 (S. Afr.).

102 Id. at ¶¶ 30-32.

103 Id. at ¶¶ 33-36. This solution is very similar to the one advocated by the current author. See Schuz, supra note 100 and accompanying text.


105 Referred to by Schuz as the “adjudication premise.” Schuz, supra note 100, at 437.
residence will not apply the welfare principle in a way that is considered acceptable in the requested state. In such a case, it can be argued that returning the child, without considering whether the likely outcome in the country of origin will promote his best interests, is in violation of the principle of the paramountcy of the best interests of the child.

The issue then is whether the paramountcy principle is a fundamental principle within the meaning of Article 20 in the requested state. Few states have an explicit provision similar to that in the South African constitution. However, it might be argued that other rights, such as the right to family life, are to be interpreted in accordance with the best interests standard, but this will probably only apply to domestic decisions. Alternatively, it may be possible to show that return of the child to a country which does not treat his welfare even as a primary consideration is a breach of the child’s rights, as entrenched in Article 3 of the CRC. One problem with this argument, however, is that in many states the CRC has not been incorporated into domestic law.

Moreover, even where the paramountcy of the best interests standard is a fundamental principle, it will usually be necessary, as in the Sondrup case, to consider the question of proportionality. This would involve examining the extent of the deviation of the foreign law from the best interests standard and the likely consequences of such a deviation, and weighing these against the purpose of the Convention. The difficulty here is that only a cursory investigation of the situation in the foreign country will be possible within the constraints of the Hague summary procedure. However, it might be possible to obtain reliable information relatively quickly from the Central Authority of the requesting state and/or the liaison judge.

Overall, given the courts’ consistent rejection of any arguments against returning the child based on incompatibility with the best interests standard for fear of creating an opening that would spell the death knell of the Abduction Convention, it seems unlikely that Article 20 will be held to be established on

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106 Id. at 438.
107 In the Israeli case of PS (TA) 5201/93 G’zundheit v. G’zundheit (not reported, 4 Nov. 1993), Judge Porat held that the best interests standard in Legal Capacity and Guardianship Law § 25 (1962) (which includes the “tender years” presumption) is not a basic right or fundamental freedom within Article 20 of the Abduction Convention, but rather a guiding principle in determining custody disputes.
108 FORTIN, supra note 28, at 69-70.
109 And not to cases where the violation of rights will occur in the requesting state. See supra note 37 and accompanying text.
110 It should be remembered that non-application of the best interests standard does not necessarily mean that the result is inconsistent with the best interests of a child, even from a Western perspective.
111 See Sondrup v. Tondelli 2001 (1) SA 1171 (CC) (S. Afr.).
112 For further discussion about the liaison judge, see infra Part V(B).
this basis alone. This conclusion would seem to be consistent with the pluralist approach adopted by Eekelaar and Baroness Hale, and with the belief that Western democracies do not have a monopoly in knowing what is best for children and certainly not in knowing what is best for children who have been growing up in non-Western cultures.

However, where the norms in the foreign country give rise to a clear risk of significant physical or psychological harm to the child, the Article 13(1)(b) defense would be established. Indeed, in such a situation, the ‘primary value’ of preventing harm to the child would override respect for the foreign religious or cultural norms in accordance with the theory of cultural pluralism, as explained above. Courts have to be careful not to interpret Article 13(1)(b) so restrictively that it cannot perform the function of protecting children, for which it was designed.

In our view, Article 13(1)(b) is a preferable basis for refusing return in religious or cultural norms cases than invoking Article 20, since it focuses on the harm to the particular child in the particular circumstances and does not discredit the foreign norms per se. Thus, this approach does less damage to the reciprocal basis of the Convention and is also more consistent with a pluralistic approach to culture.

3. The Discrimination Claim

The author is unaware of any Convention case other than the Spanish case of Re S, in which a claim by the abductor that she would be discriminated against in proceedings in the requesting country has been proven. There is an Israeli
case, in which it was alleged that the abducting mother would be discriminated against in Zimbabwe on grounds of religion and gender, but there was insufficient evidence, in the court’s eyes, to support this claim. Moreover, the Israeli Court made it clear that satisfying the evidentiary burden would be an uphill task because of the presumption that member states observe human rights and, therefore, it will normally only be possible to prove Article 20 where there has been a change of regime since the accession to the Convention. The ECHR case law, discussed above, shows that not all Western judges necessarily subscribe to such an assumption.

Moreover, it can be suggested that this assumption will be weakened if and when the Convention is ratified by countries which give effect to religious law or cultural norms different from those prevalent in Western democracies.

In the meantime, insight may be gleaned as to how proven discrimination against the abductor in the requesting state might be viewed under Article 20, through a comparison with cases in which procedural deficiencies in the requesting state are claimed to constitute a breach of the fundamental principles of procedural fairness or due process within that article. A good example of such a claim can be found in the New Jersey case of Caro v. Sher. In Caro, the Respondent claimed that the return to Spain would violate her fundamental interest in procedural due process because of the four year delay in hearing her relocation petition. The Court explained that the Spanish court’s procedures clearly did not correspond in all respects with those in the U.S., but that there was no reason to prefer the jurisprudence precepts of one signatory over that of another and one of the objectives of the Convention was to ensure mutual respect for rights of custody raised in other cases, where it has been assumed that violation of a fundamental principle relating to the abductor could also be an Article 20 defense. See, e.g., Re J, [2005] UKHL 40, [2006] 1 A.C. 80, ¶ 33 (appeal taken from Eng.) (U.K.) (comments by Baroness Hale); Eskinazi & Chelouche v. Turkey, (No. 14600/05), 2005-XIII Eur. Ct. H.R. (extracts) (comments by the ECHR). See also Weiner, supra note 50, at 718 (expressly stating that the main difference between the Article 13(1)(b) intolerability defense and the Article 20 defense is that the former focuses on the child, whereas the latter may focus on the parent.).


124 See supra Part II.C.

125 See also Re E [1999] 2 F.L.R. 642 (appeal taken from Sudan) (U.K.) (comment by Thorpe L.J. indicating that the assumption is not justified).


