

# Strengthening Article 20

By MERLE H. WEINER\*

THE HAGUE CONVENTION on the Civil Aspects of International Child Abduction ("the Hague Convention")<sup>1</sup> is a private international treaty in force in approximately seventy-five countries.<sup>2</sup> The Hague Convention addresses international child abduction and generally requires that an abducted child be promptly returned to his or her habitual residence, unless the abductor can invoke one of several defenses set forth in the Hague Convention.<sup>3</sup> This Article focuses on

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1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

2. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, FULL STATUS REPORT CONVENTION No. 28, at <http://www.hcch.net/e/status/stat28e.html> (last accessed June 14, 2004).

3. The Hague Convention defenses are found in several articles: article 12 ("[T]he judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."); article 13(a) ("[T]he person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention."); article 13(b) ("[T]here 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."); article 13 (unnumbered portion) ("[T]he child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."); and article 20 ("The return of the child under the provisions of [a]rticle 12 may be refused if this would not be permitted by the fundamental principles of the requested

article 20 of the Hague Convention, which provides that a court may refuse to return a child if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." The article 20 defense has minimal doctrinal significance at present; however, I argue that it can and should be strengthened to make the Hague Convention operate more justly for those domestic violence victims who flee transnationally with their children as part of their effort to escape from domestic violence.

I have previously written that domestic violence victims are sometimes treated unjustly when they are respondents in cases brought pursuant to the Hague Convention.<sup>4</sup> At the time the Hague Convention was being drafted, approximately twenty-five years ago, many imagined that the prototypical abductor would be a father who lost, or would lose, a custody contest to a mother.<sup>5</sup> It made perfect sense, therefore, for the Hague Convention to contain expedited procedures and a remedy that returns a child to the child's habitual residence (and, it was assumed, typically to the child's primary caretaker). As it turns out, however, approximately seventy percent of the "abductors" subjected to the Hague Convention's remedy are women,<sup>6</sup> most of whom are the child's primary caretaker<sup>7</sup> and many of whom claim to be fleeing from domestic violence.<sup>8</sup> Notwithstanding these women's predicaments, some judges grant the petitions of these women's bat-

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State relating to the protection of human rights and fundamental freedoms."). Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at arts. 12-13, 20.

4. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000) [hereinafter Weiner, *International Child Abduction*].

5. *Id.* at 601-10.

6. Nigel Lowe, Sarah Armstrong, & Anest Mathias, *A Statistical Analysis of Applications Made in 1999 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Comm'n Prelim. Doc. No. 3, March 2001, at 8, available at <http://www.hcch.net/doc/abdpd3e.doc> (last accessed Aug. 24, 2004) [hereinafter Lowe, *Statistical Analysis*]; see also REUNITE, INT'L CHILD ABDUCTION CENTRE, *THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION* 17 (Sept. 2003) (sixty-three percent of sample involved abduction by mother).

7. See REUNITE, *supra* note 6, at 7 (commenting on pilot project involving twenty-three questionnaires which confirmed "mothers are more often the abductors of their children than fathers, and that, in most cases, it is the primary caregiver who will abduct their child").

8. Women claimed to be victims of domestic violence in seven out of nine cases that reached the United States Courts of Appeal between July 2000 and January 2001. See Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 *COLUM. HUM. RTS. L. REV.* 275, 277 (2002) [hereinafter Weiner, *Navigating the Road Between Uniformity and Progress*]. Domestic violence was the reason for the abduction that emerged in five of the

terers and return their children to the place from which the women have just fled.<sup>9</sup> Domestic violence victims receive no special treatment when they are respondents in these proceedings, and most domestic violence victims cannot make successful arguments under the Hague Convention's limited defenses.<sup>10</sup> Fortunately, the topic of domestic violence is on the agenda for the 2005 Special Session to Review Operation of the Hague Convention. These facts provide the background against which I suggest article 20 should be strengthened.

Strengthening article 20 is important for at least three reasons. First, attempts to breathe life back into article 20 and the recognition of domestic violence as a human rights issue may motivate delegates at the next Special Session to improve the Hague Convention's operation for cases that involve domestic violence. Focusing attention on article 20, with its reference to human rights, may help set an appropriate tone for that meeting. After all, the countries that will participate at the Special Session are parties to international instruments that recognize domestic violence as a human rights issue and impose affirmative obligations on countries to address the issue.<sup>11</sup> Their delegates should act to protect these women and children by, among other things, reinforcing the idea that article 20 is a viable defense for some domestic violence victims.

Second, strengthening article 20 should help some domestic violence victims who currently lack other viable defenses. As will be argued below, it violates fundamental principles of human rights to send a domestic violence victim's child back to a location where the mother is unsafe. This inflicts a horrific choice on the domestic violence victim: your safety or your child. She can return with her child to the child's habitual residence, but her safety and life will be at risk. Alternatively, she can choose her own safety and not return to her child's habitual residence. However, then she will be temporarily de-

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eleven interviews with abducting mothers in the REUNITE study. See REUNITE, *supra* note 6, at 20–21.

9. See, e.g., Whallon v. Lynn, 230 F.3d 450 (6th Cir. 2000); Tabacchi v. Harrison, No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).

10. While a sympathetic court occasionally extends or contorts the Hague Convention to accommodate some domestic violence victims, judges' manipulation of the Hague Convention to help domestic violence victims causes its own problems, including making inadvertent loopholes that potentially threaten the Hague Convention itself. Reform is needed because domestic violence victims are treated grudgingly and inconsistently and because consistency of interpretation is essential to this treaty's continued success. See generally Weiner, *Navigating the Road Between Uniformity and Progress*, *supra* note 8.

11. See discussion *infra* Part III.B.1.

prived of her child pending the custody contest, she will be leaving her child without her protection, and she will be increasing the risk of losing any subsequent custody contest because she will be absent from that proceeding.<sup>12</sup> A court should not return a domestic violence victim's child if the mother would be faced with such an inhumane choice.

Third, breathing life into article 20 will hopefully stop a practice that is just starting to emerge: some judges that adjudicate Hague petitions are disregarding abductors' pending refugee applications. In a few recent cases, domestic violence victims have used the same facts to claim asylum and also used the same facts to defend against their batterers' Hague petitions for their children's return. Although these women often allege that living in the child's habitual residence poses a grave threat to their own safety (based upon the foreign state's inability or unwillingness to protect them from domestic violence),<sup>13</sup> courts adjudicating their Hague Convention petitions have returned children before the asylum claims were resolved, citing the need to act expeditiously. Article 20—and its focus on human rights—suggests that this outcome is wrong.

This Article begins by detailing the legal basis for strengthening article 20. It suggests that the defense's limited use is probably attributable to three factors: (1) a statement made by Elisa Pérez-Vera, the Reporter for the Special Commission that drafted the Convention; (2) a statement made by the United States State Department in its interpretation of the treaty; and (3) statements made by courts applying the treaty. The Article contends that these three factors should have

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12. Most domestic violence victims faced with this horrific choice do return with their child to the child's habitual residence, become victimized again by their batterer, and become trapped despite their own efforts to leave. REUNITE documented that mothers who abduct, but not fathers who abduct, routinely return with their children to the children's habitual residence despite threats to their own safety. Although batterers gave undertakings to courts promising not to abuse the mother upon her return, these batterers *always* broke the undertakings, proving true women's predictions of violence. REUNITE, *supra* note 6, at 31, 38. Although courts typically awarded women in the study custody of their children upon return, the women's requests to relocate with the children were frequently denied or decided only after a prolonged period of time. *Id.* at 35, 36–37, 44.

13. To be eligible for refugee status, the alien (1) must be unable or unwilling to return to his or her country; (2) because of persecution or a well-founded fear of persecution; and (3) the persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion. See generally *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* §§ 2–6, U.N. HCR, U.N. Doc. HCR/IP/4/Eng/REV.1 (revised 1992). A country can be responsible for persecution committed by a non-governmental entity if the persecutor was someone the government was unable or unwilling to control. See *id.* ¶ 65.

minimal importance for future courts in light of the Hague Convention's diplomatic history and the substantive merit of these factors.

The Article then explores how a strong article 20 would benefit domestic violence victims and examines in more detail the three benefits set forth above: (1) article 20's potential role in stimulating a robust and productive exchange at the next Special Session; (2) the viability of an article 20 defense for domestic violence victims; and (3) the importance of article 20 when an asylum claim is pending. Part of this analysis entails examining how the application of the Hague Convention currently violates international human rights. The Article concludes with an aspirational statement that may help guide delegates in their efforts to assist victims of domestic violence and their children.

## I. Article 20's Demise

Article 20 is rarely used as a basis for refusing the return of a child. Professor Nigel Lowe studied Hague applications filed in 1999 and identified courts' reasons for refusing to return children in ninety-nine cases. In none of the cases did a court base its decision, even in part, on article 20.<sup>14</sup> As Professors Beaumont and McElevay concluded in 1999, article 20 has "nearly faded without a trace."<sup>15</sup>

While establishing the cause of article 20's impotence is somewhat speculative, three factors have likely contributed to its underutilization. First, commentary by Professor Elisa Pérez-Vera, a professor of international law at the University Autonome de Madrid and the Reporter during the drafting of the Hague Convention, appears to have stymied courts' willingness and ability to apply the defense. It was not Professor Pérez-Vera's statement that the defense should be narrowly construed that was the defense's death knell; after all, the Reporter made similar comments about other defenses and all of these have maintained some vitality.<sup>16</sup> Rather, Professor Pérez-Vera made an

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14. Lowe, *Statistical Analysis*, *supra* note 6, at 16–17.

15. PAUL R. BEAUMONT & PETER E. MCELEVAY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 172 (1999).

16. See ELISA PÉREZ-VERA, EXPLANATORY REPORT ¶ 34 (1981), *reprinted in* HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6–25, 1980, at 426 [hereinafter PÉREZ-VERA, EXPLANATORY REPORT]. This source states:

[I]t would seem necessary to underline the fact that the three types of exceptions [in articles 13 and 20] to the rule concerning the return of the child must be applied on so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.

*Id.*

enigmatic comment specifically about article 20 that appears to have hampered its application. In the Explanatory Report to the Convention, she wrote:

[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 its return would be incompatible, even manifestly incompatible, with these principles . . . .<sup>17</sup>

These perplexing words have been repeated by courts in support of the proposition that article 20 is to be interpreted narrowly.<sup>18</sup>

Second, article 20 received a separate blow from a fourteen-word passage contained in the United States State Department legal memorandum to the Senate Foreign Relations Committee. The State Department stated that the defense should only apply when the return of the child would "utterly shock the conscience of the court or offend all notions of due process."<sup>19</sup> The State Department's language has been cited by courts in the United States<sup>20</sup> and abroad.<sup>21</sup>

Third, courts have damaged the vitality of article 20. Courts have cited the rare success of an article 20 defense as a justification for not applying the defense.<sup>22</sup> In addition, some courts have suggested that article 20 is simply "redundant" with article 13(b). Article 13(b) permits a defense if return would place the child in an "intolerable situa-

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17. *Id.* ¶ 118.

18. See, e.g., *Dep't of Families Youth & Cmty. Care v. Bennett* (2000) 26 Fam. L. R. 71, ¶ 57 (Fam. Ct. Austl.); *McCall v. State Cent. Auth.* (1994) 18 Fam. L. R. 307 (Fam. Ct. Austl.); *March v. Levine*, 136 F. Supp. 831, 855 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999); *Caro v. Sher*, 687 A.2d 354, 361 (N.J. Super. Ct. Ch. Div. 1996). Cf. Hague International Child Abduction Convention: Text and Legal Analysis, Public Notice 957, 51 Fed. Reg. 10,494, 10,510 (Dep't State 1986) (legal memorandum explaining the Convention to the Senate Committee on Foreign Relations).

19. Hague International Child Abduction Convention, Public Notice 957, 51 Fed. Reg. at 10,510.

20. See *Aldinger v. Segler*, 363 F. Supp. 2d 284, 290 (D.P.R. 2003); *Hazbun Escaf v. Rodriquez*, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002). But cf. Patricia M. Hoff, Adrienne E. Volenik & Linda K. Girdner, *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, 2 JUV. & FAM. CT. J. § 10-8 (1997) (citing State Department language).

21. See *Dep't of Families Youth Cmty. Care* (2000) 26 Fam. L. R. at ¶ 56; *Emmett & Perry* (1995) 20 Fam. L. R. 380 (Fam. Ct. Austl.), available at <http://www.hcch.net/incadat/fullcase/0280.htm> (last accessed Aug. 24, 2004); *McCall* (1994) 18 Fam. L. R. at 307.

22. See, e.g., *Hazbun Escaf*, 200 F. Supp. 2d at 614 ("[P]arties have not cited, nor has the Court found, any authority applying the article 20 exception to return based on 'fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms.'" (internal citation omitted)).

tion.”<sup>23</sup> Courts reason that it would be “intolerable” to return a child if doing so would violate fundamental human rights principles.<sup>24</sup>

The comments of the Reporter, the State Department, and various courts reflect, or perhaps contributed to, the skepticism about article 20 found in several Contracting States. Some countries minimized the viability of the article 20 defense through provisions of their domestic implementing legislation. For example, the United States requires that the defense be established by clear and convincing evidence,<sup>25</sup> unlike some of the other defenses.<sup>26</sup> A few Contracting States, such as the United Kingdom and Finland, did not even enact the article 20 defense into domestic law,<sup>27</sup> a questionable result given that the Hague Convention permits no such reservation.<sup>28</sup>

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23. For the text of article 13(b), see *supra* note 3.

24. See *Danaipour v. McLarey*, 183 F. Supp. 2d 311, 326 (D. Mass. 2002), *rev'd on other grounds*, 286 F.3d 1 (1st Cir. 2002); *Hazbun Escaf*, 200 F. Supp. 2d at 614 n.37; see also Hague Conference on Private Int'l Law, *Report of the Second Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Jan. 18–21, 1993, 33 I.L.M. 225, 243 (1994) [hereinafter *Report of the Second Special Commission*] (“[I]t was suggested that Article 20 is already covered by the earlier grounds for refusing to return a child, listed under Article 13.”).

25. 42 U.S.C. § 11603(c)(2)(A) (1995). The article 13(b) defense must also be established by clear and convincing evidence. See *id.*

26. 42 U.S.C. § 11603(e)(2)(B) (1995) (referring to the defenses other than article 13(b) and article 20); see also *supra* note 3 (same).

