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R. Lee Strasburger Jr.

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THE BEST INTERESTS OF THE CHILD?: THE CULTURAL DEFENSE AS JUSTIFICATION FOR CHILD ABUSE

R. Lee Strasburger, Jr.*

INTRODUCTION

The windchill was twenty degrees, and she was dragged kicking and screaming out into the cold. She was left there, with minimal clothing, to make a point and force her cooperation.¹ Later, she was held for hours without food and water and was not even allowed to go to the bathroom until she complied with the task prescribed to her.² According to her tormentor, compliance was the only option to avoid further degrading treatment.³

What could easily describe the treatment of an enemy combatant in Guantanamo Bay is shockingly the story of a young American girl raised by her first-generation mother in the United States.⁴ What is more shocking is that the mother is also a tenured law professor at one of the country's most prestigious law schools.⁵ With more knowledge regarding the

* Law Clerk, The Honorable Cindy Morris, Superior Court of Georgia; Juris Doctor 2013, Emory University School of Law; Bachelor of Arts 2010, Duke University. The author would like to thank Professors Barbara Bennett Woodhouse and Kay L. Levine for their guidance while writing this article.

¹ AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER 11-12 (2011).

² *Id.* at 62.

³ *Id.*

⁴ CHUA, *supra* note 1; *see also* Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 197 (2005).

⁵ CHUA, *supra* note 1, at 38. While the adjective "first-generation" is an inherently ambiguous term, which is defined as either a naturalized immigrant or the naturally-born child of an immigrant; here, and in the rest of this article, the adjective will describe the naturally-born child of an immigrant.

interactions between the country's laws, customs, and culture than most United States citizens, she should have known that her actions crossed the line, especially considering that she was born and raised in the United States and not in China and the Philippines like her family.⁶ Instead, she selectively included those anecdotes in a memoir about raising her children in the United States according to her Chinese heritage.⁷ Her story is not unique.⁸

As the world continues to shrink and immigration increases across the globe, children are more frequently being raised under the influence of several cultures.⁹ As these cultures clash, children may be subject to child-rearing practices that are abusive in one culture and accepted in another, leaving state criminal court systems to sort out the aftermath.¹⁰ In these cases, the accused immigrant parents may be able to use the cultural defense to escape conviction or mitigate their sentences in the face of child abuse charges.¹¹ This cultural defense has been successfully used in courts all over the world, including the United States,¹² the United Kingdom,¹³ Canada,¹⁴

⁶ *Id.* at 14-16.

⁷ *Id.* at 3-5.

⁸ See, e.g., Piper Weiss, *Video of Child Without Clothes in Snow Sparks Outrage*, SHINE (Feb. 9, 2012, 9:04 AM), <http://shine.yahoo.com/parenting/video-child-without-clothes-snow-sparks-outrage-230300618.html>. Furthermore, Amy Chua's story is based in the United States; whereas, this article focuses on the use of the cultural defense in child abuse cases throughout the world. CHUA, *supra* note 1.

⁹ Rainer Münz, *Key Changes in Migration Trends Since 1951*, INT'L ORG. MIGRATION (Mar. 16, 2011), http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/wmr2010/Key-Changes-Migration-Trends-1951.pdf; DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 5-6 (2010).

¹⁰ See, e.g., *R. v. Derriviere*, [1969] 53 Crim. App. 637 (U.K.).

¹¹ Alison D. Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J. L. & SOC'Y 47, 49, 52 (2005). In this article, "the cultural defense" refers to a myriad of uses of culture in litigation. As no court has formally recognized such a defense, it is simpler to use one term to refer to all of the potential uses.

¹² *E.g.*, *Dumpson v. Daniel M.* (1974) [hereinafter *Dumpson v. Daniel M.*] (as reported in JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 1210-13 (2d ed. 1985)).

¹³ *E.g.*, *Derriviere*, 53 Crim. App. at 637.

¹⁴ *E.g.*, Charmaine M. Wong, *Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada*, 42 CRIM. L.Q. 367, 386 n.68 (1999) (citing *R. v. Onalik*, 65 Nfld. & P.E.I.R. 74,

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and many other countries.¹⁵ The tremendous and increasing mobility of the global population will likely magnify the conflicts of the past and increase the use of the cultural defense in child abuse cases in the future.

Under the United Nations Convention on the Rights of the Child (“CRC”), a country is responsible for promoting the best interests of every child, including protecting children from physical violence and respecting a child’s cultural values.¹⁶ When a State allows its courts to accept the cultural defense in child abuse cases, it is determining that the best interests of the child lie in cultural respect and not in the protection of children from violence. This determination is not in the best interests of the child and is contrary to the CRC.¹⁷ The CRC’s protection of culture is constrained by the broader human rights framework, including the protection from violence.¹⁸ Thus, the use of the cultural defense in child abuse cases violates the State’s responsibility under the CRC to protect children from physical violence.¹⁹

With the soon to enter into force Third Optional Protocol to the CRC and the increasing mobility of the world’s population,²⁰ the potential liability of a State that allows the use of the cultural defense is growing daily. The Third Optional Protocol will allow children and their representatives to bring

199 A.P.R. 74 [1987] Carswell Nfld. 208 (Can. Nfld. C.A.)).

¹⁵ See Renteln, *supra* note 11, at 47 n.1. (discussing the debate over the cultural defense in four additional countries).