128 Id. at ¶ 17.
and access. However, there are indications from other cases that extreme examples of procedural unfairness could lead to the application of Article 20. For example, in the Australian case of *State Central Authority of Victoria v. Ardito*, the Court refused to order the return of a child to the USA because the mother was unable to obtain a visa to re-enter the USA on the basis of the Article 13(1)(b) intolerability defense. The Court held that it was probable that the Article 20 defense (which had not been pleaded) could also be established because it was contrary to all concepts of fairness that the question of the custody of the child should be determined in circumstances in which the mother was denied the right to appear.

The most directly relevant judicial comment is that of Baroness Hale in *Re J*, who considered obiter how that case, involving abduction from Saudi Arabia, might be decided if the Hague Convention applied and Article 20 had been incorporated into the UK legislation. Baroness Hale took the view that Article 20 goes further than the ECHR jurisprudence. Thus, discriminatory law in the requesting state, which distinguished between the two parents on the basis of gender and in violation of Article 14 of the European Convention, would entitle, but not require, the Court to refuse return under Article 20.

It is unclear why inconsistency with Article 14 of the European Convention should automatically lead to the establishment of Article 20. Baroness Hale herself stated that the Human Rights Act (which incorporates the European Convention into UK law) allows the English Court to return a child in case of discrimination, unless this would involve a flagrant breach of the European Convention’s provisions. Since there was no such breach in this case, it is difficult to see how the Article 20 requirement that return is not permitted by the fundamental principles of the requested state is satisfied.

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129 It was also found that the Respondent did have methods of redress in the Spanish courts. *Id.* at 361.


131 A similar view was voiced by the Israeli District Court in *Fam A 70/97 D v. D* (Dec. 13, 1998), Pador legal database (by subscription) (isr) but was not decided finally because in the end the mother did acquire a visa, following the intervention of the Israeli Central Authority.


133 *Id.*

134 *Id.* at ¶ 42.

135 Professor Perez-Vera in her Report on the Abduction Convention wrote that in order “[t]o be able to refuse to return a child on the basis of . . . Article [20], it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that return would be incompatible, even manifestly incompatible, with these principles . . .” Proceedings of the 14th session of the Hague Conference Oct. 1980, ¶ 118, available at www.hcch.net. *See also id.* at ¶ 33. *But see* Weiner’s criticism of this interpretation, *supra* note 50, at 711-15.
One option is for the Court to decide, contrary to Baroness Hale’s view, that the Saudia Arabian discriminatory provision is a flagrant breach of Article 14 or of Article 6, which protects the right to a fair trial. It is suggested that the Article 6 argument is weak. While outright procedural discrimination against one party in the foreign court on the basis of race, religion or gender could amount to a flagrant breach of the right to a fair trial, it seems unlikely that discrimination on the basis of gender inherent in the substantive law or prevailing cultural norms would satisfy this criterion. Such a distinction makes some sense because gender preference within substantive law reflects the values of the particular society in relation to the respective role of the sexes within family life. On the other hand, procedural discrimination cannot be justified on the basis of cultural values and, thus, is not deserving of respect, even under a pluralist approach.

If the argument that there is a flagrant breach of Article 14 is accepted, then Article 20 will be established. This will also be true in the case of non-European countries, in which lack of equality is considered to be a breach of fundamental principles. Although Article 20 does not require that return be refused in this situation and simply allows the court not to order return, it is difficult to see how the requested state can order return in violation of its own fundamental principles. Thus, there would not seem to be any discretion in this situation.

However, as already mentioned, most human rights regimes include a doctrine of proportionality or a similar doctrine. Thus, in practice, the court will have discretion in determining to what extent the objectives of the Convention justify returning the child, despite the violation of the mother’s rights. This analysis is different from that of Baroness Hale, since discretion is exercised in determining whether or not the Article 20 exception is established (i.e., whether return is permitted), rather than whether return should be ordered despite the fact that the exception has been proven. However, in practice, there is probably no significant difference between the two approaches.

It should be noted that the proportionality analysis is more complicated in this situation because the human rights of the abducting parent are being balanced against the purpose of the Abduction Convention and against the rights of the child which are protected by that Convention. In principle, it would seem possible to

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136 For example, the Sharia law provision requiring evidence from two male witnesses or one male witness and two female witnesses (Section 1685 of the Majella).
137 Khaliq & Young, supra note 8, at 221.
138 A similar argument could also be made in relation to discrimination against minorities on the basis of religion or race designed to ensure that the child retains the education and cultural heritage of the majority.
139 Weiner, supra note 50, at 739.
140 This factor distinguishes this situation from the more common situation in which there is a clash between different human rights of a particular person or group. For example, the debate over the veil worn by Muslim women involves a clash between the right of Muslim women to manifest their religion by wearing a headscarf and their right to gender equality, which is alleged to be violated by the headscarf, that symbolizes female oppression. This clash enabled the ECHR to uphold French and Turkish bans on the
justify the violation of the abductor’s human rights in order to promote the objectives of protecting children from the harm caused by abduction and of giving effect to the child’s right to contact with both parents. Furthermore, since the parent is an autonomous adult, his voluntary actions might be relevant in the balancing exercise. For example, the fact that the parent subjected himself to the foreign legal system, and possibly contracted a marriage under religious or customary law, would seem to reduce the weight given to the discrimination.141

However, if one effect of the discrimination is to violate the rights of the particular child,142 then any justification for the violation of the parent’s rights would seem to disappear, and the case for refusing return either under Article 20 or Article 13 is strengthened.

IV. THE MIXED MARRIAGE CASES

A. Introduction

In these cases, the issue arises as to what extent the differences between the religious or cultural environment in which the child lives in the country of refuge, and that in which he would live in the country of origin, are relevant in determining whether the child should be returned. In non-Convention cases, where the best interests standard is still determinative, the Court will have to decide to what extent the religious or cultural differences can rebut the presumption that the best interests of the child require that his future be determined in the country of origin. The delicate balance between maintaining neutrality between different religions on the one hand, yet protecting the child from harm on the other hand is similar to that which arises in domestic case law involving custody disputes between parents from different religious or cultural communities. This dilemma is widely discussed in the literature143 and there is no need to rehearse the different approaches here. It should be noted, however, that the international element is likely to exacerbate the damage caused by moving the child from one environment wearing of headscarves in certain educational establishments, despite the clear breach of the right to manifest one’s religion. See, e.g., Leyla Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2004). Thus, Raday’s conclusion that gender equality must have normative hegemony over cultural or religious norms is too simplistic an answer for the current context. Raday, supra note 1.