27. See Hague Conference on Private Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Oct. 26, 1989, 29 I.L.M. 219, 230 (1990). The United Kingdom's reasons for not enacting article 20 into domestic law included the belief that under U.K. law article 20 was redundant with the other defenses and that its meaning and scope were uncertain. See NIGEL LOWE, MARK EVERALL & MICHAEL NICHOLLS, *INTERNATIONAL MOVEMENT OF CHILDREN* 370 (2004) (quoting Lord Hailsham, LC) [hereinafter LOWE, EVERALL & NICHOLLS, *INTERNATIONAL MOVEMENT OF CHILDREN*]; see also *Re K (Abduction: Psychological Harm)* [1995] 2 F.L.R. 550 (Eng. C.A.) (holding that article 20, which had not been incorporated into English law, could not be relied upon except to interpret other provisions which had been incorporated and that the article 13(b) defense was not established even with regard to article 20).

28. See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 42. Although England and Finland did not incorporate article 20 into domestic law, the domestic violence victim's dilemma may still provide a defense to the application of the remedy of return in these countries. Both of these countries are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 211 [hereinafter “ECHR”]. Litigants in U.K. courts can now rely directly on the ECHR. See Human Rights Act of 1998, ch. 42 §§ 3, 6 (U.K.). Moreover, courts in Finland can apply it as domestic law. See Core Document Forming Part of the Reports of States Parties: Finland, U.N. HCHR, ¶¶ 32, 43, 45, 47, U.N. Doc. HRI/CORE/Add.59/Rev.2 (1998). On the international level, both countries might be in breach of their obligations under the ECHR if they failed to avert a human rights violation in a Hague Convention case, despite the fact that article 20 was not enacted into domestic law. A country cannot use compliance with internal law as a defense to a claim of breach

Consequently, although article 20 was enacted with a "comforting majority" in its favor,<sup>29</sup> and although the Reporter acknowledged that "the exact scope" of article 20 "is difficult to define,"<sup>30</sup> suggesting a future of robust litigation, article 20 has become doctrinally insignificant. Article 20's demise is unfortunate because it was an important provision during the drafting of the Hague Convention.

## II. Strengthening Article 20

### A. The Origin of Article 20

The diplomatic history of article 20 suggests that the provision should be read liberally. First, the current wording of article 20 was not the preferred choice of a majority of delegates, many of whom wanted a wide public policy defense and a majority of whom had already voted in favor of more expansive language than that which is found in the current article 20. Although a broad public policy exception never gained sufficient support for passage,<sup>31</sup> a generously worded, but somewhat narrower, proposal initiated by the Danish and the Dutch delegations was initially adopted as an article of the Convention.<sup>32</sup> It permitted Contracting States to enter a reservation so

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under international law. See, e.g., *Report on the Work of Its Fifty-Third Session*, U.N. GAOR 55th Sess., Supp. No. 10 74-80 U.N. Doc. A/56/10 (2001) (and cases cited therein). For a discussion of the European Convention on Human Rights in the context of domestic violence, see generally Ela Grdinic, *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence*, 23 HASTINGS INT'L & COMP. L. REV. 217 (2000) and D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 534-47 (2003) [hereinafter BLAIR & WEINER, FAMILY LAW].

29. See PÉREZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 434. The vote was fourteen in favor, six against, and four abstentions. See Procès-verbal No. 13, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6-25, 1980, 339 (1980).

30. PÉREZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 426; see also JAMES G. MCLEOD, CHILD CUSTODY LAW AND PRACTICE 3-17, 3-18 (Release 4, Looseleaf 1999) (1992) ("[T]he scope of this exception is unclear and its vagueness may have been intentional on the part of its drafters.").

31. See Procès-verbal No. 9, 15 Oct. 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 6-25, 1980, 306-07 (1980) (showing vote on Working Document No. 36, proposed by Italy, as fifteen against, eight in favor, and one abstention); *id.* at 307 (showing vote on the oral proposal of Czechoslovakia, that countries be allowed to reserve the right to adopt a public policy defense, as twelve against, nine in favor, and three abstentions).

32. Working Documents Nos. 31 & 32, Oct. 11, 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6-25, 1980, 281 (1980) (proposals of the Denmark and Netherlands delegations, respectively). These two proposals were joined together and rephrased for purposes of the vote.



that an adjudicator could reject a petition for the child's return when such return would be "manifestly incompatible with the fundamental principles of law relating to the family and children in the requested State."<sup>33</sup> The delegates opposed to this language later proposed Working Document 62 (the current article 20) as a compromise.<sup>34</sup> That a majority of countries favored article 20's predecessor—a broader provision—but agreed to its tightening in order to placate other countries suggests that article 20 should be read liberally, not narrowly. In fact, some of the countries that supported the broad public policy exception believed that the current version of article 20 was not a substantial change from the early proposals. For example, Professor Barile of Italy noted, "[E]ven in the absence of a public policy clause a court might (and indeed must) apply its own rules of public policy, since they express the fundamental principles of its juridical order."<sup>35</sup>

Second, article 20 was adopted to remedy the perceived narrowness of article 13(b). A.E. Anton, then-chairman of the Commission of the Hague Conference that drafted the Hague Convention, explains that the Danish and Dutch proposals were a reaction to the narrowness of article 13(b). Since article 13(b) only focused on the child, "[a]ttempts . . . were made to widen this exception . . ."<sup>36</sup> An additional defense was needed because article 13(b) "would not by itself necessarily exclude a duty to return a child 'wrongfully removed' by a political refugee in breach of rights of custody imputed to a person under the law of the State from which he has sought refuge."<sup>37</sup> While

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Working Documents Nos. 31 and 32, in so far as they proposed allowing Contracting States to "reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed," was approved by a vote of eleven in favor (Czechoslovakia, Denmark, Finland, Ireland, Israel, Italy, Netherlands, Norway, Sweden, United Kingdom, and Venezuela), ten against (Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Luxemburg, Portugal, Spain, Switzerland), with three abstentions (Australia, Japan, and the United States). See Procès-verbal No. 9, 15 Oct. 1980, *reprinted in* HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6-25, 1980, 307 (1980); see also PÉREZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 433-34.

33. See Working Documents Nos. 31 & 32, *supra* note 32.

34. Article 20, embodied in Working Document 62, was a joint proposal of the delegations from Belgium, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, and Switzerland. See Working Document No. 62, *reprinted in* HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6-25, 1980, 332 (1980).

35. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 550 n.47 (1981).

36. *Id.* at 551.

37. *Id.*

the Secretariat, represented by Mr. Adair Dyer, and some delegates vehemently opposed the proposals of Denmark and the Netherlands, Mr. Anton has stated, "There was clearly a risk, however, that certain States might find it impossible to ratify the Convention unless a *wider safety valve* was admitted than that approved in Article 13."<sup>38</sup> Hence, a provision was proposed that ultimately resulted in the current version of article 20.

Against this backdrop, it is odd to approach article 20 with a conviction that it should be interpreted in the most restrictive fashion. Admittedly, one can find statements in support of a limited scope for article 20 among delegates who voted against the Denmark/Netherlands proposal. Most notably, for example, the French delegate who introduced Working Document 62 stated that article 20 should be used "qu'exceptionnellement et dans des circonstances rares,"<sup>39</sup> that is, "only exceptionally and in rare circumstances." Yet such a statement should not be construed as a definitive expression of the delegates' intent because it reflected the sentiment of the minority. While some delegates probably were concerned that an expansive interpretation of article 20 might undermine the Hague Convention, they had addressed this possibility by including language in article 20 that requires international consensus on those issues that can justify non-return.<sup>40</sup> The delegates did not include in the final text of article 20 any suggestion that it should be used only "exceptionally," even though this language was a clear option since a competing proposal by Australia contained that word.<sup>41</sup> In the end, even if considerable weight is attributed to the French delegate's statement, there was never any suggestion that article 20's use must remain exceptional if the world's understanding of human rights abuses expanded.<sup>42</sup>

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38. *Id.* (emphasis added).

39. Procès-Verbal No. 13, Oct. 21, 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBRE 6-25, 1980, 337 (1980) (statement of Mr. Chatin (France)).

40. See *infra* text accompanying note 43.

41. See Working Document No. 64, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBRE 6-25, 1980, 332 (1980) (proposal of the Australian delegation).

42. The Reporter made a statement that might be misinterpreted as supporting the proposition that article 20's use must remain exceptional even if the world's understanding of human rights expanded. The Reporter stated that article 20 was not "directed at development which have occurred on the international level." See PEREZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 462. The context of that statement makes clear, however, that she was emphasizing that a judge should consider such developments only to the extent that they were reflected in the internal law of the requested State.

## B. Undoing the Damage

The specific causes of damage to article 20 identified above (the Reporter's statement, the United States State Department's interpretation, and the courts' application of the defense) are particularly regrettable when they are examined individually.

### 1. The Reporter's Statement

Article 20 embodies two changes from its predecessor; one has real significance and the other has minimal, if any, significance. The principal change from the Danish/Dutch proposal was that the phrase "fundamental principles relating to the protection of human rights and fundamental freedoms" was substituted for the phrase "the fundamental principles relating to the family and children in the State addressed." Some delegates feared that without externally imposed parameters regarding what could constitute a significant principle of law, a country might unjustifiably undermine the application of the Hague Convention by citing its own internal law. Professor Pérez-Vera specifically mentions that this revision "considerably diminished" the importance of the internal law of the state of refuge by the "reference to the fundamental principles concerning the protection of human rights and fundamental freedoms" since this "relates to an area of law in which there are numerous international agreements."<sup>43</sup>

The second change reflected in article 20 is of more questionable significance. Delegates eliminated the language "manifestly incompatible" in the earlier Denmark/Netherlands proposal and replaced it with the language "would not be permitted."<sup>44</sup> Professor Pérez-Vera read this change as heightening the "extent of incompatibility [required] between the right claimed and the action envisaged."<sup>45</sup> Yet, in many situations, the two phrases have the same meaning. For example, if a fundamental principle of human rights is embodied in a legal instrument that forbids any governmental action that is "manifestly incompatible" with its principles, such as the United States Constitution, then a court "would not be permitted" to return a child upon a finding of such manifest incompatibility. If the relevant fundamental principle of human rights is found in such a legal instrument, the Reporter's comment unnecessarily confuses matters and should not be cited.

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43. *Id.* at 434.

44. *Id.* ¶ 33.

45. *Id.*

However, in circumstances in which the relevant fundamental principle of human rights is found solely in laws that are of a subordinate or equal status to the Hague Convention and its implementing legislation, a court may not be prohibited by those laws from returning a child, even though return would be "manifestly incompatible" with a fundamental principle of human rights.<sup>46</sup> In this situation, the Reporter's commentary appears to have significance, although upon further reflection the commentary is problematic even in this context.

Simply put, the distinction drawn by the Reporter between "would not be permitted" and "manifestly incompatible" is based upon words that article 20 does not actually contain. The Reporter must have subconsciously added the following italicized words to article 20's language: "would not be permitted by *the laws reflecting* the principles related to human rights and fundamental freedoms." Since "principles" never actually prohibit anything (only laws do), adding these words has some intuitive appeal.<sup>47</sup> Yet one can make sense out of article 20 without reading in additional words; one need only interpret the phrase "would not be permitted" in a less technical, more colloquial fashion.<sup>48</sup> The phrase could be read to mean "return could not occur consistently with those principles." If "would not be permitted" in fact has this meaning, then the Reporter's commentary is incorrect even when the fundamental principle of human rights is embodied in a law that is of a subordinate or equal status to the Hague Convention and its implementing legislation.

The benefit of this latter reading is that it elevates fundamental principles of human rights over legal technicalities, and it is consistent with the object and purpose of article 20. For example, in the United States, state constitutions often embody important fundamental principles of human rights. Yet state constitutions do not "prohibit" a fed-

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46. See *infra* text accompanying notes 49-50. The particulars would depend upon the domestic law of the jurisdiction.

47. The Swedish delegate noted this fact and suggested that the language be changed to "manifestly contrary to fundamental principles" of human rights. See Procès-Verbal No. 13, Oct. 21, 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBER 6-25, 1980, 337-38 (1980) (statement of Ms. Pripp (Sweden)). Her proposal was made informally and seems not to have prompted further discussion or a vote. Delegates may have believed the change was unnecessary if they were reading the term "would not be permitted" in the more informal sense. *Id.*

48. Cf. *Continental Oil Co. v. Fed. Power Comm'n*, 266 F.2d 208, 212 (5th Cir. 1959) (attributing colloquial meaning to the term "production" to effectuate purpose of Natural Gas Act); *Royal Ins. Co. of Am. v. Austin*, 558 A.2d 1247, 1250 (Md. Ct. Spec. App. 1989) (attributing colloquial meaning to term "hit and run" to effectuate purpose of statute).

eral court from returning a child in a Hague proceeding because the federal court is interpreting and applying federal law.<sup>49</sup> A federal court could reject outright the relevance of state constitutional rights to an article 20 defense. Similarly, a child's return might not be "prohibited" by human rights legislation, even if return would arguably violate the law, unless the human rights law explicitly said that it was intended to trump the Hague Convention's remedy of return.<sup>50</sup> Even a relevant and ratified human rights treaty might be irrelevant if it was not incorporated into domestic law and the requested State required such incorporation for the treaty to bind its courts. The principles contained therein would not prohibit return. These examples suggest that courts should exercise extreme caution before concluding that the words "would not be permitted" have the meaning implicitly attributed to them by the Reporter. Requiring that the relevant fundamental principle of human rights be grounded in a particular type of legal source leads to outcomes that are inconsistent with article 20's purpose.

There is one other possible understanding of the words "would not be permitted" if one is trying to make sense of the Reporter's statement. Regardless of the legal source of the relevant fundamental principle, perhaps the words "would not be permitted" reflect a qualitative distinction regarding those fundamental principles of human rights whose violation can excuse return. Does the phrase "would not be permitted" mean that article 20 only refers to those principles of human rights from which no derogation is possible?<sup>51</sup> This particular

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49. The United States' implementing legislation is a federal statute. See International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437-42 (codified as amended at 42 U.S.C. §§ 11601-11610 (1989)).

50. See, e.g., *S (Children)* [2002] 2 F.C.R. 642 (Eng. C.A.) (Laws, L.J.) (noting, *in obiter*, that section 15 of the Immigration and Asylum Act 1999, which generally limited removal of an individual who made an asylum claim, subject to certain exceptions, was not intended to create "any exception to the obligations arising under Article 12 of the Hague Convention. . . .") Cf. *Gonzalez v. Gutierrez*, No. D040063, at \*9, 2003 WL 22236051 (Cal. Ct. App. Sept. 30, 2003) (holding that Congress did not intend the "political asylum laws to broadly preempt the uniform statutory scheme pertaining to custody matters . . . [and] there is nothing in the asylum law and the UCCJEA that inherently conflicts so that a UCCJEA action would be necessarily barred" by a party's asylee status).