¹⁶ Convention on the Rights of the Child art. 3, 19, 30, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁷ See *infra* Part III.

¹⁸ See Comm. on the Rights of the Child, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia)*, at 8, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter Comm. Comment 8]; see also IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 458 (Rachel Hodgkin & Peter Newell eds., 2007) [hereinafter IMPLEMENTATION HANDBOOK].

¹⁹ See CRC, *supra* note 16, at art. 19.

²⁰ The protocol currently has 36 signatories and 4 ratifications; it will enter into force three months after it receives its tenth ratification. *Status of Optional Protocol to the CRC on a Communications Procedure*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-11-d&chapter=4&lang=en (last visited April 30, 2013).

claims against signatory nations for violations of the CRC.²¹ Thus, signatory States must come into compliance with the CRC or face potential international rebuke.²² To avoid liability in child abuse cases where the cultural defense would be used, the courts should instead compare the accused's acts to an internationally-derived standard to determine if the parent's actions are acceptable.

Part I of this article discusses the trends in immigration and parenting that make use of the cultural defense increasingly more likely in the future. It also explains the cultural defense and children's rights under the CRC. Part II discusses the best interests principle of the CRC as the framework from which to analyze the use of the cultural defense in child abuse cases. Then, in Part III, this article analyzes the use of the cultural defense in child abuse cases from around the world under the framework of the CRC and explains why its use is in direct conflict with the CRC. Finally, Part IV proposes an internationally-derived standard against which judges or juries should compare the acts of immigrant parents in child abuse cases.

I. BACKGROUND

To justify the use of a comparison to an internationally-derived standard instead of the cultural defense in child abuse cases, this Article demonstrates the cultural defense's incompatibility with the principles and rights of the CRC. First, however, it is helpful to understand the trends in immigration, child-rearing practices, and the law upon which the pressing need for this change is predicated.

This section first illustrates the global trends in immigration. Next, it explains the cultural basis of child-rearing techniques. Then, it describes the cultural defense and its use in child abuse cases. Finally, it clarifies the role of the CRC in child abuse cases and the changes the Third Optional Protocol to the CRC will bring to the international legal community.

²¹ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res. 66/138, annex, U.N. Doc. A/RES/66/138, 66th Sess. (January 27, 2012) [hereinafter Third Optional Protocol].

²² *Id.*

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The global migration of people can be characterized by two major trends over the last century: the origins and destinations of most immigrants have changed, and the immigration rate has increased exponentially.²³ Thus, some of the world powers, which were accustomed to spreading their culture to other countries, are now seeing unprecedented influxes of foreign cultures, and there is no indication that these trends are going to ebb in the near future.²⁴

Where Europe used to be the starting point for a large majority of the world's emigrates 120 years ago, it is now one of five regions in the world that together receive 60% of the world's total immigrant population.²⁵ The United States, Australia, Russia, and the Persian Gulf region are the other four areas to which immigrants flock.²⁶ The majority of these immigrants, who used to emigrate from Europe to escape harsh social, economic, or religious conditions, now emigrate from Asia, Africa, and Latin America for many of the same reasons.²⁷

As the world's population grows, the amount of immigration naturally increases as well. Over the last century, the world's population and immigration rates have both experienced exponential growth.²⁸ The number of immigrants entering Europe has risen sharply over the last decade, almost tripling over the last ten years.²⁹ In the United States, the number of legal immigrants entering the country has doubled over the last two decades.³⁰ While economic downturns have

²³ Münz, *supra* note 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*; see also *US Immigration History*, RAPIDIMMIGRATION.COM, http://www.rapidimmigration.com/1_eng_immigration_history.html (last visited Feb. 25, 2012).

²⁸ *Population Numbers, Graphs, and Data*, SUSPS.ORG, <http://www.susps.org/overview/numbers.html> (last visited Feb. 25, 2012).

²⁹ Münz, *supra* note 9.

³⁰ *2011 Yearbook of Immigration Statistics*, U.S. Dep't of Homeland Sec., Office of Immigration Statistics (Sept. 2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf (last visited March 10, 2013).

influenced the immigration rates in the past, there is no indication that these new trends are going to slow in the near future.³¹ A 2009 survey indicates that at least 700 million adults world-wide would immigrate to another country if given the chance.³² The top three locations that these adults would immigrate to if given the chance are the United States, Canada, and Europe.³³

If the trends do not shift dramatically in the near future, unprecedented numbers of immigrants will likely enter countries that are not historical destinations for immigration. These trends make comparison to an internationally-derived standard, as proposed by this Article, increasingly necessary to prevent the justification of child abuse.