141 In the case of Eskinazi & Chelouche v. Turkey, there is reference to the fact that the mother contracted a Jewish religious marriage and established a home with the father in Israel. Eskinazi & Chelouche v. Turkey, (No. 14600/05), 2005-XIII Eur. Ct. H.R. (extracts). Similarly, in the case of Re S, [2000] 1 F.L.R. 454 (appeal from Isr.) (U.K.), significant weight was placed on the fact that the mother was also an Orthodox Jewess and that she had agreed to the dispute being heard before the Rabbinical Court, rather than the secular Family Court.

142 Khaliq & Young, supra note 8, at 222.

to another because, in addition to the religious/cultural differences, there will often also be other lifestyle changes, such as language and climate. However, this is simply one factor to be taken into account and does not raise any new questions of principle. A further problem which may arise as a result of the international dimension is the possible lack of familiarity of the court in the requesting state with the religion or cultural community of the abducting parent. This issue also arises under Hague Convention cases and will be discussed below.

Accordingly, the discussion will now focus on the position in Hague Convention cases. It will consider the extent to which the cultural or religious differences between the two environments may form the basis for establishing one or more of the Convention defenses.

The argument that the child should not be returned to the country of origin for cultural or religious reasons is not infrequently raised in the Israeli courts by Jewish abductors, who were living abroad with non-Jewish partners, even when the abducting parent is not a practicing Jew. Similarly, even in cases where both parties are Jewish, the abductor sometimes claims that the child should be allowed to stay in Israel so that he can live in a Jewish environment and receive a better Jewish education than is available in the country of origin. In such cases, the abductor’s argument is properly rejected as acceptance would be fundamentally inconsistent with Israel’s membership of the Hague Convention.

However, the abductor’s claims are treated more seriously in cases where there is a clear and significant religious or cultural gap between the child’s lifestyle in Israel and that of the left-behind parent in the country of origin. Nonetheless, in no case has return been refused on this basis.

In the next section, the potential for use of the various defenses in the mixed-marriage scenario will be examined. Afterward, the difficulties involved in determining whether the defenses have been established will be illustrated by reference to two prominent Israeli cases in which, after prolonged litigation, the Supreme Court ordered that the children be returned, despite the vast religious or cultural gap and despite their objections, resulting in tragic consequences.

**B. Potential for Use of the Hague Defenses in the Mixed Marriage Cases**

There are four defenses which may be pleaded by the abductor in the mixed marriage situation described above, depending on the circumstances of the case: (1) grave risk of harm to the child or intolerable situation (Article 13(1)(b)); (2) child’s objection to return (Article 13(2)); (3) passage of time and settlement (Article 12(2)); and (4) breach of fundamental freedoms (Article 20). The arguments which are likely to be brought in favor of and against the application of the defenses will be considered below.

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144 See, e.g., FamA 902/07, Plonit v. Plonim (Apr. 26, 2007), Pador legal database (by subscription) (isr).
145 Per Justice Assulin, at first instance in the Belgian Saga (FamC (BSH) 3450/07, Ploni v. Almonit (Jan. 9, 2008), Pador legal database (by subscription) (isr)).
1. Grave Risk of Harm

This defense is frequently pleaded and is the most commonly established defense globally. In this context, the claim will usually be that return will cause the child psychological damage, rather than physical damage, because of the culture shock. Convention jurisprudence makes clear that the defense will only be established where the damage involved is greater than the usual damage caused by moving from one country to another. The abductor will claim that the wide cultural or religious disparity satisfies this criterion. The left-behind parent is likely to counter this by pointing out that the child, at some previous time, lived in the environment to which he is now being returned; unless this is not the case because the left-behind parent has changed his religious or cultural affiliation following the abduction. He will also argue that the issue of the religious or cultural education and lifestyle of the child should be determined in domestic proceedings in the country of origin. The abductor will counter that even temporary return will cause harm because of the culture shock. Of course, the length of time since the child left the country of origin will be highly relevant in determining the cogency of this argument.

The Mixed-Marriage Cases scenario might well increase the chance that the abducting parent is not prepared to return with the child. The prevalent approach in Convention jurisprudence is that the abductor cannot rely on the fact that his refusal to return will cause damage, but there is some case law which suggests that a reasonable and convincing refusal to return may lead to the establishment of the grave risk exception. The abductor may claim that the religious or cultural disparity makes his refusal unreasonable, but such a claim is unlikely to be accepted unless he can show that he would not be allowed to practice his religion freely in the requesting state.

Finally, the left-behind parent may well offer various undertakings designed to reduce the impact of the culture shock, such as allowing the child to continue to

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146 See Lowe et al., supra note 2 (In 1999, 18% of all refusals utilized this defense, and in 2003, 13% of all refusals utilized this defense).
147 However, it may be argued that the practices of a particular religion or group might involve physical damage. For example, in the Australian case of Emmett & Perry v. Dir.-Gen. of Dep’t of Family Serv. (1996) F.L.C. ¶ 92-645 (Austl.), in which the parties were of the Hari Krishna faith, the wife argued that the husband was contemplating marrying off his teenage daughters to older men.
150 See, e.g., Hollins v. Crozier, [2000] N.Z.F.L.R. 775 (N.Z.) (Judge Doogue said, “If the mother had proved on the balance of probabilities that she would not under any circumstances return then, the evidence satisfies me overwhelmingly that for Joshua a return to Australia would entail a return into the primary care of his father and; that could in fact be psychologically abusive to him and thus, Article 13(1)(c)(i), which enacts the grave risk exception, would be made out.”).
practice the religion he is currently observing and/or receive education in that religion.\textsuperscript{151} If return is ordered on the basis of such undertakings or conditions stipulated by the court, thought has to be given as to whether and how they can realistically be enforced.\textsuperscript{152}

2. Child’s Objections

The religious or cultural disparity between the two environments may make it more likely that an older child will object to returning to the foreign environment. The abductor will argue that this is an objectively valid and cogent reason for refusing to return. The left-behind parent will reply that the child’s expressed views are not independent and that he is being influenced by the abductor and by the religious or cultural community in which he is living in the country of refuge. Indeed, it might seem that the child’s views cannot be independent because the child is being educated in the religion chosen by the abducting parent and has become used to his way of life.