51. If this were the correct interpretation of article 20, the inquiry would focus on what rights were non-derogable according to the requested State's own law. However, for purposes of considering the likelihood that article 20 refers only to these sorts of rights, it is useful to consider what were the commonly accepted non-derogable rights at the time of the Hague Convention's promulgation. Article 4(2) of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], serves as a useful proxy. It lists the following as rights from which no derogation is possible: the right to life (article 6); the right not to be subjected to torture or to cruel, inhuman, or degrading

interpretation seems unlikely. The drafters did not explicitly include this limitation in article 20 even though it would have been easy to do. The Reporter never said anything else to suggest that this is the correct interpretation. In addition, the Hague Convention's *travaux préparatoires* suggests that article 20 was intended to cover a broader array of rights than only this narrow category. For example, delegates rejected the United States' proposal to limit article 20 to "civil rights," thereby suggesting that human rights and fundamental freedoms included "social, economic, and cultural freedoms."<sup>52</sup> These types of rights are commonly and legitimately restricted by governments.<sup>53</sup>

In the end, it is best to recognize that the Reporter's commentary on the change from "manifestly incompatible" to "would not be per-

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treatment or punishment (article 7); the prohibition on slavery and servitude (article 8); the prohibition on imprisonment for breach of contract (article 11); the prohibition on ex post facto application of the criminal law (article 15); the right to legal personhood (article 16); and the right to the freedom of thought, conscience, and religion (article 18). In addition, derogation was not permissible for rights that were *jus cogens*. See Vienna Convention of the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k & rpt'r's n.6 (1987); see also *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988). Human rights that had the status of *jus cogens* in 1980 included the prohibition on genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 & cmt. (1987).

52. See Working Document No. 65, Oct. 21, 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBRE 6-25, 1980, 332 (1980) (proposal of the United States delegation); see also Procès-Verbal No. 13, Oct. 21, 1980, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBRE 6-25, 1980, at 337-38 (1980) (statement of Ms. Selby (United States)); *id.* (sixteen delegates voted against the proposal and two in favor of it); see also *id.* at 338 (comments of Mr. Savolainen (Finland)) ("[I]t was clear that the United Nations Declaration of the Rights of the Child was included in the term 'human rights.'"). The U.N. Declaration includes the child's right to social security and the right to elementary education. See *Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4334 (1959).

53. See International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 4, 993 U.N.T.S. 3 (permitting limitations on rights if they are "determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society"). The Declaration of the Rights of the Child also contains rights from which derogation is possible. See, e.g., *Declaration of the Rights of the Child*, *supra* note 52, at 19, *princs.* 2, 4.

Even if a meritorious article 20 defense required that the right infringed be one from which no derogation were possible, article 20 might still be useful to the domestic violence victim. Some scholars have argued that gender-based violence, which has "centrality to the subordination of women," should be considered *jus cogens*. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 365-66 (1994) [hereinafter Copelon, *Domestic Violence as Torture*]. To the extent that domestic violence threatens victims' lives and is degrading treatment, it also falls within articles 6 and 8 of the ICCPR. See ICCPR, *supra* note 51. These principles, of course, would have to be part of the law of the requested State. See *infra* text accompanying note 102.

mitted" is confusing and unhelpful.<sup>54</sup> The Reporter probably attributed significance to this change because she feared that the Hague Convention would be undermined if any of the defenses were interpreted too widely. As she has said about her own Explanatory Report, "[I]t has not been approved by the Conference, and it is possible that, despite the Rapporteur's [sic] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective."<sup>55</sup> Courts should minimize their reliance on these words of the Reporter. Instead courts should consider outright the appropriate limits of the article 20 defense and the sufficiency of the other limiting factors that already exist. These would include the need to have an international consensus about a particular right, as mentioned above, and the need to ensure that the principles are "not . . . invoked any more frequently [in Hague Convention proceedings] . . . than they would be in their application to purely internal matters."<sup>56</sup>

## 2. The State Department's Spin

The United States State Department's comments about article 20 also grew out of a fear that the provision might be interpreted too broadly.<sup>57</sup> The United States, in fact, showed a particular animosity toward the article 20 defense during negotiations,<sup>58</sup> and this hostility

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54. A civil law expert has confirmed that there is no meaningful distinction in civil law between the two phrases that might explain the Reporter's interpretation. See Letter from Cristina Gonzalez Beilfuss, Prof. Titular Derecho Internacional Privado, Univestitat de Barcelona, to Merle H. Weiner, Assistant Professor, University of Oregon School of Law (Oct. 6, 2003) (on file with author).

55. PERÉZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 427–28. Typically, however, the Report is considered to be quite authoritative as it is "recognized by the Conference as the official history and commentary on the Convention . . ." Hague International Child Abduction Convention, 51 Fed. Reg. 10, 494, 10,503 (Dep't State 1986).

56. PERÉZ-VERA EXPLANATORY REPORT, *supra* note 16, at 462; see also *infra* text accompanying notes 164–166 (discussing other possible limits on article 20's reach).

57. Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510 (commenting that the exception "like the others, was intended to be restrictively interpreted and applied" and was favored to the public policy clause which might "be interpreted so broadly as to undermine the fabric of the entire Convention").

58. The U.S. delegation either voted against or abstained from voting on all of the "public policy" predecessors to article 20 and on article 20 itself. As to Working Documents Nos. 31 and 32, the delegate from the United States stated that the "United States delegation did not intend to lend its support to the insertion of a public policy exception." See Procès-verbal No. 9, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION OCTOBRE 6–25, 1980, 306 (1980). The United States voted against Czechoslovakia's oral proposal that article 12 contain such a provision. See *id.* The United States also voted against a similar provision that would have allowed a state to reserve the right not to return on this basis. *Id.* at 307. The United States then voted against Working Document 31, and abstained from a vote on Working Document 31

continued in the State Department's legal interpretation of the Hague Convention for the United States Senate. In its legal analysis, the State Department claimed that the violation of human rights must "utterly shock the conscience."<sup>59</sup> The origin of this language is impossible to trace, although it likely came from United States constitutional jurisprudence addressing substantive due process.<sup>60</sup>

The "shock the conscience" test is not grounded in the language of article 20 itself and finds absolutely no support in the Hague Convention's diplomatic history. An examination of the context in which the "shock the conscience" test is employed in U.S. constitutional law demonstrates why it should never have been imported into the context of article 20. The "shock the conscience" test is used by courts in the United States to evaluate whether executive action violates substantive due process.<sup>61</sup> Substantive due process allows courts to hold unconstitutional certain government conduct even though the government's conduct does not violate a right explicitly protected by the Bill of Rights. In the context of the United States Constitution, therefore, it may be appropriate to utilize a narrow test to determine whether the executive has violated a person's substantive due process rights since other explicit provisions of the Constitution also help protect against excessive government action.<sup>62</sup> However, the State Department suggests that the "shock the conscience" test should be the sole measure of whether an article 20 defense is meritorious. When the "shock the conscience" test becomes the only measure of a human rights violation, it narrows the scope of the defense too dramatically,<sup>63</sup>

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read together with 32. *Id.* The United States abstained from voting on Working Document No. 62. See Procès-verbal No. 13, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LAW QUATORZIÈME SESSION OCTOBER 6-25, 1980, 339 (1980). The United States also tried to narrow the scope of article 20 after it was proposed in Working Document 62. See Working Document No. 65, reprinted in HAGUE CONFERENCE ON PRIVATE INT'L LAW, III ACTES ET DOCUMENTS DE LAW QUATORZIÈME SESSION OCTOBER 6-25, 1980, 332 (1980); Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510.

59. See Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510.

60. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that stomach pumping by hospital at direction of police in order to gain evidence for conviction was "too close to the rack and the screw" and therefore violated the Fourteenth Amendment because it "shocks the conscience").

61. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

62. But see Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 444 (2001).

63. See, e.g., *United States v. Knight*, 917 F.2d 1, 5 (5th Cir. 1990) (finding that "a due process violation for outrageous conduct will be found only in the rarest and most outrageous of circumstances").



and contrary to the intent of the framers, it makes every ruling turn on the highly subjective view of the particular judge.<sup>64</sup>

### 3. The Courts' Contribution

#### a. Redundant Provisions

Contrary to some courts' conclusions, articles 20 and 13(b) are not coterminous even though a successful article 20 defense may sometimes mean that the return of the child would be "intolerable" under article 13(b). The defenses diverge because an article 20 defense, unlike an article 13(b) defense, need not focus on the child but can focus on the parent. Article 13(b) provides no defense to a mother who faces violence in the child's habitual residence unless she can link that violence to an intolerable situation for the child.<sup>65</sup> While harm to the mother can obviously harm a child,<sup>66</sup> courts adjudicating Hague cases often have refused to make this connection.<sup>67</sup> Even

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64. See *Lewis*, 523 U.S. at 861 (Scalia, J., dissenting) ("[T]oday's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of Subjectivity, th' ol' 'shocks-the-conscience' test.") (emphasis in original); see also Erica L. Reilley, *County of Sacramento v. Lewis: A "Conscience-Shocking" Decision Regarding Officer Liability in High-Speed Police Pursuits*, 32 *LOV. L.A. L. REV.* 1357, 1392 (1999); Carrie E. Lente, *The Supreme Court Adopts the "Shock the Conscience" Standard in the Context of Vehicular Police Pursuits in County of Sacramento v. Lewis*, 32 *CREIGHTON L. REV.* 1263, 1309 (1999).

65. The extent to which the adults' interests are irrelevant to an article 13(b) inquiry was vividly displayed in one recent case involving domestic violence. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1351 (M.D. Fla. 2002).

66. Delegates at the 2002 Special Commission recognized the connection. "The meeting emphasised the importance of recognising that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent." 2002 SPECIAL COMM'N, REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION CONCERNING THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 27 SEPT.-1 OCT. 2002 24 (Mar. 2003) [hereinafter 2002 SPECIAL COMMISSION]. For a summary of some of the specific harms children can experience, see Jay G. Silverman et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 *AM. J. PUB. HEALTH* 951 (2004). The article explains:

Children's continued exposure to abusive parents may place them at increased risk for a range of serious health concerns. Children of women who have been abused by a male partner are at very high risk of being abused by these same men, with approximately half of all children of battered women abused by their mothers' abusers. Such children have been found to suffer high rates of mental and physical health concerns (e.g., headaches, failure to thrive, vomiting, diarrhea) and are more likely to report distress related to postdivorce parental visitation. Children exposed to a male partner's abuse are also at prenatal risk; violence against pregnant women is associated with very preterm labor and delivery, very low birthweight, and fetal or neonatal death.

*Id.* (citing studies).

67. See, e.g., *Aldinger v. Scgler*, 263 F. Supp. 2d 284, 289 (D.P.R. 2003) ("While there has been violent behavior between the parties in this case, there are no allegations of direct

courts that recognize a link may find that potential harm to the child does not reach the level of severity required by the article 13(b) defense.<sup>68</sup>

Nor is there necessarily congruence between the violation of a parent's or the child's human rights and the return of the child to an intolerable situation. For example, returning a boy to a legal system that severely discriminates against his mother may violate the mother's rights, but if the child is returned to a loving father, the return may not be "intolerable" for the child.

Finally, an interpretation that renders article 20 redundant violates the basic canon of construction that provisions should not be read to render one provision redundant.<sup>69</sup> The Hague Convention's legislative history, as well as statements by the Permanent Bureau,<sup>70</sup> indicate that article 20 was meant to have a separate function.

## b. Uniformity of Case Law

The article 20 defense has been rejected in cases with varied facts.<sup>71</sup> This virtual uniformity of results should not provide courts an

physical or psychological abuse against the children."); Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); see also Jacques Chamberland, *Article 13(1)(b) and Domestic Violence: The Canadian Situation*, 5 JUDGES' NEWSLETTER 17, 19 (Spring 2003). The article states:

As a matter of fact, one can say that, but for a few exceptions, the parent opposing the return of the child on account of the situation of domestic violence prevailing at home, did not succeed in his or her efforts to convince the judicial authorities of the validity of the defense within the meaning of Article 13(1)(b).

*Id.* (reviewing Canadian law).

68. See *Sonderup v. Tondelli*, 2001 (1) SA 1171, ¶¶ 34, 46 (CC).

69. See *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) ("[A]ll parts of a treaty are to receive a reasonable construction, with a view to giving a fair operation to the whole."); *Geofroy v. Riggs*, 133 U.S. 258, 270 (1890) ("It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions, if that be practicable."); *N.W. Life Assurance Co. v. Comm'r*, 107 T.C. 363 (1996) (interpreting Convention with Respect to Taxes on Income and on Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11,087, so as not to make a provision redundant).

70. THIRD SPECIAL COMM'N, REPORT OF THE THIRD SPECIAL COMMISSION MEETING TO REVIEW THE OPERATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION ¶ 77 (Mar. 1997) [hereinafter REPORT OF THE THIRD SPECIAL COMMISSION].

71. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, THE INTERNATIONAL CHILD ABDUCTION DATABASE ("INCADAT"): "W" (Arg. Sup. Ct. June 15, 1995), at <http://www.hcch.net/incadat/fullcase/0362.htm> (last accessed Aug. 24, 2004) (stating that the Hague Convention was consistent with the Convention on the Rights of the Child's requirement that children's best interests be a primary consideration, but reversing return order because, *inter alia*, separation of child from mother satisfied article 13(b) standard given psychologist's testimony); Dep't of Families, Youth & Cmty. Care v. Bennett, (2000) 26 Fam. L. R. 71 (Fam. Ct. Austl.) (rejecting article 20 argument based on allegation that courts in the child's habitual residence would not be able to consider appropriately the child's ethnic

heritage in determining custody); Emmett & Perry (1996) FLC 92-645 (Fam. Ct. Austl.), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/family%5fct/unrep946?query=title+%28emmett%22+%29> (last accessed June 14, 2004) (rejecting article 20 argument that the courts in the child's habitual residence might award custody to a father who might betroth his daughters to older men); McCall v. State Cent. Auth. (1994) 18 Fam. L. R. 307 (Fam. Ct. Austl.) (rejecting proposition that courts acting pursuant to the Hague Convention had to consider the welfare of the child as the paramount consideration, pursuant to section 64(1)(a) of the Family Law Act, because the courts' jurisdiction under the Hague Convention did not arise from the Family Law Act but from the external affairs power); Struweg v. Struweg, [2001] CarswellSask 420, ¶¶ 18, 19, 21 (Can.) (finding one parent alone lacks the standing to decide whether Canadian child will exercise his or her rights under the Charter of Rights and Freedoms to "remain in" Canada, but even if right existed, right is not infringed by family law orders relating to custody or residence of a minor child, and even if it is infringed, it is a reasonable limitation justifiable under section one of the Charter); HAGUE CONFERENCE ON PRIVATE INT'L LAW, THE INTERNATIONAL CHILD ABDUCTION DATABASE ("INCADAT"): *D. v. B.* (Quebec Super. Ct. 1996), at <http://www.hcch.net/incadat/fullcase/0369.htm> (last accessed June 14, 2004) (holding Hague Convention did not violate section 6(1) of the Canadian Charter of Rights and Freedoms because that provision applied to criminal extradition); Parson v. Styger, [1989] 67 O.R. 2d 11 (Ontario Ct. App.) (rejecting argument that a return order pursuant to the Hague Convention for a Canadian child violated every Canadian citizen's right to remain in Canada because right to remain in Canada is subject to the Hague Convention, and the return of a Canadian child to a foreign country did not deny the child's fundamental rights under the Charter); *G. & G. v. Decision of OLG Hamm* of 18 Jan. 1995, 35 I.L.M. 529 (1996) (rejecting argument, *inter alia*, that order of return would violate the child's right under article 16(2) of the German constitution not to be extradited or the child's right under article 2(1) to the free development of his or her personality); *W. v. Ireland*, [1994] I.L.R.M. 126 (Ir. H. Ct.) (finding that Hague Convention did not inherently violate various provisions of the Irish Constitution, including the State's duty to respect, defend and vindicate the personal rights of the citizen, because article 20 of the Hague Convention requires courts to consider the Irish Constitution); *C.K. v. C.K.*, [1993] I.L.R.M. 534 § 6 (Ir. H. Ct.) (holding that order of return did not violate principle that children's welfare is of fundamental importance in Irish law); *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC) (rejecting argument that the Hague proceeding violated the South African constitutional requirement that the child's best interests have "paramount importance" in every matter concerning the child); HAGUE CONFERENCE ON PRIVATE INT'L LAW, INCADAT: *HC/E/CH 427*, (Switz. Sup. Ct. Mar. 29, 1999), at <http://212.206.44.26/index.cfm?fuseaction=convtext.showfull&Ing=1&code=427> (last accessed June 14, 2004) (summary of case) (rejecting argument that the return of the children violated the mother's freedom of movement inherent in Swiss public policy because if she obtained sole custody in Israel she would be free to move abroad and relocate with her children); HAGUE CONFERENCE ON PRIVATE INT'L LAW, INCADAT: *M. v. F.* (Fr. Cl. App. Mar. 29, 2000), at <http://www.hcch.net/incadat/fullcase/0274.htm> (last accessed June 14, 2004) (rejecting article 20 argument based on allegation that the courts in the child's habitual residence required that mother exercise her access rights to date in that country); HAGUE CONFERENCE ON PRIVATE INT'L LAW, INCADAT: DECISION OF THE OBERGERICHT DES KANTONS LUZERN, (Switz. Ct. App. Aug. 31, 2001), at <http://212.206.44.26/index.cfm?fuseaction=convtext.showFull&Ing=1&code=418> (last accessed June 14, 2004) (summary of case) (rejecting article 20 argument based on allegation that the law of the child's habitual residence required joint parental authority in the absence of a court decision); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1365 (M.D. Fla. 2002) (rejecting article 20 argument based on allegation that the child's habitual residence was facing a political, economic, and judicial crisis); *Fabri v. Pritikin-Fabri*, 221 F. Supp. 2d 859, 873 (N.D. Ill. 2001) (rejecting argument that

independent reason to disregard article 20. First, reference to prior case law is only necessary (and potentially persuasive) if article 20 were ambiguous.<sup>72</sup> While the meaning of "would not be permitted" may be ambiguous,<sup>73</sup> the availability of the defense is not. It is improper for a court to use prior case law to suggest that article 20 is a dead letter. Second, the prior cases are largely distinguishable from the domestic violence victim's invocation of article 20. Only one of the cases involved an allegation that the respondent's physical integrity or life was at stake, and that court's opinion implied that the safety concerns were insufficiently substantiated.<sup>74</sup> Rather, most cases rejecting

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returning the children would violate the right to travel or the right to family privacy because respondent is not being ordered to return the child to Italy and there is no reason to think Italian court would not be fair in making custody decision); *Freier v. Freier*, 969 F. Supp. 436, 443-44 (E.D. Mich. 1996) (rejecting article 20 argument based on allegation that the child's habitual residence restricted the respondent's freedom to travel); *March v. Levine*, 136 F. Supp. 831, 854 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001) (rejecting article 20 argument based on allegations that petitioner had threatened respondents and witnesses with death and that respondents would be unable to get a fair trial in Mexico); *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 n.40 (E.D. Va. 2002) (rejecting article 20 argument based on allegation that the child's habitual residence had denied the respondent procedural due process); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (rejecting article 20 argument based on allegations that the police in the child's habitual residence had treated the respondent and her child inhumanely); *Caro v. Sher*, 687 A.2d 354, 361 (N.J. Super. Ct. Ch. Div. 1996) (rejecting article 20 argument based on allegations that the court proceedings in the child's habitual residence were inefficient); *Ciotola v. Fiocca*, 684 N.E.2d 763, 769 (Ohio Ct. Com. Pl. 1997) (rejecting article 20 argument based on allegation that the child's habitual residence would not treat the child's best interest as foremost).

72. "[A] court shall not, through interpretation, alter or amend the treaty" when the text is unambiguous. *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 707 (2d Cir. 1990); *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994). *Cf.* *DP v. Commonwealth Cent. Auth.*, (2001) 180 A.L.R. 402 (Austl.) (Gaudron, Gummow, Hayne, JJ) ("Exactly what is meant by saying that reg 16(3)(b) is to be narrowly construed is not self-evident. On its face reg. 16(3)(b) presents no difficult question of construction and is not ambiguous."). The dissenter in the case wrote,

[I]t is unhelpful to say that reg. 16(3)(b) [which mirrors article 13(b)] is to be construed narrowly. In a case where there is no serious question of construction involved, such a statement may be misunderstood as meaning that the provision is to be applied grudgingly. The task of the decision-maker is to give effect to the regulation according to its terms.

*Id.* (Gleeson, C.J., dissenting). *But see* *S (A Child)*, [2002] EWCA Civ. 908 (Eng. C.A.) (Ward, L.J.) ("[W]e are not confident that this court would take the same view as the majority in the High Court of Australia.").

73. See discussion *supra* Part II.B.1.

74. See *March v. Levine*, 136 F. Supp. 831 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001). Although the respondents alleged that the petitioner's threats to their lives and their witnesses' lives interfered with their ability to obtain due process in Mexico, the court saw "no clear evidence" that their rights would not be protected in Mexico. *Id.* at 855. While the court did not specifically address whether the respondents' safety was at risk, the opinion, read as a whole, suggests that it did not think so. There is one other case involving

the article 20 defense involve rights upon which reasonable limits could be (and presumably were) imposed, such as the right to travel. Third, to the extent that some of the prior cases are grounded either on a misunderstanding of the significance of the Reporter's statement or on the U.S. State Department's unreasonable interpretation of article 20, these cases should also be discounted.<sup>75</sup> Although maintaining a uniform interpretation of the Convention is a valid objective,<sup>76</sup> and while privileging a uniform interpretation over a correct interpretation might be warranted if justice were not impaired, uniformity should not be prized at the expense of a just outcome for domestic violence victims.<sup>77</sup>

Moreover, the case law is not entirely uniform. The article 20 defense has been accepted in a few underreported cases. A Spanish court accepted the article 20 defense when it thought that the mother would not receive due process in the courts of the child's habitual residence.<sup>78</sup> A French court implicitly accepted the defense when it found that the mother would be unable to relocate with her child from the child's habitual residence in violation of the mother's

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a respondent whose life might have been threatened by returning to the child's habitual residence, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, INCADAT: *M. v. F.* (Fr. Ct. App. Mar. 29, 2000), at <http://www.hcch.net/incadat/fullcase/0274.htm> (last accessed June 14, 2004), but the opinion does not contain enough information about the violence to make any sort of informed judgment about the mother's allegations.

75. Cf. *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d. Cir. 1978) (holding that Warsaw Convention creates a cause of action, thereby reversing its twenty-year old legal position, because, among other things, the "paucity of analysis that accompanied the creation of the rule").

76. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 325 cmt. d (1987) ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.").

77. See Weiner, *Navigating the Road Between Uniformity and Progress*, *supra* note 8, at 292-93.

78. In *Re S*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Secció, a Spanish appellate court refused to return a child to Israel because the return order would violate paragraph 24 of the Spanish Constitution, which said that "[a]ll persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense." See SPAIN CONST. art. 24(1) (amended 1992), in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (Gisbert H. Flanz, ed. 2003). The father had been granted sole custody of the child by a religious court in Israel because the mother was a "moredet" or "rebellious wife" since she took the children to Spain on an interim basis. The Spanish court said that the Israeli order was made to punish the mother, was made with no account of the child's best interest, and was contrary to the Hague Convention's purpose to restore the status quo ante. A summary of the case is available on the Hague Conference's website. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, INCADAT: *Re S*, at <http://212.206.44.26/index.cfm?fuseaction=convtext.showFull&Ing=1&code=244> (last accessed June 14, 2004).

rights.<sup>79</sup> Several Australian courts have recognized in *obiter dictum* that an article 20 defense exists if the abductor would be unable to appear at a custody contest in the child's habitual residence for legal<sup>80</sup> or personal reasons.<sup>81</sup> Some judges have even acknowledged that returning a child to a location where the mother is inadequately protected from domestic violence would violate the fundamental principles relating to human rights of their country, although they did so under the rubric of article 13 rather than article 20.<sup>82</sup> The fact that some judges have accepted the article 20 defense and others have accepted its premise gives hope that article 20 can be revived.<sup>83</sup>

### III. The Need for a Vital Article 20

Given the foregoing, strengthening article 20 seems possible, albeit challenging. The effort is justified because article 20 potentially offers so much. Simply, the attacks on article 20 have had two significant negative effects that deserve correction: First, the attacks have led courts to ignore respondents' pending refugee claims. Second, the attacks have blocked an appropriate defense for domestic violence victims who flee with their children when the domestic violence victims cannot receive adequate protection in the child's habitual residence. A vital defense might lead to different results in the future and also

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79. See *Ministère Public v. Mme. Y*, T.G.I. Périgueux, Mar. 17, 1992, D. 1992, P. 315 (Fr. Dist. Cl.). The court did not rule on an article 20 defense, but rather held that a *ne exeat* clause was not sufficient to give the father "rights of custody" because to do so would result in the mother's rights being violated. See also BEAUMONT & McLEAVY, *supra* note 15, at 175 (describing decision of the Tribunal de Grande Instance at Périgueux in *S. v. J.*); Weiner, *Navigating the Road Between Uniformity and Progress*, *supra* note 8, at 311-16 (discussing case).

80. See *State Cent. Auth. v. Ardito* (1997) (Fam. Ct. Austl.) (No. M1.1481/97) (holding that it was an "intolerable situation" under article 13(b) that the mother, who had consented to return with the child, would be unable to accompany her young child back to the United States to participate in the custody litigation because of visa problems and stating in *obiter dictum* that ordering the child's return under such circumstances would violate article 20).

81. See *Dep't Families Youth & Cmty. Care v. Bennett* (2000) 26 Fam. L. R. 71 (Fam. Ct. Austl.) (extending in *obiter* *Ardito's* holding to cases involving an abductor who cannot appear at a custody contest in the child's habitual residence because of the respondent's own personal situation).

82. See *De los Rios Carmona v. Melendez Rosa*, 141 D.P.R. 282 (P.R. 1996) (opinion of President Mr. Andreu Garcia & Associate Judge Ms. Naveira de Rodon); see also *Struweg v. Struweg*, [2000] 208 Sask. R. 243, ¶¶ 50-51, 57-58 (holding that the level of violence was not sufficient to maintain the claim).

83. There may be even more judicial opinions in which article 20 has found support. See, e.g., *In re Child Abduction and Enforcement of Custody Orders Act* [1991], 1996/568, at 8 (Transcript), 14 Oct. 1998 (Ir. H. Ct.) (discussing initial decision prior to undertakings).

help set the tone for the next Special Commission meeting to review operation of the Hague Convention.

### A. Refugee Claims

The intersection of Hague Convention defenses and refugee claims is a relatively new phenomenon,<sup>84</sup> fueled partly by the recent recognition in countries that process a large volume of Hague Convention applications that domestic violence can be a basis for asylum.<sup>85</sup> Since a domestic violence victim might need permission to remain in the country to which she and her child have fled,<sup>86</sup> she might seek asylum based upon the persecution she will experience if

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84. See, e.g., *Kovacs v. Kovacs*, [2002] 212 D.L.R. (4th) 711 (Ontario Super. Ct.); *Gonzalez v. Gutierrez*, 311 F.3d 942, 942 (9th Cir. 2002). Cf. *S (Children)* 2 F.C.R. 642 (Eng. C.A. 2002) (affirming trial court's order to return children to India despite the fact that mother was granted exceptional leave to remain in England and children were her dependents); *Osman v. Elasha* 2000 Fam. 62 (Eng. C.A. 2000) (ordering return of two children to the Sudan to custody of paternal grandmother despite the fact that mother's asylum application was pending and counsel alleged that a grant of asylum might reasonably stop mother from returning to Sudan); *In re Application of Salah*, 629 N.W.2d 99, 101-02 (Minn. Ct. App. 2001) (noting that respondent had claimed she was a victim of petitioner's domestic violence, that she had a provisional grant of asylum, and that she could be deported from Canada, the child's habitual residence, since petitioner had cancelled his "affidavit of support").

85. Domestic violence can be gender-related persecution. See *Islam v. Sec'y of State for the Home Dep't*, 38 I.L.M. 827 (Eng. H.L. 1999); IMMIGRATION APPELLATE AUTH., ASYLUM GENDER GUIDELINES § 2A.17 (2000); Minister for Immigration & Multicultural Affairs v. Khawar 210 CLR 1, \*12 (H.C. Austl. 2002); *Re KM*, Refugee Appeal No. 2624/96 (N.Z.), summarized in REFUGEE LAW CTR., GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISIONS & GUIDELINES 660 (1999); REFUGEE PROTECTION DIV., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE § A(I)(3) (2003); T-98-08454, 141 RefLex, June 21, 2000, at [http://www.irb.gc.ca/en/decisions/reflex/index\\_e.htm](http://www.irb.gc.ca/en/decisions/reflex/index_e.htm) (last accessed June 14, 2004); T. (O.S.) [2000] C.R.D.D. No. 80 (Can. Imm. & Ref. Bd.); *Begum v. Canada*, [2001] C.F.P.I. 59; *Hernandez v. Canada*, [2001] F.C.T. 643. Together England, Australia, New Zealand, and Canada process approximately thirty-one percent of the overall Hague Convention applications for children's return. Lowe, *Statistical Analysis*, *supra* note 6, at 7. The United States processes another twenty-two percent of the overall Hague Convention applications. *Id.* While the law in the United States is less clear about if and when domestic violence can constitute a basis for asylum, some immigration judges grant asylum to domestic violence victims. See Stephen M. Knight, *Seeking Asylum From Gender Persecution: Progress Amid Uncertainty*, 79 INTERPRETER RELEASES 689, 690 (2002) (noting a "small but significant number of women" have been granted asylum in the United States recently); see also CTR. FOR GENDER & REFUGEE STUDIES, CGRS CASE SUMMARIES, at <http://www.uchastings.edu/cgrs/summaries/persecute.html> (last accessed June 14, 2004) (showing that fifty-three individuals were granted asylum in the United States since 1994 based upon domestic violence).