B. Cultural Influences on Child-Rearing Practices and the Effects of Immigration

The way a family raises a child is directly related to the cultural background of the child's caregiver.³⁴ As families immigrate to new countries, they may not change their child-rearing practices along with their location. Thus, children are increasingly being raised under the influences of several different cultures.

A parent's cultural background influences that parent's values and parenting styles.³⁵ In the world today, all new parents seek advice from those around them with relevant knowledge to determine how to raise their child: child-rearing experts, their parents, and their friends.³⁶ These three groups

³¹ See Münz, *supra* note 9.

³² Neli Esipova & Julie Ray, *700 Million Worldwide Desire to Migrate Permanently*, GALLUP WORLD (Nov. 2, 2009), <http://www.gallup.com/poll/124028/700-million-worldwide-desire-migrate-permanently.aspx>.

³³ *Id.*

³⁴ See generally PARENTS' CULTURAL BELIEF SYSTEMS: THEIR ORIGINS, EXPRESSIONS, AND CONSEQUENCES (Sara Harkness & Charles M. Super eds., 1996) (discussing the various influences of culture on parents' interactions with their children). This discussion is in no way meant to be ethnocentrically limited to those cultures in which parents are the only caretakers of their children. Unfortunately, repeated reference to a child's "parent, extended family, and community" is bulky and awkward.

³⁵ See *id.* at 2-3, 7-9.

³⁶ JOHN W. SANTROCK, A TOPICAL APPROACH TO LIFESPAN DEVELOPMENT

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of people are influenced by their experiences and draw on these experiences to influence the new parents seeking their help.³⁷ The experiences of these three groups are gained from the culture in which they live and implicitly convey core cultural values upon the parents.³⁸ Thus, new parents use those cultural influences and impart those cultural values to their children.³⁹ If, for example, obedience is valued in the culture, parents will seek to develop obedience in their children and will use child-rearing techniques developed in the culture to do so.⁴⁰ Therefore, the parents' culture directly affects the child as it influences their parenting style and practices.⁴¹

If a parent immigrates to another country, he or she typically does not change all of his or her core values or cultural background.⁴² These values are learned over a long period of time and are not easily changed or forgotten.⁴³ Because immigrant parents bring their ideals with them from their native culture, first-generation children are often raised as if they were living in the parents' native culture, even though these children live in a new culture.⁴⁴ This situation is unique be-

(4th ed. 2007); Wendy Walsh, *Spankers and Nonspankers: Where They Get Information on Spanking*, 51 FAM. REL. 81, 83 (2002).

³⁷ See Walsh, *supra* note 36, at 83.

³⁸ *Id.*

³⁹ See Carolyn Pope Edwards et al., *Parental Ethnotheories of Cultural Development: Looking Beyond Independence and Individualism in American Belief Systems*, in INDIGENOUS AND CULTURAL PSYCHOLOGY: UNDERSTANDING PEOPLE IN CONTEXT 141, 143 (Uichol Kim et al. eds., 2006); Todd Taylor, Note, *The Cultural Defense and its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 333-34 (1997).

⁴⁰ CHUA, *supra* note 1, at 12.

⁴¹ See Edwards, *supra* note 39, at 143, 149-50; Michael Futterman, Note, *Seeking a Standard: Reconciling Child Abuse and Condoned Child Rearing Practices Among Different Cultures*, 34 U. MIAMI INTER-AM. L. REV. 491, 494-96 (2003).

⁴² See John W. Berry, *Immigration, Acculturation, and Adaptation*, 46 APPLIED PSYCHOL.: INT'L REV. 5, 6, 9-10 (1997).

⁴³ See Seth J. Schwartz et al., *Rethinking the Concept of Acculturation: Implications for Theory and Research*, 65 AM. PSYCHOLOGIST 237, 238-39 (2010).

⁴⁴ Arpana G. Inman et al., *Cultural Transmission: Influence of Contextual Factors in Asian Indian Immigrant Parents' Experiences*, 54 J. COUNSELING PSYCHOL. 93, 93 (2007); Chemba S. Raghavan et al., *Parental Ethnotheories in the Context of Immigration: Asian Indian Immigrant and Euro-American Mothers and Daughters in an American Town*, 41 J. CROSS-CULTURAL

cause these first-generation children receive input from two distinct cultures as they grow and mature. Often, the children must conform to the standards of their parents' native culture. This conformity is especially age-driven as young children have not yet developed the agency to rebel that their older selves will most likely possess.⁴⁵ Consequently, first-generation children often feel pulled between their parents' native culture and the culture in which they live.