However, as the present author has previously argued,\textsuperscript{153} the fact that there are certain influences on the child should not automatically lead to the conclusion that his views are not genuine or independent. Even adults’ views are influenced by the environment in which they grew up and the education they received. Furthermore, consideration should be given to the consequences of forcing the child against his will. Where his views are based on religious conviction, it will be much harder to “break his will.” and the process of doing so may cause significant psychological damage. Moreover, forced return may result in alienating him from the left-behind

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\textsuperscript{151} See, e.g., FamC (TA) 107060/99, Minor v. L.K. (May. 21, 2001), Pador legal database (by subscription) (isr), and others (the “Swedish Saga”); Belgian Saga, FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr) (non-Jewish fathers agreed to provide Kosher food for the children, who were religious Jews and to send them to Jewish schools).

\textsuperscript{152} In the Swedish Saga, which started off as a custody case in Israel between the Swedish non-Jewish father and the Israeli Jewish grandparents (after the death of the Israeli Jewish mother), the father did not keep his commitments and eventually the Israeli court reversed the temporary custody order in his favor. \textit{Id.} The grandparents then “abducted” the child back to Israel. The father’s subsequent Hague application was rejected on the basis that the child’s habitual residence had remained in Israel (FamC (RG) 107064/99, K.L. v. N.D.SH. (Dec. 30, 2003), Pador legal database (by subscription) (isr)).

\textsuperscript{153} In the Belgian Saga, the Israeli Supreme Court delayed return of the child to Belgium for two months in order to enable the child to be prepared for his return. FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr) (per Justice Jubran). This preparation, which was to be conducted by the Israeli social services, was to include meetings with the father. In practice, there was significant delay in organizing the meetings and even when they did take place the child did not cooperate. \textit{Id.} at ¶ 15 (opinion by Justice Arbel).

parent who has made him return against his will, which defeats the primary purpose of restoring the relationship between the child and the left-behind parent.

Finally, it should be remembered that the child objection exception reflects the child’s rights to participate in decisions concerning him, entrenched in Article 12 of the United Nations Convention on the Rights of the Child and that giving insufficient weight to the views of a mature child violate this right.154

3. Passage of Time and Settlement

First, it must be emphasized that the two conditions in Article 12(2) are cumulative. Thus, the defense is only relevant where one year has passed between the date of the unlawful removal or retention and the date of the commencement of proceedings. In such a case, the abductor will argue the fact that the child has integrated into the religious or cultural environment in which the abductor lives is evidence of his having become settled in the environment within the meaning of Article 12(2). The religious or cultural identification would seem to be relevant to the emotional aspect of settlement, required by some of the cases.155

Furthermore, settlement should be considered from the child’s perspective156 and in light of his rights. Return could breach his right to identity unless there are sufficient safeguards to ensure real and proper expression of that identity in his country of origin. The left-behind parent might counter that the child’s rights are being violated by the fact that he is not being exposed to the other half of his identity. This argument raises fundamental issues about the concept of identity, which are outside the scope of this paper.157 However, it can be argued that the child’s own perceptions must play a key role in determining his identity and that this identity is very relevant in determining whether there has been settlement, as defined by Article 12(2).

154 See Schuz, supra note 100, at 419.
155 Courts do tend to mention active participation in the local religious community as a factor in settlement. See, e.g., Re C, [1999] 1 F.L.R. 1145, 1154; Re M & Anor [2007] UKHL 55, ¶ 52, [2007] EWCA (Civ) 992 (appeal taken from Zimb.) (U.K.) (comment of Baroness Hale); but ef. M v. M, [2008] EWHC (Fam) 2049, ¶ 29, [2008] 2 F.L.R. 1884, 1893 (the children’s involvement with the Catholic Church in the U.K. was seen as evidence of the fact that they were still grounded in Polish culture).
157 See Ya’ir Ronen, Child’s Right to Identity as a Right to Belong, 26 TEL AVIV U. L. REV. 935 (2003). See also Eekelaar, supra note 143, at 182-83 (claiming that children can forge a positive identity which incorporates features of two or more cultures without suffering harm).
4. Breach of Fundamental Freedoms

In rare cases where it can be shown that the child would not be allowed to practice his current religion or adhere to his current cultural practices in the country of origin, Article 20 may be invoked. As indicated above, this will be very difficult to prove, since there is an assumption that Convention states observe basic human rights, and because the claim depends to a large degree on speculation and cannot easily be supported by concrete evidence.

C. The Israeli Case Law

1. The Dolberg Case

In this case, two girls, aged fourteen and ten, who had been living an ultra-orthodox Jewish life with their mother for the previous two years, were returned to Italy against their will. The Supreme Court expressed confidence that the Italian court would take into account the effect of cutting off the girls from their way of life when determining where they should live, and also referred to the secular father’s commitment to return the girls to the mother if they could not adjust to the way of life in his home.

However, in reality, once the girls were returned to Italy, the comments of the Israeli Courts were completely ignored. The Italian court, at the father’s request, revoked the mother’s parental rights. That Court held that the mother’s abduction of the girls, and her imposing upon the girls fundamental changes in their way of life, showed beyond all doubt that she did not possess parental capacity and that her parental authority should be revoked. Furthermore, the Court severely restricted all contact between the girls and their mother, forbidding any telephone or written contact outside the presence of the father or his agent, so