86. Forty-eight percent of abductors are not nationals of the country to which they flee. Lowe, *Statistical Analysis*, *supra* note 6, at 9. Lowe mentions that a wide variation exists by country. *Id.* For example, all eight of the persons who abducted to Hungary were Hungarian nationals, but only twenty-two percent of the individuals fleeing to Australia were

she is forced to return to the child's habitual residence.<sup>87</sup> While her application for refugee status is pending, or perhaps after it is granted, the other parent may seek the child's return pursuant to the Hague Convention.

Early indications suggest that some judges are unwilling to stay the Hague proceeding until resolution of the refugee claim.<sup>88</sup> An illustrative case is *Kovacs v. Kovacs*,<sup>89</sup> decided by the Ontario Superior Court of Justice. The case involved a woman who fled Hungary with her children. When they arrived in Canada, she sought refugee status for both herself and her children,<sup>90</sup> alleging that the authorities in Hungary would not protect her against her very violent husband because she was a Roma (gypsy).<sup>91</sup> While the application for refugee status was pending, the father sought the immediate return of the younger child, his biological son, pursuant to the Hague Convention. The court refused to delay the Hague petition's resolution.

The case raised many issues, but central to the discussion here are the court's reasons for not awaiting the decision on the refugee applications. The court was very concerned that the Hague proceeding occur expeditiously and believed that the "tenets of the Hague Convention will be defeated" if the Canadian refugee process ran its normal course.<sup>92</sup> The court was also troubled by the fact that the

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Australian nationals. *Id.* at 10; see also REUNITE, *supra* note 6, at 20 (noting that in sixteen of twenty-two cases the "abducted-to" jurisdiction was the home country of the abductor).

87. For example, in *Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), the respondent had an application for asylum pending during the Hague proceeding. Because the Ninth Circuit reversed on the issue of whether the petitioner had rights of custody, it did not review the district court's denial of the respondent's affirmative defenses under articles 13(b) and 20. See *id.* at 948 n.11. A June 25, 2002 decision by the immigration judge granted Ms. Gutierrez's application for asylum based on her status as a victim of domestic violence. See *Gonzales v. Gutierrez*, No. D040063, 2003 WL 22236051 (Cal. Ct. App. Sept. 30, 2003).

88. See, e.g., *Kovacs v. Kovacs*, 212 D.L.R. (4th) 711 (Ontario Super. Ct. 2002). Cf. *Gonzales*, 2003 WL 22236051 (holding that issue of whether trial court should have stayed the UCCJEA action while abductor's asylum petition was pending was rendered moot by grant of asylum application, and concluding that mother's and children's asylum status did not preempt the UCCJEA action because Congress did not intend the "political asylum laws to broadly preempt the uniform statutory scheme pertaining to custody matters . . . [and] there is nothing in the asylum law and the UCCJEA that inherently conflicts so that a UCCJEA action would be necessarily barred").

89. 212 D.L.R. (4th) 711 (Ontario Super. Ct. 2002).

90. *Id.* ¶ 3.

91. The basis of the respondent's refugee claim, in short summary, was the following: she was subjected to physical and psychological abuse by the applicants; on two occasions the child was physically abused by the applicants; and the State of Hungary was unwilling or unable to protect her and her child. *Id.* ¶ 14.

92. *Id.* ¶¶ 15, 75.



mother alone was applying for asylum for her child and the father had no right to be heard in those proceedings.<sup>93</sup> The court concluded,

To accept that one parent has a unilateral right to assert a refugee claim would invite any parent involved in a custodial dispute in another jurisdiction to come to Canada and assert a claim to refugee status on behalf of the child . . . . [S]uch an interpretation would drive a coach and four through the Convention and the CLRA [Children's Law Reform Act], which implements it.<sup>94</sup>

The court's concerns are legitimate, but there were ways to reconcile the immigration and Hague Convention proceedings so that the immigration case could conclude first and the Hague Convention could remain strong. For example, the Kovacs children could have received a designated representative in the immigration proceeding since their interests might have conflicted with their mother's interest,<sup>95</sup> and the father could have been involved in the immigration proceeding as a witness.<sup>96</sup> In addition, the immigration proceedings could have been expedited since a parallel Hague Convention case was also pending.<sup>97</sup>

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93. *Id.* ¶¶ 37, 39.

94. *Id.* ¶ 148. In addition, the court thought this result best comported with the Canadian Charter. The Charter gave each parent an interest in the custody of the child and the Hague proceeding allows all parties to be heard. *Id.* ¶¶ 144–46 (citing the notion of “security of the persons” in section 7 of the Charter).

95. At the time *Kovacs* was decided, the Immigration Act, R.S.C. chs. 1–2 (1985) (Can.) (as amended), and the Convention Refugee Determination Division Rules, SOR/93-45 (Jan. 28, 1993) (Can.), were in effect. Under those provisions, once the senior immigration officer made a determination that the mother and her children were eligible to make a refugee claim, the Convention Refugee Determination Division (“CRDD”) of the Immigration and Refugee Board would determine whether the child should be appointed a representative. *Kovacs*, 212 D.L.R. (4th) ¶ 80. The CRDD should appoint a designated representative (other than the mother or father) if the children's interests conflict with their parents' interests. *Id.* In fact, the Immigration Refugee Board's Convention Refugee Determination Division Handbook, chapter 12, stated, “The Refugee Division is required to designate a representative for any claimant who is 17 years of age or younger . . . .” *Id.* ¶ 59. However, new immigration rules came into effect on June 28, 2002 and may impact the ability to appoint a designated representative. See Immigration and Refugee Protection Act, ch. 27 (2001) (Can.); Refugee Protection Division Rules, SOR/2002-228 (2002) (Can.).

96. The Immigration Act permitted a party, the refugee hearings officer, the Minister's representative, or the Refugee Division to call the father as a witness. See Immigration Act, R.S.C. chs. 1–2, § 67(2)(a); *Kovacs*, 212 D.L.R. (4th) 711, ¶ 56; see also Immigration and Refugee Protection Act ch. 27, §§ 165, 170(e); Inquiries Act, R.S. (1985), chs. 1–13, §§ 4, 5 (1985) (Can.).

97. See Immigration & Refugee Protection Act, ch. 27 § 162(2) (2001) (the Refugee Division shall deal with proceedings “as informally and quickly as the circumstances and the consideration of fairness and natural justice permit”). Even if the immigration proceedings could not be expedited, the court still should let those proceedings conclude first. Speed must never come at the expense of human rights. While several experts at the Special Commission meeting in 2002 emphasized that “speed is an essential element,” they

Even absent these solutions, article 20 suggests that, at a minimum, a court should stay the Hague Convention proceeding until the asylum application is resolved. While article 20 arguably requires an outright dismissal of the Hague Convention petition if the respondent has a pending asylum application,<sup>98</sup> a stay is preferable. The Hague Convention proceeding may provide important remedies for cases in which the asylum claim lacks merit, whether or not return of the child is one of those important remedies (since a child may be deported anyway if the asylum case fails). For example, the judge adjudicating the Hague Convention petition may be the only authority who can award attorney's fees to the prevailing petitioner,<sup>99</sup> assuming the respondent lacks other viable defenses, or who can request that the petitioner enter undertakings related to the mother's and child's safety.<sup>100</sup>

The above argument assumes, of course, that returning a refugee's child pursuant to the Hague Convention constitutes a violation of "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>101</sup> While lawyers and academics in each of the Contracting States should undertake the required analysis since article 20 references the law of the requested State,<sup>102</sup> a brief examination of relevant public international law prin-

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also stressed that "it is important to ensure that the pursuit of speed does not detract from the rights of all parties being respected and the requirements of due process, which must not be neglected." See 2002 SPECIAL COMMISSION, *supra* note 66, at 17.

98. See *infra* text accompanying note 106. Granting the article 20 defense outright would be consistent with the need to resolve Hague Convention cases expeditiously.

99. See, e.g., 42 U.S.C. § 11607(b)(3) (2004).

100. It is beyond this Article to discuss what mechanism, if any, should be used to stay a deportation order if the mother has another viable defense under the Hague Convention. Presumably there are mechanisms (such as humanitarian parole) that might permit a mother and child to remain in a country if, for example, an article 13(b) defense were established, even though the asylum application had failed.

101. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 20.

102. The Reporter suggested that the principles accepted by the requested State could be found in "general international law, treaty law," or "through internal legislation." PÉREZ-VERA, EXPLANATORY REPORT, *supra* note 16, at 461-62. The public international principles discussed here may have legal effect in a particular country. See, e.g., FREDERIC L. KIRGIS, INTERNATIONAL AGREEMENTS AND U.S. LAW, ASIL INSIGHT (1997), available at <http://www.asil.org/insights/insigh10.htm> (last accessed June 14, 2004) (explaining that international treaties have effect in U.S. domestic courts if they are "self-executing" or have been implemented by a federal law, but also noting that treaties may have "indirect effect in U.S. courts" because U.S. courts interpret federal statutes consistent with those obligations so that the United States does not violate its treaty obligations and U.S. courts would not permit an inconsistent state law to stand for the same reason); see also BLAIR & WEINER, FAMILY LAW, *supra* note 28, at 44-45 (explaining that most common law countries do not permit self-executing treaties, but that some civil law countries do permit them to varying

ciples suggests that the argument may be available in many countries. The popularity of these human rights principles, as reflected by their inclusion in widely accepted international human rights instruments, suggests that they are probably also reflected in the laws of many nations. The international law framework also provides the necessary assurance that the domestic law principles are not merely local "public policy," but rather rise to the level of fundamental principles of human rights.

The Universal Declaration of Human Rights states, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."<sup>103</sup> Treaties<sup>104</sup> and customary international law<sup>105</sup> prohibit countries from returning or expelling refugees, or even applicants for refugee status,<sup>106</sup> to the place where the refugee's life, physical integ-

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degrees). Customary law and general principles of international law may also have relevance for domestic courts. For example, in the United States, this international common law is part of federal common law. See *The Paquette Habana*, 175 U.S. 677, 700 (1900) (applying international custom that exempted coastal fishing vessels from capture as prize of war). It is also part of common law in many other common law countries. Civil law countries often recognize this type of international common law through constitutional provisions, sometimes giving it supremacy over domestic law. See BLAIR & WEINER, *FAMILY LAW*, *supra*, note 28, at 48.

103. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Pt. 1, resolutions at 71, U.N. Doc. A/810 (1948) [hereinafter *UDHR*]. But see James A. R. Nafzinger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804, 839, 847 n.186 (1983) (explaining that while the UDHR gives the right to the individual to seek asylum, there is no duty imposed on a state to grant it).

104. This principle of non-refoulement "is expressed in the Declaration on Territorial Asylum; in the 1951 Convention Relating to the Status of Refugees; by incorporation, in the 1967 Protocol to the latter agreement; and in other agreements, such as the American Convention on Human Rights." Nafzinger, *supra* note 103, at 839.

105. See Guy S. Goodwin-Gill, *Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific*, 12 PAC. RIM L. & POL'Y J. 23, 29 (2003). The principle of non-refoulement may even rise to the level of *jus cogens*. *Jus cogens* is a peremptory norm of international law from which no derogation is permitted. See Jean Allaine, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 534, 538-42 (2001), available at [http://www3.oup.co.uk/reflaw/hdb/Volume\\_13/Issue\\_04/130533.sgm.abs.html](http://www3.oup.co.uk/reflaw/hdb/Volume_13/Issue_04/130533.sgm.abs.html) (last accessed June 14, 2004).

106. While the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("the Geneva Convention"), and the 1967 Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, do not address this issue specifically, the Office of the U.N. High Commissioner for Refugees (UNHCR) has addressed it and its determinations are authoritative, pursuant to article 35 of the Geneva Convention. It states that a person can qualify as a refugee even before the person's status is legally determined. See *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 13, ¶¶ 28, 192 (vii) (explaining that recognition of refugee status does not make a person a refugee, but only states that which is true); see also Resolution on Minimum Guarantees for Asylum Procedures § 7, 1996 O.J. (C 274) (E.U. Council Resolution). Applicants for refugee status are protected from refoulement even if the applicant has been denied asylum but is await-

erty, or liberty is threatened. This principle of non-refoulement also prohibits countries from taking actions that compel refugees to return to the place of persecution.<sup>107</sup> Returning a refugee's child to such a territory qualifies as a coercive act that violates this fundamental principle of human rights.<sup>108</sup> Empirical evidence, in fact, shows that most mothers, even mothers whose safety is at risk, will return with their children when those children are returned pursuant to the Hague Convention.<sup>109</sup>

The child's rights are also violated when he or she is returned while an application for refugee status is pending. The child may have applied for asylum because the child has been targeted for persecution or because the child has a well-founded fear of persecution from membership in the same social group as his or her mother, *i.e.*, the family.<sup>110</sup> Sending the child back in this situation is a direct infringe-

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ing resolution of an appeal. *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 13, ¶ 192 (vii).

107. See, e.g., 1951 Convention Relating to the Status of Refugees, *supra* note 106, at art. 33 ("No Contracting State shall expel or return ("Refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.") (emphasis added); Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, art 2(3), 1001 U.N.T.S. 45. The latter states,

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.

*Id.* (emphasis added).

108. Immigration law is typically structured to prevent a refugee's child from being returned. Countries often have provisions regarding family reunification and derivative beneficiaries. See Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 260-61, 276, 278-79 (2003); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 173-74 (1997); CANADIAN TASK FORCE ON MENTAL HEALTH ISSUES AFFECTING IMMIGRANTS & REFUGEES, AFTER THE DOOR HAS OPENED ch. 2, 10 (1988). There is recognition that family unity is an "essential right of the refugee." See *Family Protection Issues*, U.N. Executive Commission of the High Commissioners Programme, ¶¶ 6-7, U.N. Doc. EC/49/SC/CRP.14 (1999) (citing Final Act of the 1951 U.N. Conf. of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation B).

109. See REUNITE, *supra* note 6, at 35 (thirteen out of fourteen mothers who abducted their children returned to the child's habitual residence despite threats to their own safety). Cf. S, [2002] 3 F.C.R. 43, ¶¶ 16, 31 (Eng. C.A.) (mother assured judge that if the child were ordered to be returned to Israel the mother would return too and care for the child pending the outcome of a welfare hearing despite the fact that mother suffered from panic disorder and agoraphobia that could be debilitating because of hostilities there).