The number of first-generation children experiencing this conflict is increasing. As the migration data show, currently, more people are moving between cultures.⁴⁶ This increase in immigration directly results in more parents raising their children in their native culture and children growing up stretched between two cultures. However, a search of over forty different parenting-style surveys conducted in the United States, Canada, and the United Kingdom over the last fifteen years, revealed only one survey that looked to the effects of immigration on child-rearing practices in the last decade.⁴⁷ A 2008 survey in Canada of 254 immigrant parents from the Caribbean and the Philippines indicated that almost 59% of the immigrant parents felt they had a right to physically punish their first-

PSYCHOL. 617, 627-28 (2010); see Futterman, *supra* note 41, at 494-96. With the increase in air travel and the use of communications platforms such as Skype, immigrants are more easily able to keep in touch with their native culture. Nevertheless, from personal experience, this contact does not mean that the immigrant is up to date on all of the cultural changes or even willing to accept the ones he or she is aware of.

⁴⁵ BARBARA B. WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 111 (2008).

⁴⁶ See *supra* Part I.A.

⁴⁷ *The Nature and Extent of Corporal Punishment—Prevalence and Attitudinal Research in North America*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN (July 2012), <http://www.endcorporalpunishment.org/pages/pdfs/prevalence/NorthAmerica.pdf> [hereinafter *North American Surveys*]; *The Nature and Extent of Corporal Punishment—Prevalence and Attitudinal Research in Europe and Central Asia*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN (July 2012), <http://www.endcorporalpunishment.org/pages/pdfs/prevalence/Europe-CentralAsia.pdf>. The process of individual acculturation, how an immigrant adapts his or her culture to the new culture in which he or she is living, has received significant attention over the last few decades. See Schwartz, *supra* note 43, at 237. Nevertheless, the focus on how individual acculturation affects parenting has received much less attention. See Raghavan, *supra* note 44, at 617-19.

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generation children.⁴⁸ Both the governmental and non-governmental entities involved in influencing parental education and preventing child abuse are overlooking an interesting and growing subset of the population: families of first-generation children.⁴⁹ This lost generation of first-generation children does not receive the attention it deserves and, as a result, does not receive support from policy makers.

A comparison of surveys of parents in the Philippines and Canada to the survey mentioned above serves as a useful example of the problem facing first-generation children. A look at surveys of parents in the Philippines indicates that at least 71% of girls and 77% of boys have experienced some form of corporal punishment.⁵⁰ In combination with the 2008 survey, where 59% of the Filipino immigrant parents believed in corporal punishment,⁵¹ and in comparison to Canada, where the percentage of children subject to corporal punishment in the entire population is closer to 50%,⁵² the data shows that immigrant parents do not readily adapt their parenting styles to their new cultures.⁵³ Instead, these parents likely act as if they were still in their native cultures and countries. Ignoring the small sample size from the 2008 survey in light of the increases in immigration, this data shows a growing portion of the population that must be accounted for in future policy decisions.⁵⁴

Culturally influenced child-rearing practices and the inflexibility of immigrant parents in adapting those practices make the conflict of cultures almost inevitable. As immigration continues to rise, these cultural conflicts over child-rearing will

⁴⁸ *North American Surveys*, *supra* note 47, at 1.

⁴⁹ *See id.*

⁵⁰ *The Nature and Extent of Corporal Punishment—Prevalence and Attitudinal Research in East Asia and the Pacific*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, at 12 (July 2012), <http://www.endcorporalpunishment.org/pages/pdfs/prevalence/EastAsia-Pacific.pdf> (defining corporal punishment as “spanking, hitting, or slapping with a bare hand . . . or hitting with an object”). With statistics consistently over 60% in three different surveys regarding corporal punishment of children, corporal punishment must be culturally accepted in the Philippines.

⁵¹ *Id.*

⁵² *North American Surveys*, *supra* note 47, at 2.

⁵³ *Id.*

⁵⁴ *See id.*

likely increase as well, increasing the significance of the analysis of this article.

C. *The Cultural Defense and its Use in Child Abuse Cases*

The cultural defense can be used in child abuse cases to escape conviction or mitigate punishments. Accordingly, its use represents a significant threat to protecting children from violence.

The cultural defense is a legal theory that is used by immigrants around the world in both civil and criminal proceedings and has broad applications beyond simply determining culpability.⁵⁵ For example, the defense can be further used to mitigate punishments, increase awards for damages, and create exemptions from policies.⁵⁶ In its most basic form, the defense is used to assert that while the immigrant defendant's actions are unacceptable in the culture in which the prosecution is occurring, these same actions would be legally and socially acceptable in the immigrant's native culture and country.⁵⁷ Accordingly, the immigrant's native culture exerts a stronger influence than the current culture on the defendant and predisposes the defendant to act in certain ways consistent with that influence.⁵⁸ Thus, the defendant should be found not guilty or receive a mitigated punishment as he or she lacked the intent or knowledge to commit the crime (i.e. the *mens rea* for the crime is missing).⁵⁹

Proponents of the cultural defense cite both national and international justifications for its use. Within the United States, for example, both the constitutional right of a parent to

⁵⁵ See Renteln, *supra* note 11, at 47-50; Julia P. Sams, Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 335 (1986).