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159 During this time, they had been in hiding in order to avoid the return order made by the Israeli court. They lived part of the time in Israel and part of the time in South America.
160 The mother later discovered that he had secretly converted to Christianity.
161 CA 2610/99 Pekan v. Dolberg 53(2) PD 566, 574 [1999] (isr). At first instance, Justice Geifman also emphasized the importance of continuing close contact between the girls and their mother and expressed his reliance on the father to ensure this. FamC (TA) 5063/97, Plonit v. Almoni (Apr. 16, 1999), Pador legal database (by subscription) (isr).
162 The following information is based on material provided to the author by the mother including letters written to her by the girls and “smuggled out” of the father’s house, an affidavit from a Rabbi in Genoa and a confirmed translation of the decision of the Italian court. Corroboration of the lack of fair trial in the Italian court was provided verbally to the author by a very senior and highly respected Israeli lawyer who traveled to Italy pro bono to provide her with assistance in the Italian proceedings.
163 Id.
164 Id.
as to prevent the mother from having an inappropriate influence on the girls.\textsuperscript{165} The court did not hear testimony from the girls.\textsuperscript{166} Instead, it relied on a psychological report which viewed the ultra-orthodox hassidic way of life of the mother as radical and harmful to the girls inter alia because of their lack of exposure to the secular media and literature.\textsuperscript{167} The restriction of the girls’ contact with their mother caused them considerable distress, but eventually they were “broken” and gave up their religious way of life.\textsuperscript{168}

2. Analysis

The main problem in \textit{Dolberg} is one of misinformation and lack of liaison between the courts in different member states, similar to that seen in the cases discussed in the first part of this Article. Furthermore, the expert’s approach to the ultra-orthodox Hassidic Judaism, adopted by the Italian Court, appears to be a universalistic one, not dissimilar to that found in the decision of Justice Steiner in the \textit{Neulinger} case.\textsuperscript{169}

In relation to the Hague Convention defenses, on the facts before the Israeli Supreme Court, there was no basis for establishing the grave risk of harm defense. However, it may be questioned whether sufficient weight was given to the girls’ objections. Justice Geifman, who heard direct testimony from the girls, relied on the fact that they did not show any aversion to their father and appeared to accept the fact that they would be returned to him.\textsuperscript{170} It seems that insufficient consideration was given to the objective reasons for not wanting to return to Italy, although this may be partly because the girls themselves did not state the religious or cultural difference as the main reason for their objections. However, it probably would not have made much difference what they had said because the judge relied on psychological evidence that in the situation in which the girls had been placed, it was unrealistic to expect them not to object to returning to the father.

However, even if there was no basis for refusing return, there was clearly room to require undertakings, to be contained in a mirror order,\textsuperscript{171} which would protect the girls after their return, instead of simply relying on the father and the Italian authorities. Furthermore, it would seem that direct contact between the Israeli and Italian judges\textsuperscript{172} might have changed the ending of the story. For

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{165} Id.
\item\textsuperscript{166} Id.
\item\textsuperscript{167} Id.
\item\textsuperscript{168} Id.
\item\textsuperscript{170} FamA (TA) 1047/99 Plonit v. Almoni [1999] ¶ 7 (Pador 623 (4) 99).
\item\textsuperscript{171} This is an order given by the Court in the requesting state which parallels the conditions made by the court in the requested state. See Schuz, \textit{supra} note 156; discussion \textit{infra} Part V.C.
\item\textsuperscript{172} For a detailed discussion about the concept of cross-border direct judicial communication in International Abduction cases, see \textit{infra} Part V.B.
\end{itemize}
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example, the Israeli judge could have sought assurances that the mother would not be prejudiced in the custody case by the fact that she had abducted the girls, and about measures to enable the girls to remain in close contact with their mother and to observe their religion. If the Italian judge had given these assurances, it is unlikely that the Italian Court would have made the orders that it did.

3. The Belgian Saga

(a) The Facts

In January 2006, the then seven-year-old boy was brought to Israel by his Jewish mother from France, where they had been living for two years with the permission of the Belgium court. A few weeks earlier, the Belgium court had allowed the Belgian father’s appeal from its earlier decision and held that custody should be transferred to him. The father issued Hague Convention proceedings in November 2006 and the mother pleaded the grave risk of harm and child objection defenses.

The child was heard directly by the District Court, but the Court held that his clearly expressed and strong objections to returning to Belgium could not be taken into account because he was not sufficiently mature and because his views had clearly been influenced by his mother.

In relation to the grave risk defense, considerable weight was placed on the psychological report. On the one hand, this report clearly stated that return of the child to Belgium by himself would be a catastrophe, because of the separation from his mother and because of the great disparity between the religious and cultural environment to which he was accustomed to in Israel and the environment in which his father lived in Belgium. The report even suggested that the child would become depressed and perhaps even suicidal. On the other hand, the report expressed the view that if the child stayed in Israel, he would lose all contact

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174 FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr).
175 The mother had become religious after she divorced her non-Jewish husband. Id. at ¶ 20.
176 Id. at ¶ 4 (Justice Procaccia’s opinion).
177 Id.
178 FamA (BSH) 121/07, Plonit v. Plonit (Oct. 21, 2007), Pador legal database (by subscription) (isr). This hearing took place after the Supreme Court allowed the mother’s appeal against the return order having been made without hearing the child (FamA 5579/07, Ploni v Ploni (Aug. 15, 2007), Pador legal database (by subscription) (isr).
179 Id., confirmed on appeal FamA 9201/08, Ploni v. Plonit, (Oct. 20, 2009), Pador legal database (by subscription) (isr).
180 FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr), ¶ 13 (opinion of Justice Procaccia).
181 FamA (BSH) 121/07, Plonit v. Plonit (Oct. 21, 2007), Pador legal database (by subscription) (isr), ¶ 2 (opinion of Justice Hendel).
with the father and this would cause long-term harm to his psychological and emotional development.\(^{182}\) Thus, according to the report, the least detrimental alternative was for the child to return to Belgium with the mother, although there was a risk that the mother’s presence would impede the restoration of the relationship between the father and the child.

In the end, eight out of the nine judges who decided the case held that the child should be returned.\(^{183}\) Some held the grave risk defense was not established and some held that while the defense was established, the child should still be returned because allowing him to remain in Israel would also cause him harm.\(^ {184}\) The return order was delayed to allow time for the child to be prepared for the transition, and was made subject to the father fulfilling various conditions.\(^ {185}\) Eventually, immediate return was ordered by the Supreme Court ex parte even though all the conditions had not yet been fulfilled.\(^ {186}\) The father’s lawyer then gave the mother’s lawyer twenty-four hours notice of the flight that he had booked for the child’s return. However, the child did not turn up at the appointed time at the airport on July 3, 2008, and has not been seen since. The mother was arrested and charged with kidnapping the child.\(^ {187}\)

(b) Analysis

Arguably, the court took too narrow a view of the Convention defenses. In particular, the decision of the Supreme Court emphasizes the importance of not allowing the abducting mother to benefit from her illegal actions. Justice Procaccia explained that the cause of the harm to the child was the mother’s actions in bringing the child to Israel and changing his way of life. With respect, the focus ought to be on the child, who should not be punished for the sins of his mother.