110. See CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURES § 33.04(1)(b)(ii) (B) (II) (2003); REFUGEE PROTECTION DIV., INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW § 9.4 n.148 (2002) ("Since 'family' may constitute a particular

ment of the child's rights. Alternatively, the child may be a derivative beneficiary to the mother's application.<sup>111</sup> Under this second scenario, the child's right to be with his or her mother has been abridged. Family unification is of paramount importance in human rights law.<sup>112</sup> Although the child arguably has a right to be "reunified" with the left-behind parent too, at this stage of the proceedings the child's rights should be interpreted in favor of the child's mother, the victim of the persecution, and not the father, the alleged persecutor. After all, the court's decision to stay the Hague Convention petition is only temporary pending the outcome of the asylum proceedings, and the custody contest will ultimately resolve the long-term allocation of parental responsibility consistent with the child's rights.

The *Kovacs* approach, whereby a court essentially ignores the pending asylum proceeding, need not be persuasive to future courts either inside or outside of Canada. The resolution of the conflict between refugee law and child abduction law was *obiter dictum* in *Kovacs*.<sup>113</sup> More importantly, the *Kovacs* approach may be a poor policy choice for many countries. The asylum adjudicator may be in the best position to decide the factual issues common to both proceedings. In some countries, the asylum process has been fine-tuned to address specific issues persecuted people face when fleeing persecution. Asylum procedures often have relaxed rules of evidence because persecuted people commonly flee with little "formal" documentation of the

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social group . . . , a relative who is targeted, albeit as a secondary object of the persecutor's animosity, may base his or her claim on direct persecution by reason of membership in a particular social group.".)

111. The "derivative beneficiary" status stems from the Principle of Family Unity, which was recognized by the Final Act of the conference that adopted the 1951 Refugee Convention, and which is now observed by the majority of States whether or not parties to the 1951 Convention or the 1967 Protocol. See *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 13, ¶¶ 82–83. The Final Act of the Conference recommends that "Governments . . . take the necessary measures for the protection of the refugee's family, especially with a view to . . . [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country. *Id.* ¶ 182. This, in turn, is based on the statement in the Universal Declaration of Human Rights, among others, that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *UDHR*, *supra* note 103, art. 16.

112. See Starr & Brilmayer, *supra* note 108, at 218–19, 229–30, 234, 278, 282–85; see also *supra* note 111 and accompanying text; Convention on the Rights of the Child, Nov. 20, 1989, § 22(b), 1577 U.N.T.S. 3 [hereinafter CRC].

113. The court did not return the child because to do so would put him in an "intolerable situation." *Kovacs*, 212 D.C.R. (4th) 711, ¶ 238. The applicant had a long criminal record for fraud and deceit, was a fugitive from justice in Hungary, and the court feared that he would abduct the child from Hungary if the child were returned. *Id.* ¶¶ 234, 237.

situation from which they are fleeing.<sup>114</sup> The asylum adjudicator may also be better suited to assess the abductor's credibility about the domestic violence. For example, in the United States, federal courts have jurisdiction to adjudicate Hague Convention applications, but federal judges often have little experience with family violence cases or interviewing children.<sup>115</sup> In contrast, the immigration authorities in the United States receive training specifically on these issues.<sup>116</sup> Moreover, the asylum adjudicator may be best positioned to obtain relevant information on the inability or unwillingness of the habitual residence to protect the respondent from the batterer's violence. In the United States, this type of evidence is readily available to immigration authorities, who may even have an affirmative obligation to obtain it.<sup>117</sup> If the

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114. See, e.g., *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999) ("Without discounting the importance of objective proof . . . it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.") The *Abankwah* court noted that the "requirement of evidence [to satisfy the objective element of the test for well-founded fear of persecution] should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself." *Id.* (citations omitted). See also INS, EXAMINATIONS HANDBOOK § 16 (2003) ("The strict judicial rules of evidence do not apply in administrative proceedings such as exclusion, deportation, adjustment of status, and other administrative actions under the jurisdiction of the Service."). Decision-makers may base their decisions on any evidence that is considered credible or trustworthy in the circumstances of the case. See *id.*; Immigration and Refugee Protection Act, 2001, ch. 27, §§ 170 (g), (h) (Can.). See generally REFUGEE PROTECTION DIV., ASSESSMENT OF CREDIBILITY IN CLAIMS FOR REFUGEE PROTECTION, ch. 1, § 1.1 (2002). Hague Convention proceedings also have some relaxed evidentiary rules, for example, see Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, arts. 22, 30, although these rules are less extensive than the relaxed rules governing some immigration proceedings.

115. This may not be true in other countries. See *S (Children)* [2002] 2 F.C.R. 642, ¶ 29 (Eng. C.A.) (Laws, L.J.); *id.* ¶¶ 39–40 (Thorpe, L.J.) (suggesting coordination between family law and immigration branches and that allegations of domestic violence be investigated and determined first by a judge of the Family Division).

116. See, e.g., INS, OFFICE OF INT'L AFFAIRS, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN 5–7 (1995) [hereinafter "PHYLLIS COVEN MEMO"]; DEP'T. OF STATE, GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING (2000); INS, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 6, 29 (1998) [hereinafter "JEFF WEISS MEMO"]. Immigration authorities in some other countries also receive such training. See generally CTR. FOR GENDER & REFUGEE STUDIES, GOVERNMENTAL GENDER GUIDELINES OF ASYLUM ADJUDICATORS, at <http://www.uchastings.edu/cgrs/law/guidelines.html> (last accessed June 13, 2004).

117. See, e.g., INS, BASIC LAW MANUAL: ASYLUM 57–58 (1991) (describing asylum officer's duty to elicit evidence, including information favorable to the applicant's case, and describing how asylum officer may supplement the information with material provided by the Department of State, the Asylum Policy and Review Unit, the INS Headquarters Office of Refugees, Asylum and Parole, and "any other credible source including international organizations (such as UNHCR); private voluntary organizations; academic institutions (such as scholarly journals)" (citing 8 C.F.R. § 208.12)); see also PHYLLIS COVEN MEMO, *supra* note 116, at 8 (describing how INS Resource Information Center ("INS RIC") will be issu-

immigration case concludes first, the court adjudicating the Hague petition may have more evidence before it about the ability and willingness of authorities in the child's habitual residence to protect victims of domestic violence. This additional evidence will make the article 20 adjudication more accurate.

Finally, the immigration adjudication should conclude before the Hague adjudication because women will otherwise be reluctant to raise an article 20 defense, no matter how meritorious it may be. Simply put, a woman who raises the article 20 defense in the Hague proceeding and loses—a likely outcome given the narrowness of the article 20 defense at present—may be bound in the asylum proceeding by aspects of that determination under principles of collateral estoppel.<sup>118</sup> Consequently, women who anticipate being granted asylum may be reluctant to raise the Hague Convention defense at all. Yet, these are the very individuals who should be the most successful with the defense.

## **B. A Meritorious Defense**

Article 20 should also provide a meritorious defense for some domestic violence victims who do not need to seek asylum. Both the mother's and the child's human rights are violated by the child's return. On the one hand, it violates the mother's human rights to send her child back to the place of past violence because the mother must then choose between her safety and her child's companionship. On the other hand, it violates the child's human rights to send the child to a country where the government cannot or will not address the mother's legitimate safety concerns so that the mother must stay away or to threaten the very mother-child relationship by encouraging the mother's return to a place where her life is endangered. A strengthened article 20 should provide a plausible defense for these women so long as the state of refuge recognizes the underlying fundamental principle of human rights in its domestic law and applies that princi-

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ing "alerts" and country profiles addressing the incidence of violence and the adequacy of state protection); JEFF WEISS MEMO, *supra* note 116, at 16 (describing how INS RIC distributes "comprehensive information concerning child-specific persecution and violations of the rights of children is distributed regularly and systematically" and how asylum officers also have access to the electronic database produced by the Center for Documentation and Research at the UNHCR in Geneva).

118. While Hague Convention decisions do not control decisions on the merits in custody contests, see Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 19, they may control in asylum adjudications since asylum adjudications differ from custody contests.

ple to purely internal matters.<sup>119</sup> While it is beyond the scope of this Article to see if the fundamental principle of human rights is recognized by the laws of any particular Contracting State, the relevant public international law principles are explored for the same reasons as suggested above.<sup>120</sup> For those who are interested in the viability of this defense in the United States for domestic violence victims, I refer you to my companion article, *Using Article 20*,<sup>121</sup> which suggests that the defense could be successful in the United States.

## 1. The Fundamental Principles Relating to Human Rights

The international law of human rights has progressed dramatically since 1980. Of particular note is the increased attention to women's rights. Although the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") was adopted by the U.N. General Assembly in 1979,<sup>122</sup> the same year the Hague Convention was being drafted, CEDAW was "consigned to little more than window dressing for many years."<sup>123</sup> Not until the 1993 World Conference in Vienna did women's rights take a more central position on the human rights agenda.<sup>124</sup> There the slogan "women's rights are human rights" became the mantra of the Conference, and thereafter women's rights were treated as human rights by the international human rights community.<sup>125</sup>

As part of this increased attention to women's rights, violence against women became a significant focus. During the 1990s, states

119. See *supra* text accompanying notes 56 and 102. The relevant fundamental principle can be expressed at various levels of abstraction. For instance, one can frame the principle as the state's affirmative obligation to address domestic violence or as a prohibition against gender discrimination. The broader the principle, the more likely one can find evidence that the country follows the principle with respect to purely internal matters. Requiring that the fundamental principle of human rights, however defined, be applied in a like manner to similar internal matters minimizes concerns about the possible breadth of article 20.

120. See *supra* text accompanying notes 102–103.

121. Merle H. Weiner, *Using Article 20*, 38 FAM. L.Q. (forthcoming 2004) (arguing that U.S. law could support a meritorious article 20 defense for some domestic violence victims who have fled to the United States).

122. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

123. Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL'Y & L. 865, 866 (2003) [hereinafter Copelon, *International Human Rights Dimensions*].

124. *Report of the World Conference on Human Rights*, U.N. World Conference on Human Rights, 1993, at pt. 1, ¶¶ 36–44, U.N. Doc. A/CONF. 157/24 (1993).

125. Johanna E. Bond, *International Intersectionality: A Theoretical & Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 77 (2003).



promulgated and adopted a vast array of legal instruments that recognized domestic violence as a human rights violation and imposed legally binding obligations on countries to address it.<sup>126</sup> Domestic violence was also integrated into the “mainstream” human rights agenda. For example, the Human Rights Committee in 2000 issued General Comment 28, which addresses reporting obligations pursuant to article 3 of the International Covenant on Civil and Political Rights on the equality of rights between men and women.<sup>127</sup> States Parties must address domestic violence when reporting on the right to life

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126. For example, *General Recommendation No. 19, Violence Against Women*, was issued in 1992 by the Committee to End Discrimination Against Women (the monitoring body for the Convention to Eliminate All Forms of Discrimination Against Women). See *General Recommendation No. 19, Violence Against Women*, U.N. HCHR, 11th Sess., at 1, U.N. Doc. A/47/38 (1992) (stating that domestic violence is a type of discrimination that prevents women from enjoying equality of rights). The U.N. General Assembly in 1994 passed Resolution 48/104 Containing the Declaration on the Elimination of Violence Against Women. See *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/104 (1993) (declaring violence against women a violation of women's rights and noting an urgent need for women to gain equality of rights). The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women was promulgated that same year. See Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women, “Convention of Belém do Pará,” June 9, 1994, 33 I.L.M. 1534. In 1995, the U.N. Fourth World Conference on Women issued a very detailed Declaration and Platform for Action on Violence Against Women, directing states to take a variety of actions to prevent, condemn, and punish violence against women. See U.N. Fourth World Conference on Women, Declaration and Platform for Action, 35 I.L.M. 401 (1996). Subsequently, there have been regular reports from Radhika Coomaraswamy, the U.N. Special Reporter on Violence Against Women, Its Causes and Consequences, and the endorsement of these reports by the UN Human Rights Commission. See, e.g., *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45*, U.N. ESCOR, 50th Sess., ¶¶ 32–41, U.N. Doc. E/CN.4/1995/42 (1994) (detailing important events in international law for domestic violence victims); *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. CHR, 59th Sess., ¶¶ 26–36, U.N. Doc. E/CN.4/2003/L.52 (2003). Cases have also been successfully brought against States Parties to the Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women. See, e.g., Maria da Penha Maia Fernandes, Case No. 12.051, Inter-Am Ch. H.R. 54-1 (2001) (No. 12.051). The obligations pursuant to treaties are in addition to any obligations imposed by customary international law. Some authors contend that customary international human rights norms include “CEDAW’s Declaration that domestic violence is a violation of women’s fundamental human rights.” See Katherine M. Culliton, *Finding a Mechanism to Enforce Women’s Rights to State Protection from Domestic Violence in the Americas*, 34 HARV. INT’L L.J. 507, 537 (1993). Others contend that customary law protects the rights that are affected by domestic violence, such as the right to life and the right to physical integrity. See Elizabeth Dietz, *Violence Against Women in the United States: An International Solution*, 13 ARIZ. J. INT’L & COMP. L. 551, 568 (1996). There may also be relevant *jus cogens* norms, such as the right to be free from torture. See *id.*

127. See General Comment 28, U.N. HRC, 68th Sess., U.N. Doc. CCPR/21/Rev.1/Add. 10 (2000).

protected by article 6. In addition, "[t]o assess compliance with article 7 of the Covenant [prohibiting torture or cruel, inhuman or degrading treatment], as well as with article 24, which mandates special protection of children, the Committee needs to be provided information on national laws and practices with regard to domestic and other types of violence against women, including rape."<sup>128</sup> The Human Rights Committee has made clear that the Covenant requires that a State Party's legal response to domestic violence be effective.<sup>129</sup>

Children's human rights have also received significant attention since 1980. Protection of children is not a new theme in human rights law, as exemplified by the 1924 Geneva Declaration and the 1959 U.N. Declaration on the Rights of the Child.<sup>130</sup> The popular Convention on the Rights of the Child ("CRC"), which entered into force in 1990,<sup>131</sup> made these rights legally binding and provided an impetus for increased attention to children's issues worldwide.

As part of this international attention to children's human rights, there has been a recognition that domestic violence harms children and that the elimination of domestic violence is also a children's human rights issue. For example, the CRC requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . . while in the care of parent(s), legal guardian(s) or any other person who has care of the child."<sup>132</sup> This provision prompted the Committee on the Rights of the Child to ask

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128. See *id.* ¶ 11. Recently the Committee issued a strong resolution reaffirming its commitment to the topic of domestic violence. See, e.g., *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, *supra* note 126.