⁵⁶ Renteln, *supra* note 11, at 49.

⁵⁷ *Id.* at 47-49. For a more nuanced explanation of different forms that the cultural defense can take, see Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 L. & Soc. Inquiry 39, 49-67 (2003) (classifying the uses of the cultural defense into three categories: cultural reason, cultural tolerance, and cultural requirement).

⁵⁸ Renteln, *supra* note 11, at 48.

⁵⁹ *Id.* at 47-49; see Taylor, *supra* note 39, 347-50.

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raise his or her children without interference and equal protection of the law are seen as both supporting and requiring use of the cultural defense in criminal trials.⁶⁰ Without the cultural defense, an immigrant, without knowledge of the norms of the current culture, is not in the same position as his or her new countrymen whose age, race, and gender are considered when determining culpability or sentencing.⁶¹ Culture is just another factor, similar to age or race, to be considered by the judge or jury.⁶² Further, the cultural defense protects a parent's right to raise his or her children in accordance with his or her culture without government interference.⁶³ Internationally, treaty obligations, such as the CRC, often include an obligation to protect the right to one's culture, especially when part of a minority group.⁶⁴ If the laws get in the way of practicing a culture, then the immigrant is unfairly discriminated against.⁶⁵ The State is required to take affirmative steps to protect the right to culture.⁶⁶

Opponents of the cultural defense proffer many reasons for the courts to reject its use. For example, comparison to the mistake of law doctrine is a strong argument against the cultural defense.⁶⁷ Ignorance of the law because you are from another country, critics argue, should not be an acceptable defense to committing a crime.⁶⁸ Public policy is also an argument against the use of the cultural defense, as critics argue it is not in the interests of the State to allow immigrants to

⁶⁰ See Renteln, *supra* note 11, at 48; Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 Buff. L. Rev. 829, 865-68 (1999).

⁶¹ See Renteln, *supra* note 11, at 48.

⁶² *Id.*; see also Wanderer & Connors, *supra* note 60, at 873.

⁶³ Wander & Connors, *supra* note 61, at 865-68.

⁶⁴ Compare Renteln, *supra* note 11, at 48, with CRC, *supra* note 16, art. 30.

⁶⁵ ALISON D. RENTELN, THE CULTURAL DEFENSE 211-12 (2004).

⁶⁶ Renteln, *supra* note 11, at 48; Taryn F. Goldstein, Note, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize A "Cultural Defense"?*, 99 DICK. L. REV. 141, 157 (1994).

⁶⁷ Sams, *supra* note 55, at 335-37.

⁶⁸ See Michael Fischer, *The Human Rights Implications of a "Cultural Defense"*, 6 CAL. INTERDISC. L.J. 663, 685-88 (1998); Sams, *supra* note 55, at 335-37.

ignore the culture of the State they are currently living in.⁶⁹ Others point out that the cultural defense could be overbroad, as it would allow non-immigrant defendants to assert racial stereotypes as a form of cultural motivation for their acts.⁷⁰ Finally, the cultural defense arguably undermines the rights of women and children, as it subjects them to cultures that do not value the rights of women and children.⁷¹

Although opponents of the cultural defense do not need to distinguish between the types of cases, the use of the cultural defense in child abuse cases does not necessarily receive the same support or justification that the cultural defense receives in other cases from the proponents of the cultural defense. While equal protection and due process still apply, the *mens rea* justification is notably absent.⁷² In several criminal codes, child abuse does not contain a *mens rea* element.⁷³ While a parent must intend to make contact with their child, the parent does not need to intend to cause the specific contact that occurs, a general intent to hit the child is sufficient.⁷⁴ Therefore, this rationalization, while compelling, is absent from child abuse cases.

⁶⁹ Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1103 (1994) (citing Malek-Mithra Sheybani, Note, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L. REV. 751, 781 (1987)); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1321-22, 1326 (1991).

⁷⁰ See Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 85, 95 (Austin Sarat & Thomas R. Kearns eds., 1999).

⁷¹ See Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 93-94 (1994); Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1709-11 (2001).

⁷² See John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 114-15 (1986) (noting that excusing an act committed with a "general criminal intent" is not acceptable).

⁷³ See, e.g., *State v. Lucero* 647 P.2d 406, 408-09 (N.M. 1982); *State v. Williquettee*, 385 N.W. 2d 145 (Wis. 1986); see also Jennifer Lynn Thompson, *Criminal Child Abuse*, 33 FAM. ADVOC. 20, 22 (2011).

⁷⁴ DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE (4th ed. 2010).