\(^{182}\) This part of the reported is clearly influenced by Richard Gardner’s Parental Alienation Syndrome theory, which has been widely discredited in the USA. See Bruch, supra note 3, at 381.

\(^{183}\) The Family Court judge (FamC (BSH) 3450/07, Ploni v. Almonit (Jan. 9, 2008), Pador legal database (by subscription) (isr)), two judges in the District Court (FamA (BSH) 121/07, Plonit v. Plonit (Oct. 21, 2007), Pador legal database (by subscription) (isr)) reported at Pador 07 (33) 599 (2007) and all three judges in the Supreme Court (FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr)).

\(^ {184}\) Justice Asulin in the Family Court (FamC (BSH) 3450/07, Ploni v. Almonit (Jan. 9, 2008), Pador legal database (by subscription) (isr)).

\(^ {185}\) Including agreeing to the child living with the mother until the Belgian Court heard the case.

\(^ {186}\) FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr). In particular, no undertaking had been received from the French prosecution authorities that they would not continue to pursue the criminal proceedings which had already been started against the mother. The mother’s application to the High Court of Justice to revoke the order was rejected (HCJ 5952/08, Plonit v. Supreme Court & Others (Jul. 3, 07), Pador legal database (by subscription) (isr)).

\(^ {187}\) The trial started in June 2009, but has not yet been completed.
The issue is whether there is a grave risk of harm and not who is responsible for this risk.

In addition, the weight the psychologist gave to the different options, which was accepted blindly by the court, seems to be misconceived. The potential harm caused by return was immediate and concrete, whereas the potential harm caused by staying in Israel was long-term and hypothetical and could have been avoided by enforcing contact with the father. Furthermore, the expert’s conclusion does not appear to give sufficient weight to the traumatic effect on the child of the vast religious/cultural divide between the two environments, despite his express recognition of this factor. It is suggested that the judges would have done well to heed the words of Baroness Hale, “No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.”

Moreover, insufficient weight was given to the child’s vehement objections. The court’s finding of lack of maturity was inconsistent with the psychologist’s view on this issue. While there was clear evidence of influence by the abductor, the child had valid objective reasons for resisting being returned to a way of life which was completely foreign to that which he was accustomed. It is open to serious debate whether forcible return in such circumstances can be in the best interests of the child.

The condition that the child should remain in the temporary custody of the mother in Belgium until a decision on the merits by the Belgian court appears to provide an optimal solution. However, in practice such a condition provides little protection. Even though a mirror order was obtained from the Belgian court, an opinion provided by a leading Belgian lawyer expressed the view that the Belgian court would very quickly restore its original custody order in favor of the father, without giving any real consideration to the changed circumstances.

Finally, it is impossible to justify the ex parte order requiring immediate return, despite the fact that not all the conditions had been fulfilled. The basis of the return order was that the mother would return to Belgium with the child and it was not reasonable to expect her to return while there was a real risk she would be prosecuted for abduction in France. To expect her to make a decision in these circumstances within a few hours is unrealistic and inhumane. Furthermore, the expectation that the child would travel to Belgium with only twenty-four hours notice—without time to get organized properly or part from his friends—shows complete and utter lack of sensitivity for the child’s feelings and welfare. This is exactly the type of sudden uprooting of a child the Hague Convention is designed to prevent. Although contempt of court cannot be condoned, if courts create

188 The boy did say that if his father were to let him stay in Israel, he would be prepared to have contact with him.
189 See In re D [2006] UKHL 51. This case was cited to by the judges in the Belgium Saga case.
190 Source is on file with the author.
191 FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) ( isr), ¶ 52 (opinion of Justice Procaccia).
impossible situations then they should not be surprised when their orders are flouted.

Again, this seems to be a case that is crying out for judicial liaison. Perhaps, direct communication between the Israeli and Belgian judges, together with fulfillment of all the conditions originally stipulated, might have created a situation in which the child could have returned to Belgium with the mother in a way which could have protected him adequately from serious risk of real, psychological harm.

Although several aspects of this analysis appear not to be directly related to the issue of religion and culture, it is suggested that the religious or cultural differences pervade all aspects of the case. For example, this factor exacerbated the hardship for the child caused by the short notice he was given of the date of return. Perhaps greater sensitivity to this aspect of the case might have produced a different result.

V. CONCLUSIONS AND RECOMMENDATIONS

Without coming to a definitive conclusion as to the optimal relationship between culture and human rights, it is suggested that a pluralistic approach is more appropriate in the context of international child abduction. A universalistic approach is inconsistent with the reciprocal nature of the Hague Convention and bilateral arrangements existing between some countries outside the Hague framework. Furthermore, even in cases where there is no Convention or other arrangement, the universalistic approach appears inconsistent with the modern recognition that there are many different valid ways to raise children. On the other hand, a relativist approach is problematic when the welfare of children is at stake.

As demonstrated above, in relation to non-Convention cases, the via media adopted by the House of Lords in the case of Re J is consistent with a pluralistic approach to culture. In the context of the Hague Convention, it is suggested that a pluralist approach to culture requires the exercise of caution and a careful balancing of the different interests and factors involved before refusing to return children on the basis of Article 20 in cases where the alleged breach of fundamental principles arises out of non-Western religious or cultural norms in the requesting state. The fact that mutual co-operation and reciprocity are so critical to achieving the objectives of the Hague Convention would seem to strengthen the arguments in favor of tolerance of cultural diversity and require a narrow interpretation of Article 20. However, where the breach of fundamental principles

192 See infra Part V(B).
193 See supra note 2 (citing the bilateral treaties).
195 Id.
results in a real risk of harm to the child, return should be refused under Article 13(1)(b). Similarly, where the child is mature enough to understand the consequences of the situation in the requesting state and so objects to return, then the Article 13(2) child objection defense may be invoked.