129. For example, in commenting on Sweden's report, the Committee stated, "The Committee notes with concern the persistence of domestic violence despite legislation adopted by the State Party. . . . The State Party should pursue its policy against domestic violence, and in this framework, should take more effective measures to prevent it and assist the victims of such violence." *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant* (Sweden), U.N. HRC, 74th Sess., ¶ 7, U.N. Doc. CCPR/CO/74/SWE (2002).

130. See Declaration of the Rights of the Child, League of Nations, O.J. Spec. Supp. 28, at 66 (1924) [hereinafter Declaration of Geneva]; *Declaration of the Rights of the Child*, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

131. CRC, *supra* note 112.

132. *Id.* at art. 19(1). Article 19(2) of the Convention on the Rights of the Child also states, in part, "Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention . . . ."

countries specifically about their efforts to end domestic violence.<sup>133</sup> Because domestic violence harms children, UNICEF has also taken up the cause of ending domestic violence,<sup>134</sup> as have regional organizations such as the Council of Europe.<sup>135</sup>

The sources of international law that impose obligations on states to address domestic violence are obviously varied.<sup>136</sup> These various sources do not merely impose negative prescriptions on states to avoid certain activities (such as discriminating against domestic violence victims in the implementation of the criminal law). Rather, they also impose affirmative obligations on countries to exercise due diligence to punish past incidents, prevent future incidents, and rehabilitate victims.<sup>137</sup> A state violates both its negative and positive obligations

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133. For instance, the Committee criticized Jordan for "the lack of adequate measures taken . . . to evaluate and address . . . domestic violence," and recommended that Jordan study the problem and enact "appropriate follow-up measures." See RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 240 (1998) (citing Jordan IRCo, Add. 21, paras. 15 and 23).

134. See U.N. Children's Fund, Domestic Violence Against Women and Girls, 6 INNOCENTI DIG. 2, 2 (2000).

135. See, e.g., Recommendation No. R(85)4 of the Committee of Ministers to Member States on Violence in the Family (1985) (adopted by the Committee of Ministers on Mar. 26, 1985, at the 382d meeting of the Ministers' Deputies), available at [http://www.social.coe.int/en/cohesion/fampol/recomm/family/R\(85\)4.htm](http://www.social.coe.int/en/cohesion/fampol/recomm/family/R(85)4.htm).

136. See *supra* note 126 and text accompanying notes 129, 133. See, e.g., Copelon, *International Human Rights Dimensions*, *supra* note 123; Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 506 (1993).

137. For example, if domestic violence itself is "inherently discriminatory in that it both reflects inequality and perpetuates it," Rhonda Copelon, *Symposium: Int'l Human Rights Dimensions of Intimate Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 865, 869 (2003) [hereinafter Copelon, *Symposium*], international law requires countries to take positive measures to combat that aspect of gender inequality. See CEDAW, *supra* note 122, at art. 2(e). If domestic violence violates a person's right to life, liberty, or personal security, then article 2 of the ICCPR imposes on States Parties an obligation to address it. ICCPR, *supra* note 51, at art. 2 (providing that States Parties must "respect and . . . ensure . . . the rights recognized in the present Covenant . . ."). If domestic violence is torture or cruel, inhuman, and degrading treatment, then there is an obligation, among others, to provide a victim of torture "the means for as full rehabilitation as possible." See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, at art. 14(1), 1465 U.N.T.S. 85. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women imposes affirmative obligations on States Parties if the "violence against women" is "perpetuated or condoned by the state or its agents." See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 126, at arts. 2, 7, 8. Article 8 of the European Convention on Human Rights imposes obligations on States Parties to adopt measures "designed to secure respect for private life even in the sphere of the relations of individuals between themselves." See, e.g., *X & Y v. The Netherlands*, 8 Eur. Ct. H.R. 235 (1985). Article 3, which addresses torture or inhuman or degrading treatment, also imposes affirmative

under international law when it returns the domestic violence victim's child to a place where the parent is unsafe.

For example, article 17 of the International Covenant on Civil and Political Rights ("ICCPR") prohibits the "arbitrary" interference with one's family. "Arbitrary" means unreasonable in the particular circumstances and in conflict with the underlying provisions, aims, and objectives of the ICCPR.<sup>138</sup> The return of a domestic violence victim's child constitutes unreasonable interference with the mother's and child's family. Return is also inconsistent with other provisions of the ICCPR, such as the protection of the victim's right to life, her right to be free from cruel, inhuman, or degrading treatment, and her right to security of person,<sup>139</sup> since the domestic violence victim will likely return with her child and be beaten by her batterer.<sup>140</sup>

The possible justifications for infringing the domestic violence victim's rights do not withstand close analysis, either because the justifications are doctrinally impossible or because the justifications do not make the action reasonable in these particular circumstances. For example, the child's return cannot be justified as being in the child's "best interest" because there is no determination of the child's "best interest" in a Hague proceeding.<sup>141</sup> Similarly, return cannot be justified as protecting the father's interest in having a custody award in his favor because the father's interest can be vindicated in the location where the mother is located. The Hague Convention does not itself determine custodial rights.<sup>142</sup>

Those justifications that might prove more valid do not render the return of the child a reasonable act in these particular circumstances. While the father and child have an interest in a relationship

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obligations on States Parties. See *Z & Others v. United Kingdom*, 34 Eur. H.R. Rep. 3 (2002).

138. See HUMAN RIGHTS COMM., GENERAL COMMENT 16 ¶ 4 (32d Sess. 1988); see also *Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999), *abrogated on other grounds*, *Restrepo v. McElroy*, No. 99-2703, 2004 WL 652802 (2d Cir. Apr. 1, 2004).

139. See, e.g., ICCPR, *supra* note 51, at arts. 6, 7, & 9. The government has an obligation to prohibit these activities by private persons. See, e.g., HUMAN RIGHTS COMM., GENERAL COMMENT 7 (16th Sess. 1982); *General Comment 28*, *supra* note 127.

140. See REUNITÉ, *supra* note 6. The inability of the abductor to receive due process in the child's habitual residence would also justify the defense. The entire Hague Convention rests on the notion that a fair custody contest can occur in the child's habitual residence. Due process is a recognized international human right that is applied internally by Contracting States. In a particular case, it may be helpful to conceive of the domestic violence victim's safety concerns as also affecting her ability to receive due process.

141. See *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 610 (E.D. Va. 2002).

142. See, e.g., Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 19.

with each other pending any custody litigation,<sup>143</sup> the mother and child have an identical interest. While the father's and child's interest can be satisfied by visitation in the place to which the mother has fled, a place where visitation can be structured to address the mother's safety concerns, the mother cannot visit her child in the child's habitual residence without great risk to her own safety—a risk which can impair her parenting<sup>144</sup> and harm the child if it materializes.<sup>145</sup> Exercising interim visitation abroad is an unlikely option for the mother given her status as an abductor, nor is it likely to be of a sufficient quantity or quality to satisfy the mother's desire for companionship. In contrast, the court adjudicating the return petition can assure the father substantial visitation as a condition of its order refusing to return the child. A General Comment issued by the Human Rights Committee suggests that this interim visitation arrangement would best comport with a state's public international law obligations: "If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, *to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents.*"<sup>146</sup>

Nor can returning the child be justified as necessary for the continued vitality of the Hague Convention. A narrow interpretation of the Hague Convention's exceptions is often touted as essential to the Convention's success,<sup>147</sup> yet it is unnecessary to interpret the defense so narrowly as to foreclose its application when it is warranted. Moreover, while ending international child abduction is an important state interest, so too is ending domestic violence.<sup>148</sup> The only rational way

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143. The child has a right to the company of his or her parents. See *UDHR*, *supra* note 103, at art. 16 ("[T]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); *ICCPR*, *supra* note 51, at art. 23 (same); *CRC*, *supra* note 112, at art. 7 (a child has "as far as possible, the right to know and be cared for by his or her parents").

144. The batterer's presence can detract from a woman's ability to mother. In addition, if he injures her, this too inhibits her ability to focus on her child. The child welfare system in the state of the child's habitual residence might even remove the child from the mother because of the risk to the child from the domestic violence. See *In re G.S. Jr. & S.S.*, 59 P.3d 1063, ¶¶ 41–45 (Mont. 2002).

145. See Weiner, *International Child Abduction*, *supra* note 4, at 621–22 (citing sources).

146. See *General Comment 17*, U.N. HRC, 35th Sess., ¶ 6, at 146, U.N. Doc. No. HRI/GEN/1/Rev. 6 (1989) (emphasis added).

147. See, e.g., Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994) ("Perhaps the most important aspect for success of the Convention will be the ability to limit the use of defenses.").

148. See *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992) ("[T]he general public has an extraordinary interest in a society free from violence, especially where vulnerable persons are at risk.") (employing the *Matthews* balancing test to determine whether a temporary custody order to domestic violence victim violated due process).

to harmonize these interests is to allow the article 20 defense in the narrow circumstances in which a woman's safety will be threatened if she returns with her child to the child's habitual residence. Otherwise, women may, in fact, be deterred from abduction, but at a great cost to themselves and inevitably their children.

Returning the domestic violence victim's child also violates a country's affirmative obligations imposed by international law. The return of the child increases, not decreases, the risk of future violence to the woman (and the consequent harm to the child) since many women will return with their children.<sup>149</sup> Undertakings agreed to by the petitioner regarding the woman's safety do not eliminate or sufficiently reduce this risk.<sup>150</sup> The return of the child also undermines the rehabilitation of the domestic violence victim, broadly understood. If the mother returns with her child, her rehabilitation is set back because her physical safety again becomes a primary concern. Some women also may experience traumatic stress when they return to the place of violence.<sup>151</sup> If she does not return with her child, her ability to heal will likely be affected because she is separated from her child.<sup>152</sup>

Returning the child also makes the country complicit in furthering discrimination against women. Domestic violence reflects and perpetuates gender hierarchy, and countries have an affirmative

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149. See REUNITE, *supra* note 6.

150. *Id.* at 30–31. The REUNITE study revealed that non-molestation undertakings were given in fifty percent of the cases in which undertakings were given (six out of twelve). *Id.* at 31. These non-molestation clauses were broken in one hundred percent of the cases. *Id.* The REUNITE study also documents instances in which the police took no action when undertakings were broken. Sometimes the police said the undertaking had “no real effect.” *Id.* at 33. The authors report, “where it was sought to enforce the undertakings through police complaint, the outcome was generally unsuccessful.” *Id.* at 34. In addition, court enforcement of undertakings was stymied by cost, among other barriers. *Id.* See also Weiner, *International Child Abduction*, *supra* note 4, at 676–82.

151. See EVE B. CARLSON & JOSEF RUZEK, NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, EFFECTS OF TRAUMATIC EXPERIENCES (Sept. 1, 2003), at [http://www.ncptsd.org/facts/general/fs\\_effects.html](http://www.ncptsd.org/facts/general/fs_effects.html) (last accessed June 14, 2004) (describing physical and mental reactions to trauma reminders); see also *Blondin v. Dubois*, 78 F. Supp. 2d 283, 290–91 (S.D.N.Y. 2000) (relaying testimony of Dr. Solnit that sending child victim of violence back to place of violence can trigger post-traumatic stress disorder).

152. Cf. *Exec. Comm. of the High Comm's Programme, Family Protection Issues*, ¶¶ 14–17, U.N. Doc. EC/49/SC/CRP.14 (1999), noting,

The refugee family . . . helps to ensure the emotional well-being of its individual members. The important psychological support which the family environment can provide should not, in U.N. HCR's experience, be underestimated. Maintaining the family unit is one means of ensuring a semblance of normality in an otherwise uprooted life.

obligation to combat it.<sup>153</sup> When a court punishes a woman for escaping domestic violence by removing her child even though the child's habitual residence cannot or will not adequately protect the mother, or when the court requires that the mother put herself in danger to be with her child, the court is failing to address this form of gender discrimination adequately. In fact, the court becomes a tool of batterers who seek to maintain access to their victims.

## 2. Discretion

Some authorities have suggested that a successful article 20 defense does not prohibit a court from exercising its residual discretion to return a child.<sup>154</sup> This conclusion is suspect if the relevant fundamental principle is embodied in a constitution or other law that the court must obey. While it may have some merit if the relevant fundamental principle is reflected in a law with an equal or subordinate status to the Hague Convention and its implementing legislation, courts should be extremely reluctant to exercise any discretion they may have to return the child.

Courts that exercise their discretion to return children despite the existence of a defense typically balance the purpose of the Convention against a finding that a defense has been made out.<sup>155</sup> A court that balances these considerations when an article 20 defense exists should almost always decide not to return the child. The purpose of the Convention is to secure the prompt return of children; promptly returning abducted children is supposed to deter abductions and locate the custody contests where most of the relevant evidence exists.<sup>156</sup> The purpose of the Convention, however, is qualified by the assumption on which it rests: that prompt return will best serve chil-

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153. See *supra* note 137 and accompanying text.

154. See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 18; *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); Hague International Child Abduction; Text and Legal Analysis, Public Notice 957, 51 Fed. Reg. 10,494, 10,509 (Dep't State 1986) ("Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies.").

155. See LOWE, EVERALL & NICHOLLS, INTERNATIONAL MOVEMENT OF CHILDREN, *supra* note 27, at 368. For an example of the court's exercise of its discretion to return a child, see *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362 (M.D. Fla. 2002) (finding nine-year-old child's views were formulated when child was only six and heavily influenced by abductor).

156. The drafters also probably believed that a prompt return would return the child to its primary caretaker. See Weiner, *International Child Abduction*, *supra* note 4, at 608–09, 616–17.

dren's interests.<sup>157</sup> It cannot be presumed that deterring abduction and situating the custody contest in the child's habitual residence is best for the children of domestic violence victims.<sup>158</sup> Rather, it is more logical to presume that children will be harmed by deterring the escape of their mothers from domestic violence and by situating their custody contests in locations where their mothers are unsafe.<sup>159</sup> Because this conclusion also extends to the particular child before the court, the court should be extremely reluctant to exercise its discretion, just as courts have been reluctant to exercise their discretion when the respondent establishes an article 13(b) defense.<sup>160</sup> In addition, return in this context sends messages to children and others that human rights are irrelevant and that domestic violence perpetrators need not be accountable for their acts yet again. These messages are antithetical to children's interests in the long run.

Finally, return in these circumstances may violate a country's obligations under public international law. However, whether a country's obligations under the relevant human rights treaties trump the "discretion" allegedly given to judges under the Hague Convention to disregard those same human rights is a question of treaty interpretation and general principles of international law.<sup>161</sup>

### 3. Boundaries

Skeptics may contend that a strengthened article 20 defense will know no bounds. After all, might it not violate the mother's rights if the state of habitual residence will not consider the fact of domestic

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157. See Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 1 & preamble.

158. See Weiner, *International Child Abduction*, *supra* note 4, at 619–26.

159. See Silverman et al., *supra* note 66; sources cited *supra* notes 134–35, 144; Weiner, *International Child Abduction*, *supra* note 4, at 621–22 (citing sources).