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In the realm of child abuse litigation, the cultural defense has seen many uses worldwide,⁷⁵ examples of its use to escape conviction or mitigate punishment are explained below. In the United States, the cultural defense was successfully used to mitigate the penalty in *Dumpson v. Daniel M.*⁷⁶ There, a Nigerian immigrant beat his son, also a Nigerian immigrant, in the presence of the school's assistant principal during a conference with the educator regarding his son's behavior in class.⁷⁷ When asked about his actions, the father indicated that his son disrespected the principal by looking at her face and that acting out in class brought shame upon his family.⁷⁸ Both of those excuses, the defense argued, were valid under Nigerian law and in the Nigerian culture.⁷⁹ With that use of the cultural defense, the father did not lose custody of his son but instead received counseling.⁸⁰

In the United Kingdom, the *Regina v. Derriviere* decision demonstrates that the cultural defense can be used successfully to prevent conviction.⁸¹ There, a West Indies immigrant punched his son in the face, leaving cuts and bruises, for disobedience, which is arguably an acceptable way to handle such an offense in the West Indies.⁸² As the court handed down its verdict, it indicated that the cultural defense would have been successful in the present case had the defendant not successfully used the defense a few months earlier to escape conviction for abusing his daughter.⁸³ In that case, he beat his daughter so violently that he fractured her wrists, and the court accepted his cultural defense on similar grounds.⁸⁴

While the cited cases are several decades old, they are only the beginning of an increasing trend in the use of the cultural

⁷⁵ See, e.g., *R. v. Derriviere*, [1969] 53 Crim. App. 637, 638-39 (U.K.); see generally Wong, *supra* note 14, at 389 n.68.

⁷⁶ See *Dumpson v. Daniel M.*, *supra* note 12.

⁷⁷ *Id.* at 1210-11.

⁷⁸ *Id.* at 1211.

⁷⁹ *Id.* at 1211-12.

⁸⁰ *Id.* at 1213.

⁸¹ *R. v. Derriviere*, [1969] 53 Crim. App. 637, 638-39 (U.K.).

⁸² *Id.* at 639.

⁸³ *Id.* at 638-39.

⁸⁴ *Id.* at 639.

defense in child abuse cases.⁸⁵ Further, they are emblematic and canonized examples of cases that often go unpublished or recorded only in local newspaper articles because they are state, trial-level cases.⁸⁶ While the exact number of child abuse cases involving the cultural defense is unknown, the number is definitely increasing and is continually difficult to determine.⁸⁷ Accordingly, the use of the cultural defense presents a significant threat to children.

D. *Children's Rights and the CRC*

The increasing use of the cultural defense in child abuse cases implicates many international obligations, including those of the Third Optional Protocol to the CRC. The CRC, as the world's foremost and most universally accepted source of children's rights,⁸⁸ is the obvious choice to analyze the use of the cultural defense in these cases.

The Children's Rights movement has increased in influence over the last few decades.⁸⁹ Children are now consistently viewed as being in a unique position due to their potential vulnerability and dependence on adults.⁹⁰ Furthermore, children's rights are now considered to be human rights and are known to be more complex than the rights of adults, requiring child-specific tailoring.⁹¹ For example, since the drafting of the CRC, there has been a world-wide push to end all corporal punishment of children.⁹² At the time of this writing, thirty-three

⁸⁵ See, e.g., Dana Parsons, *This Just In, Judge: There's No Cultural Defense for Child Abuse*, LA TIMES (Apr. 28, 2002), <http://articles.latimes.com/2002/apr/28/local/me-parsons28>.

⁸⁶ See *id.*

⁸⁷ WOODHOUSE, *supra* note 45, at 62.

⁸⁸ Mary-Hunter Morris, Note, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 296 (2008).

⁸⁹ See Alison D. Renteln, *Corporal Punishment and the Cultural Defense*, 73 LAW & CONTEMP. PROBS. 253, 272 (2010).

⁹⁰ WOODHOUSE, *supra* note 45, at 29-31.

⁹¹ *Id.* at 29.

⁹² See Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Covering Evidence From Social Science Research and International Human Rights Law and Implications for U.S. Public Policy*, 13 PSYCHOL. PUB. POL'Y & L. 231, 231 (2007).

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countries have legislatively abolished all forms of corporal punishment and several other countries are considering similar legislation.⁹³ The stances of these countries show the effects of the movement, as child abuse itself was only indentified as a significant problem about fifty years ago.⁹⁴

The CRC creates international rights for children and also provides principles that guide States' actions regarding children.⁹⁵ Relevant to the use of the cultural defense in child abuse cases, the CRC creates, among others, a right to protection from all forms of violence, a right to enjoy one's own culture, and a principle that nations must act in the best interests of the child.⁹⁶ At this point in time, the CRC has been ratified by every country in the world, except the United States and Somalia.⁹⁷ Thus, these rights and principles receive almost worldwide acceptance in the international community and are slowly being elevated to the level of *jus cogens*.⁹⁸ Accordingly, any analysis of an international matter concerning children will focus, at some point, on the interaction with the rights and principles of the CRC. Outside of the United States and Soma-

⁹³ *States with Full Abolition*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, <http://www.endcorporalpunishment.org> (last visited Mar. 1, 2013). This article will not discuss the merits of the movement to eliminate corporal punishment. Nevertheless, it is important to note that in some countries, like Sweden, corporal punishment has been outlawed but there is no punishment for the crime.