These defenses should also be invoked where appropriate in Mixed Marriage Cases. While clearly cultural or religious disparity per se will not establish the defenses, this disparity may increase the likelihood that return will cause real psychological harm and will often provide an objectively legitimate reason for a mature child’s objection to return. Proper weight should be given to these factors. Furthermore, where the child is to be returned, the cultural or religious disparity will increase the need to ensure that enforceable safeguards are put in place to protect the child.

Moreover, it is absolutely essential in all the types of cases discussed to ensure that the courts have accurate information about the religious law and/or cultural norms involved. The cases discussed above illustrate how misinformation can have disastrous consequences. While the substantive issues discussed in this Article are complex and not easily solvable, the technical problem of ensuring accurate information should be able to be overcome by appropriate measures. In our view, there are three particular procedural reforms that, if universally adopted by member states, could prevent the unfortunate outcomes seen in some of the cases discussed in this Article. A fourth recommendation relates specifically to the ECHR.

A. Separate Representation of Children

It has been argued that children have a right to separate representation in Hague Convention cases when their interests may conflict with their parents. Further, a number of situations have been suggested in which this criterion is satisfied, including cases where the grave risk of harm or child objection defense is raised. In such cases, the child’s separate representative, who is only concerned with the child’s interests is best placed to present the child’s interests objectively, putting the emphasis on issues concerning the child. Conversely, where the child’s interests are presented by the parents, they will invariably be intertwined with the individual interests of each parent. Furthermore, the fact that the abducting parent is perceived to be the guilty party or belongs to an apparently radical

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197 See Weiner, supra note 50 (this should include situations where the child will be harmed indirectly because of the physical abuse or persecution of the mother.).
198 Schuz, supra note 100, at 431-32.
199 Id.
200 Re M Re M & Anor [2007] UKHL 55, ¶ 57, [2007] EWCA (Civ) 992 (appeal taken from England.) (U.K.) (Baroness Hale recognizes the risk that the child’s point of view may be “lost in the competing claims of the adults.”).
201 See Belgian Saga, FamA 1855/08, Plonit v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr) (in the judgment of Justice Procaccia).
religious or cultural group is liable to affect the way in which the court treats the abductor’s arguments in relation to the child’s interests.

In cases involving religious law or cultural norms, the separate representative is also in a position to ensure that the information provided by the parties to the court concerning religious law or cultural norms is accurate and to explain to the court the implications of this information for the child. It is obviously important to ensure that the separate representative does not have any preconceived bias against one of the religions or cultures involved in order to avoid the sort of bias found in psychological opinions given to the Swiss Court in the Neulinger case (Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009); and to the Italian Court in the Dolberg case (see supra note 162)).

Furthermore, where it is proposed to make return of the child conditional on undertakings designed to reduce the harm to the child, the separate representative can make inquiries to verify the extent to which such undertakings will be effective. Similarly, if the court makes conditions relating to the child, which have to be fulfilled before the return, the separate representative can accompany the child and ensure that the conditions are fulfilled.

In recent years, there has been increased recognition of the need for separate representation in Hague cases in some countries. Nonetheless, only a small minority of abducted children is represented. Hopefully, the issue will be discussed at the next meeting of the Special Commission, which is due to convene in Spring 2011, and a recommendation will be made that children should be separately represented in Hague cases, at least where certain issues, such as the grave risk of harm or child objection defenses, are raised.

B. Liaison Judges

As mentioned above, the idea of direct contact between judges has gained momentum over the last decade. This communication usually takes place by

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203 For example, if the child in the Belgian Saga had been separately represented, the representative might have been able to liaise between the parties to ensure that the meetings to prepare the child for return were arranged promptly. See Belgian Saga, FamA 1855/08, Ploët v. Ploni, (Jul. 1, 2008), Pador legal database (by subscription) (isr) (decision of May 21, 2008 delaying the date of the return because the preparatory meetings had not been carried out).

204 The most significant example is the Swiss Federal Act on International Child Abduction and the Hague Convention on the Protection of Children and Adults, Dec. 21, 2007, 211.222.32. An English translation of the Act can be found at the end of A. Bucher’s article. Bucher, supra note 92. In England, where judges have discretion as to whether to order separate representation, there has been some relaxation in the formerly very stringent criteria. See, e.g., Marilyn Freeman & Anne-Marie Hutchinson, Abduction and the Voice of the Child: In re M, [2008] INT’L FAM. L. 163.

205 See Conclusions and Recommendations of the Fourth and Fifth Meetings of the Special Commission to review the operation of the Hague Abduction Convention, available at www.hcch.net; and the conclusions and recommendations of the judicial conference held in Brussels in January 2009, available at http://www.hcch.net/upload/jud...
telephone conversations or electronic mail and is subject to procedural safeguards, such as providing the parties and their attorneys with full details of the contact. It is suggested that such communication can be particularly valuable in cases where issues of religion or culture arise. Direct exchange of information and explanation of the prevalent religious or cultural norms could go a long way to dispelling the cultural intolerance sometimes displayed by judges. Conversely, such communication may also enable a judge to assess more accurately the real risks involved in returning the child and the effectiveness of undertakings and other guarantees. Thus, ideally, countries that have not yet appointed a liaison judge will do so, and these judges will make use of direct communication facilities in appropriate cases.

C. Undertakings

The need to provide safeguards to protect children who are returned under the Hague Convention is hardly peculiar to cases involving religious or cultural disparity, but the risk of harm being caused by the sudden change of cultural environment together with the potential for misinformation and misunderstanding in these sorts of cases makes these measures even more necessary in such cases.

Although the concept of making return orders conditional on undertakings was not envisaged by the drafters of the Hague Convention and is the fruit of judicial creativity, the practice has been adopted by a number of member states. However, provision is not always made to ensure that these undertakings are enforceable. Thus, the judge in the requested state may think that he is protecting the child, but in practice the protection is ineffective.

Thus, it is essential to ensure that such undertakings can and will be enforced, if necessary, in the requesting state. Mirror orders certainly strengthen the undertakings and direct judicial contact can further ensure that there is consonance between the expectations of the judiciary in the two countries.

See also Hoole v. Hoole [2008] BCJ No. 1768, BCSC 1248.