160. See BEAUMONT & MCELEAVY, *supra* note 15, at 155. See, e.g., *Walsh v. Walsh*, 221 F.3d 204, 221 n.17 (1st Cir. 2000); *Danaipour v. McLarey*, 286 F.3d 1, 25–26 (1st Cir. 2002). Whether courts have recently increased the use of their discretion in the context of article 13(b) by imposing undertakings on petitioners is an empirical question. To the extent that courts have used undertakings to return a child even in cases in which an article 13(b) defense has been established, this practice is highly questionable. The problems with undertakings in the context of domestic violence have been noted, including by Weiner, *International Child Abduction*, *supra* note 4, at 679–81, and by the REUNITE study. See REUNITE, *supra* note 6, at 28, 35.

161. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 323, 332 cmt. f (1987). The lawfulness of a country's actions might differ under international and domestic law. Under domestic law, for example, rules about the effect of treaties in domestic courts as well as rules about the priority of implementing legislation might be determinative.



violence in its custody adjudications or if the state of habitual residence will not allow her to relocate?<sup>162</sup> Do these situations require that a court accept the article 20 defense?

These are difficult questions because of the conflicting considerations involved. On the one hand, some have argued that a court's failure to consider domestic violence in custody adjudications violates international human rights law<sup>163</sup> and the relevant international principles may be reflected in the internal law of a particular Contracting State. On the other hand, article 20 was not intended as a means to judge different custody regimes.<sup>164</sup> Countries differ dramatically regarding how they resolve custody contests<sup>165</sup> as well as the permissibility of transnational relocation for custodial parents. Allowing these sorts of differences to establish an article 20 defense would encourage forum shopping, contrary to the goal of the Hague Convention. As Lord Justice Thorpe once recognized, "The further development of international collaboration to combat child abduction may well depend upon the capacity of states to respect a variety of concepts of child welfare derived from differing cultures and traditions."<sup>166</sup>

Fortunately, the resolution of these challenging questions is not necessary to a determination that the defense is appropriate when a domestic violence victim's safety is threatened in the child's residence. An evaluation of the mother's safety concerns does not involve an assessment of a particular custody regime, nor does it encourage forum-shopping, any more so than any of the other established defenses.

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162. I do not mean to imply that the left-behind parent has "rights of custody" if he or she is only the beneficiary of relocation restrictions, without more. I do not believe that to be the case. See Weiner, *Navigating the Road Between Uniformity and Progress*, *supra* note 8, at 326–33. However, relocation restrictions may inhibit travel because they may subject the custodial parent to domestic sanctions, such as contempt, if disobeyed.

163. Silverman et al., *supra* note 66; ARIZ. COALITION AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE (2003), at <http://www.azcadv.org/PDFs/FS-BMTP%20report.pdf> (last accessed June 14, 2004).

164. See John M. Eckelaar, *International Child Abductions by Parents*, 32 U. TORONTO L.J. 281, 314 (1982) (describing how article 20 was not intended to provide a defense for different family law principles and giving as an example preferred custody rights in one parent).

165. For example, some countries have a strong preference for mother custody until a certain age, or for joint custody, or for religious matching.

166. *Osman v. Elasha* [2000] Fam. 62, 70 (Eng. C.A.) (holding that children should be sent back to Sudan even though, under Islamic law applied by the Sudanese court, that meant that the paternal grandmother would have custody of the children and their mother would only have rights of access (because she was divorced and remarried) and would not see the children as often as she wanted).

### C. Reforming the Convention

The Permanent Bureau at the Hague understands that domestic violence can motivate a victim to flee transnationally with her children. For example, the topic of domestic violence was relevant to the recent rejection of a proposed access protocol.<sup>167</sup> The Permanent Bureau now must use its knowledge of domestic violence to address the problem discussed in this article, a problem that strikes at the very heart of the Hague Convention.<sup>168</sup>

Concerned individuals have suggested various measures to ameliorate the injustice domestic violence victims experience when they are respondents in Hague Convention proceedings.<sup>169</sup> Delegates

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167. "Access" means "visitation." See 2002 SPECIAL COMMISSION, *supra* note 66, at 33–34. The Report states,

The general principle of the right of the child to maintain contact with both parents is of course broadly accepted. But there is a difference in the weight attached in different jurisdictions to the presumption in favour of contact by the non-custodial parent, particularly in cases where domestic violence has been alleged.

*Id.*

168. The remedy of return is the principal remedy of the Hague Convention and cases in which petitioners seek that remedy outnumber cases in which petitioners seek access by five to one. See Lowe, *Statistical Analysis*, *supra* note 6, at 34.

169. See, e.g., Weiner, *International Child Abduction*, *supra* note 4, at 698–703 (arguing that the remedy of return should be stayed pending a custody contest in the child's habitual residence); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J. L. POL. & FAM. 191 (1999) (suggesting courts should take a more realistic approach to the article 13(b) defense in cases involving domestic violence). Various other possibilities also exist. For example, it might be useful to ask about domestic violence remedies on the questionnaire for countries seeking to become parties to the Convention. See Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 772 (2003) [hereinafter Weiner, *Transnational Litigation for Feminists*]. Admittedly, however, completing the questionnaire is optional and few states have done so, see 2002 SPECIAL COMMISSION, *supra* note 66, at 27, and the responses that have been received are relatively uninformative. See MINISTRY OF JUSTICE, LAW REFORM, AND NAT'L INTEGRATION, ANSWERS TO THE QUESTIONNAIRE FOR NEWLY-ACCEDING STATES, available at [http://www.justiceministry.gov.lk/International\\_muiual/\(D\)%20Answers%20to%20the%20Questionnaire%20.htm](http://www.justiceministry.gov.lk/International_muiual/(D)%20Answers%20to%20the%20Questionnaire%20.htm) (last accessed June 14, 2004); HAGUE CONFERENCE ON PRIVATE INT'L LAW, PERU'S ANSWER TO APPROVED QUESTIONNAIRE AT THE FOURTH MEETING OF THE SPECIAL COMM'N ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF INTERNATIONAL CHILD ABDUCTION pt. VII, available at <http://www.hcch.net/e/conventions/quest28e.html#replies> (last accessed June 14, 2004). The Guide to Good Practice could incorporate recommendations for cases involving domestic violence victims who flee with their children to find safety. The 2002 Special Commission adopted two chapters of the Guide and left other chapters for further consideration. See 2002 SPECIAL COMMISSION, *supra* note 66, at 13. Ensuring confidentiality for domestic violence victims would be extremely helpful. See *id.* at 17–18. The Report further states:

An expert noted that confidentiality of information should be respected. However, the reality is that confidentiality cannot be guaranteed outside one's own

meeting in 2005 should discuss the issue, canvas and evaluate the possible solutions, and act to protect these women and children. Article 20, although not directly implicated, is relevant to this meeting in two ways. First, delegates should proclaim that article 20 is a viable defense for domestic violence victims, and they should specifically mention both victims who are seeking asylum and victims who are not. Such a statement would strengthen the defense.

Second, article 20, with its focus on human rights, reminds Contracting States that they have a legal obligation to address domestic violence seriously. The appendix indicates that countries attending the Special Commission meeting can be judged on how well they fulfill their public international law obligations at that meeting. As mentioned before, article 2 of the International Covenant on Civil and Political Rights requires States Parties have to "respect and to ensure . . . the rights recognized in the present Covenant," and those rights include equality of rights between men and women,<sup>170</sup> a woman's right to life,<sup>171</sup> a woman's right to be free from torture or cruel, inhuman, or degrading treatment,<sup>172</sup> and children's right to be protected from violence.<sup>173</sup>

Countries already have been condemned for violation of their public international law obligations with respect to their application of the Hague Convention. So far, however, countries have been found in breach of their public international law obligations only for their failure to address abduction adequately.<sup>174</sup> In the future, countries may also be found in breach of their public international law obligations if they fail to remedy the situation currently faced by domestic

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jurisdiction, and a new paragraph 1.3 was inserted in the Guide to indicate that the applicant should be aware that confidentiality of personal information cannot always be guaranteed in the requested country's administrative and legal procedures, particularly when email communications are being used.

*Id.* Incorporating the topic of domestic violence into judicial training and education is another possibility. Finally, having delegates to the next Special Session acknowledge that article 13(b) and article 20 are viable defenses for domestic violence victims would be extremely helpful. *See also* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. (forthcoming 2004).

170. ICCPR, *supra* note 51, at art. 3; *see also* General Comment 28, *supra* note 127.

171. ICCPR, *supra* note 51, at art. 6.

172. *Id.* at art. 7.

173. *Id.* at art. 24.

174. *See* Ignaccolo-Zenide v. Romania, 31 E.H.R.R. 7 (2001) (holding that Romania violated article 8 of the European Convention on Human Rights when the Romanian authorities did not take adequate measures to secure the prompt return of a child pursuant to the country's Hague obligations); *see also* Sylvester v. Austria, 37 E.H.R.R. 17 (2003) (holding Austria had violated the applicants' rights under article 8 of the European Convention on Human Rights because it did not enforce a final order of return).

violence victims. For example, an individual may file a petition for alleging a treaty violation if a court orders her child to be returned.<sup>175</sup> Human rights monitoring bodies may ask States Parties to account for their insensitivity to women's human rights in their application and review of the Hague Convention. The Special Rapporteur on Violence against Women might add this issue to her agenda.

The fact that there may be a legal obligation to address this particular issue should not overshadow the fact that there is also a moral obligation to do so. Contracting States and their delegates should be committed to minimizing the harm caused by their legal framework. The Hague Convention was a magnificent solution to one type of social injustice. Time has shown that it causes another. Fine-tuning the instrument to minimize its harm is both possible and desirable. Just as individuals had the wisdom to create the Hague Convention, individuals have the wisdom to make it better. Just as individuals had the ability to draft the Hague Convention, individuals have the ability to craft new solutions. Article 20 represents a commitment by countries to respect human rights in the implementation of the treaty—this commitment should guide delegates as they address the domestic violence victim's dilemma.

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175. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; *Optional Protocol to the Convention on the Elimination of Discrimination Against Women*, Dec. 22, 2000, G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess., Supp. No. 49, at 5, U.N. Doc. A/Res/54/4 (1999); Convention for the Protection of Human Rights & Fundamental Freedoms, as amended by Protocol No. 11, art. 34, Nov. 4, 1953, 213 U.N.T.S. 221; Inter-American Convention on the Prevention, Punishment, & Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

## APPENDIX

## Contracting States That Are Party to Major International Law Treaties

Hague Convention on the Civil Aspects of International Child Abduction	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Convention on the Elimination of All Forms of Discrimination Against Women	International Covenant on Civil and Political Rights	Convention on the Rights of the Child	European Convention on Human Rights	Percentage of Overall Hague Applications Received by Country <sup>1</sup>
Argentina	X	X	X	X	X		
Australia		X	X	X	X		7%
Austria		X	X	X	X	X	1%
Bahamas	X	X	X		X		
Belarus		X	X	X	X		
Belgium		X	X	X	X	X	1%
Belize	X	X	X	X	X		
Bermuda		X	A	X	X	X	
Bosnia & Herzegovina		X	X	X	X	X	
Brazil	X	X	X	X	X		
Bulgaria		X	X	X	X	X	
Burkina Faso		X	X	X	X		
Canada		X	X	X	X	X	4%
Cayman Islands		X	A	X	X		
Chile	X	X	X	X	X		1%
China, Hong Kong		X	X	S	X		
China, Macau		X	X	S	X		
Colombia	X	X	X	X	X		
Costa Rica	X	X	X	X	X		
Croatia		X	X	X	X	X	
Cyprus		X	X	X	X	X	
Czech Republic		X	X	X	X	X	1%
Denmark		X	X	X	X	X	1%
Ecuador	X	X	X	X	X		
El Salvador	X	X	X	X	X		
Estonia		X	X	X	X	X	
Falkland Islands		X	X	X	X	X	
Fiji			X		X		
Finland		X	X	X	X	X	
France		X	X	X	X	X	4%
Georgia		X	X	X	X	X	
Germany		X	X	X	X	X	7%
Greece		X	X	X	X	X	
Guatemala	X	X	X	X	X		
Honduras	X	X	X	X	X		
Hungary		X	X	X	X	X	1%
Iceland		X	X	X	X	X	
Ireland		X	X	X	X	X	4%
Isle of Man		X	X	X	X	X	
Israel		X	X	X	X		2%
Italy		X	X	X	X	X	4%
Latvia		X	X	X	X	X	
Lithuania		X	X	X	X	X	

1. Nigel Lowe, Sarah Armstrong, & Ancst Mathias, *A Statistical Analysis of Applications Made in 1999 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Comm'n Prelim. Doc. No. 3, March 2001, at 7, available at <http://www.hcch.net/doc/abdpd3e.doc> (last accessed Aug. 24, 2004).

Luxembourg		X	X	X	X	X	
Macedonia		X	X	X	X	X	
Malta		X	X	X	X	X	
Mauritius		X	X	X	X		
Mexico	X	X	X	X	X		4%
Moldova		X	X	X	S	X	
Monaco		X	X	X	X		
Montserrat		A	A	X	X	X	
Netherlands		X	X	X	X	X	3%
New Zealand		X	X	X	X		4%
Nicaragua	X	S	X	X	X		
Norway		X	X	X	X	X	1%
Panama	X	X	X	X	X		
Paraguay	X	X	X	X	X		
Peru	X	X	X	X	X		
Poland		X	X	X	X	X	
Portugal		X	X	X	X	X	1%
Romania		X	X	X	X	X	1%
Saint Kitts and Nevis	X		X		X		
Serbia/Montenegro		X	X	X	X	X	
Slovakia		X	X	X	X	X	
Slovenia		X	X	X	X	X	
South Africa		X	X	X	X		
Spain		X	X	X	X	X	4%
Sri Lanka		X	X	X	X		
Sweden		X	X	X	X		1%
Switzerland		X	X	X	X	X	1%
Thailand			X	X	X		
Trinidad and Tobago	X		X	X	X		
Turkey		X	X	S	X	X	
Turkmenistan		X	X	X	X		
United Kingdom		X	X	X	X	X	18%
Uruguay	X	X	X	X	X		
USA		X	S	X	S		22%
Uzbekistan		X	X	X	X		
Venezuela	X	X	X	X	X		
Zimbabwe			X	X	X		

## Key:

S = Signature Only

A = Bermuda, Cayman Islands, Falkland Islands, and Montserrat are Overseas Territories of the United Kingdom. The Isle of Man is a Crown Dependency. The United Kingdom can and has extended various treaties to these territories. Even if the U.K. has not extended a particular treaty to a territory, the United Kingdom considers the territory bound by these treaties. *See, e.g.*, White Paper, Britain and the Overseas Territories: A Modern Partnership § 4.1-4.3 (1999).