⁹⁴ MICHAEL FREEMAN, ARTICLE 3: THE BEST INTERESTS OF THE CHILD 70 (2007).

⁹⁵ CRC, *supra* note 16.

⁹⁶ *Id.* arts. 3, 19, 30.

⁹⁷ Somalia does not have a government, and the United States has signed the treaty and ratified two of the three optional protocols to the treaty. See *Status of Convention on the Rights of the Child*, UN TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Oct. 10, 2011); *Status of Optional Protocol to the CRC on the Involvement of Children in Armed Conflict*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited Oct. 10, 2011); *Status of Optional Protocol to the CRC on the Sale of Children*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (last visited Oct. 10, 2011). Some scholars believe that the United States, despite its objections, will become obligated by the CRC as *jus cogens* and that ratification is therefore unnecessary. WOODHOUSE, *supra* note 45, at 313.

⁹⁸ BEDERMAN, *supra* note 9, at 44.

lia, a national matter regarding children will also implicate the obligations of the CRC. Even within the United States, the CRC still exerts its influence on the resolution of children's rights issues.⁹⁹

The CRC's right to protection from all forms of violence is an expansive right based on the principles that no violence against children is justifiable and all such violence is preventable.¹⁰⁰ It applies to "all forms of physical and mental violence" committed by anyone, including parents and guardians.¹⁰¹ The State is charged with taking appropriate legislative and administrative actions to protect children, such as violence prevention, violence identification, and use of the courts.¹⁰² While the CRC does not define what constitutes violence, subsequent interpretations of the CRC by the UN Committee on the Rights of the Child ("Committee") have given more definition to the right.¹⁰³

The Committee issued an interpretation of the right to protection that defined violence in April 2011.¹⁰⁴ The definition included corporal punishment, insults, torture, sterilization, and many other harmful acts.¹⁰⁵ The Committee also indicated that the best interests principle should inform all judicial decisions regarding the right to protection from all forms of violence.¹⁰⁶

⁹⁹ *Roper v. Simmons*, 542 U.S. 551, 622-23 (2005) (Scalia, J., dissenting); see also *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

¹⁰⁰ *Comm. on the Rights of the Child, General Comment No. 13 (2011) The Right of the Child to Freedom from all Forms of Violence*, U.N. Doc. CRC/C/GC/13 (Mar. 21, 2011) [hereinafter *Comm. Comment 13*].

¹⁰¹ CRC, *supra* note 16, art. 19.

¹⁰² *Id.*

¹⁰³ See, e.g., *Comm. Comment 13, supra* note 100. This Committee is the "body of independent experts that monitors implementation of the [CRC] by its State parties." It is a part of the Office of the United Nations High Commissioner for Human Rights. *Committee on the Rights of the Child*, OFF. OF THE U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/crc/> (last visited Mar. 1, 2013).

¹⁰⁴ *Comm. Comment 13, supra* note 100.

¹⁰⁵ *Id.* ¶¶ 19-25.

¹⁰⁶ *Id.* ¶ 54. The best interests principle is commonly thought of in two different contexts. It is both informed and defined by the rights established by the CRC and a tool by which compliance with the rights of the CRC can be analyzed. Due to its complexity and centrality to the argument of this article, the best interest principle will be further explained in Part II. See BEDERMAN,

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The CRC's right to enjoy one's own culture applies especially in situations when the child belongs to an ethnic minority, such as the situation faced by immigrants in their new countries.¹⁰⁷ However, the right to culture is not unlimited. Instead, the Committee recognizes that the culture must comply with the framework of human rights and will never be exempt from these constraints.¹⁰⁸ The Committee further indicates that the right to protection from all forms of violence will supersede the child's right to enjoy his or her culture.¹⁰⁹ Thus, a cultural practice that is harmful to children can never be justified under the CRC.

The Third Optional Protocol to the CRC will allow children and their representatives to directly challenge a State act that violates the CRC.¹¹⁰ The party will be able to petition the Committee to have the offending State practice rectified so that it is in line with the CRC.¹¹¹ When it enters into effect, the signatory States of the Third Optional Protocol will be increasingly liable, on an international level, for violating the best interests of the child and other rights set forth under the CRC.¹¹² State signatories to the Third Optional Protocol and the CRC must come into compliance or face potential action from the Committee.¹¹³

The increasing use of the cultural defense in child abuse cases, resulting from increases in immigration and the persistence of the native culture in a caregiver's child-rearing techniques, implicates several rights created by the CRC. Both the right to protection from all forms of violence and the right to enjoyment of culture are at stake in these cases. To further understand their interactions, the best interests principle must

supra note 9, at 34.