Also, it has been suggested that conferences and other meetings between judges from different countries can help to build up trust and understanding which can assist in avoiding inconsistent decisions by courts in different countries. See Lord Justice Thorpe, Judicial Activism in International Child Abduction, [2010] INT’L FAM. L. 113.

For example, in MCA (NAZ) 122/09, D.C.M. v. P.M. (Nov. 1, 2009), Pador legal database (by subscription) (isr), the Israeli court ordered the mother to return to the USA on condition that the father let her live in the flat where he was living. The mother returned to the USA, but the father continued to live in the flat with his girlfriend. The mother applied to the Israeli Court, requesting its permission to return to Israel because the condition had not been fulfilled. Id. The Israeli court did not accede to her request and told the mother to apply to the U.S. court. Id. However, it should be noted that since the condition does not bind the U.S. court, there is no guarantee that she would succeed there.
D. Procedure in ECHR Petitions by Abductors

As we have seen, in cases where the requesting state has different religious or cultural norms from the European requested state, the abductor may try to avoid having to comply with a return order by petitioning the ECHR and claiming that the return order violated his human rights under the European Convention. Since he will be entitled to legal aid from the ECHR, he has nothing to lose by making such a claim and, even if ultimately unsuccessful, he has gained more time with the child in the state of refuge. By giving serious consideration to these claims, the ECHR is undermining the Hague Convention. ECHR proceedings often take a long time and, thus, the central objective of immediate return is frustrated.

In addition, while the left-behind parent does have standing as a third-party, this does not put him on an equal footing with the applicant, and he may not have the resources to secure legal representation. It should be remembered that the claim is not being made against the left-behind parent, but he is the one who will be most affected by the outcome of the petition. Thus, the lack of equality between the two parents in the proceedings before the ECHR may seem to be in breach of the European Convention’s own provisions protecting the right to a fair trial and prohibiting discrimination.

Furthermore, the ECHR may not have accurate information about the human rights situation in the requesting state because that state is not a party to the proceedings before the ECHR and, so, is not permitted to submit material to the Court. Thus, the only method of the requesting state providing the ECHR with this material is through the left-behind parent. However, this would seem to be inappropriate, as it suggests bias in favor of that party, especially when there is

### Footnotes

210 In the Neulinger case, the decision of the Swiss Appeal court, Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009), ordering a return was handed down to the lower court on August 16, 2007. The decision of the ECHR was given on August 1, 2009. The mother’s appeal to the Grand Chamber was heard in October 2009 and a decision has not been given to date.

211 For example, in the Neulinger case the father did not receive copies of correspondence, applications or exhibits that were exchanged between the Applicant, the Swiss Government and the Court. Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009). The mother submitted pictures to the court depicting the father wearing Hassidic attire and a beard insinuating that his appearance reflects his dangerous character. Id. When the father’s attorneys requested copies of the pictures and exhibits, they were asked to travel from Israel to Strasbourg and make copies from the Court’s archive. Id. (information from father’s lawyers).


213 See supra note 95 and accompanying text; See also R v. Adjudication Officer ex parte Ullah, [2004] UKHL 26, [2002] EWCA (Civ) 1856, ¶ 103 (appeal taken from Wales) (U.K.) (Lord Bingham commented that in respect of rights which involve balancing the rights of the individual with the wider interests of the community (i.e., Article 8), the Strasbourg court is not in a position to assess the balance “in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism.”).
likely to be further litigation between the two parties in the courts of that state. Moreover, since the allegation is that the requesting state will violate the human rights of the abductor, surely that state should be given the opportunity to answer the allegations and it may be that only that state has the necessary information to do so. In order to overcome these problems, it is suggested that the following or similar measures be adopted in cases where there is a petition against a return order:

1. The ECHR should make clear that only in rare cases will petitions against return orders be successful.
2. The ECHR should itself give instructions for fast track disposition, setting a very strict timetable, which will ensure that there will be a decision within two months.
3. The left-behind parent should be entitled to legal aid and his status should be equated with that of the applicant for all purposes.
4. The requesting state should be given full party status, allowed to file all relevant material, and appear before the ECHR.
5. Grand Chamber Review should not be allowed, unless there are exceptional reasons why this is necessary. Where such review is allowed, a fast track procedure should be adopted.

POSTSCRIPT

After this Article was ready for publication, on 6th July 2010, the Grand Chamber of the ECHR issued a press release announcing that the appeal in the case of Neulinger and Shuruk v. Switzerland had been allowed. The Court held that to enforce the order after the child had been settled in Switzerland with his mother for so long and had lost contact with his father would be in breach of his and his mother’s right to family life and contrary to his best interests. However, the court

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214 Especially when the ECHR itself seeks preliminary observations by way of questions directed to the parties regarding the laws and quality of child protective services in the requesting states.

215 For example, in the Neulinger case, during a Grand Chamber public hearing, the judges’ questions from the bench indicated an interest as to the likelihood of the mother being prosecuted if she accompanies the returning child to Israel. Neulinger & Shuruk v. Switzerland, App. No. 41615/07, Eur. Ct. H.R. (2009) (information provided by father’s lawyers). The Israeli Central Authority had provided a document explaining that under Ministry of Justice Guidelines, abductors are not prosecuted other than in exceptional circumstances. Id. However, due to lack of standing, the President of the First Section had ordered the physical removal of this document from the Court’s docket, thus leaving the Judges of the Grand Chamber to merely speculate as to what Israeli authorities may or may not do. Id.

216 This is possible under Rule 41 of the ECHR.

made clear that the original Swiss decision ordering return of the child had been within the margin of appreciation allowed to national courts. Thus, fortunately, the Grand Chamber did not accept the stance of Justice Steiner that return to Israel, in which religious law applied in relation to family matters, would violate the rights of the child and the mother.218

However, the decision provides strong support for the claim made in Part V.D. above, that the European Convention on Human Rights is being allowed to undermine the Hague Convention. In this case, at the end of the day, the process of petitioning to the ECHR was the cause for the ultimate non-return of the child. The length of this procedure allowed the child to become so settled in Switzerland and for the contact with the father to be even further eroded, with the result that it became too late to enforce the return order. If the ECHR is to consider petitions of abductors against return orders, it must adopt a fast track procedure in the spirit of the Hague Convention.

218 See supra notes at 91-93 and accompanying text.