¹⁰⁷ See CRC, *supra* note 16, art. 30.

¹⁰⁸ See Comm. Comment 8, *supra* note 18, at 8; see also IMPLEMENTATION HANDBOOK, *supra* note 18, at 458. Additionally, Children's Rights are now well established human rights. See generally FAMILIES ACROSS FRONTIERS, at PART TWO (Gillian Douglas & Nigel Lowe eds., 1996).

¹⁰⁹ Comm. Comment 8, *supra* note 18.

¹¹⁰ Third Optional Protocol, *supra* note 21, art. 5.

¹¹¹ *Id.* art. 8.

¹¹² *Id.* art. 5.

¹¹³ The action, at this point in time, will likely only be attempts to reach a settlement that ends the violation of the CRC. See *id.* art. 8.

be employed.

II. THE BEST INTERESTS OF THE CHILD

In determining whether the use of the cultural defense in child abuse cases complies with the States' obligations under the CRC, this article analyzes the use of the cultural defense according to the best interests principle as set forth in the CRC. However, the best interests principle is considered to be an ambiguous and indeterminate principle.¹¹⁴ With its genesis in child custody cases and its adoption by the drafters of the CRC, the explicit meaning of the best interests principle is unclear.¹¹⁵ Therefore, this section attempts to clarify the best interests principle: first, as defined by the CRC and, then, as interpreted by the European Court of Human Rights ("ECtHR").

A. *The Best Interests Principle as Defined by the CRC*

While the best interests principle originated outside of the CRC,¹¹⁶ the principle is currently regarded as one of the four general principles of the CRC.¹¹⁷ The concept is, nevertheless, undefined within the CRC and, therefore, is indeterminate.¹¹⁸ As explained in Part I, the CRC creates both rights and interests for children,¹¹⁹ including the right to protection from all forms of violence and the best interests of the child.¹²⁰ This best interests principle may seem out of place in a convention that, according to its name, was designed to create rights.¹²¹

¹¹⁴ Barbara B. Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820-22 (1999).

¹¹⁵ CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD* 43-45, 77-84 (2002).

¹¹⁶ *Id.* at 43-45.

¹¹⁷ FREEMAN, *supra* note 94, at 1.

¹¹⁸ *Id.* at 27; BEDERMAN, *supra* note 9, at 34. Further, there is no international consensus about the definition of the best interests of the child. Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 18-19 (1994); Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501, 514 (2004).

¹¹⁹ FREEMAN, *supra* note 94, at 4-5.

¹²⁰ CRC, *supra* note 16, arts. 3 & 19.

¹²¹ FREEMAN, *supra* note 94, at 4.

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Nevertheless, the rights inform and constrain the best interests of the child and create another obligation for the State.¹²² Accordingly, protection from violence, for example, is not only a right held for a child by his or her parents, but it is also in the best interests of the child.¹²³

The principle of the best interests of the child arguably serves three functions in the CRC: (1) to “support, justify or clarify a particular approach to issues arising under the [CRC];”¹²⁴ (2) to mediate conflicts arising between different rights in the CRC;¹²⁵ and (3) to evaluate State actions not governed by the rights of the CRC.¹²⁶ Each of these three functions implicates rights as established by the CRC, including the rights to protection from violence and to enjoyment of one’s culture. Consequently, all three functions are relevant to an analysis of the use of the cultural defense in child abuse cases and are further explored below.

As part of its first function, the best interests principle is an aid to statutory construction and a factor to consider when implementing the rights of the CRC.¹²⁷ As such, the best interests of a child should always be considered when a State acts in a manner that affects a right bestowed by the CRC. For example, the use of the cultural defense to justify violence against a child affects the right to protection from violence and requires courts to consider the best interests principle when determining whether to accept the defense. In that and similar situations, the best interests principle serves to further delineate a right as set out under the CRC and helps clarify which approaches are in compliance with the CRC.

The second function of the principle extends the first func-

¹²² John Tobin, *Beyond the Supermarket Shelf: Using A Rights Based Approach to Address Children’s Health Needs*, 14 INT’L J. CHILDREN’S RIGHTS 275, 287 (2006).

¹²³ See FREEMAN, *supra* note 94, at 5-6 (citing Tobin, *supra* note 122, at 287).

¹²⁴ Alston, *supra* note 118, at 15-16.

¹²⁵ *Id.* at 16.

¹²⁶ *Id.* (citing Stephen Parker, *The Best Interests of the Child; Principles and Problems*, 8 INT’L J.L. & FAM. 26, 27 (1994)).

¹²⁷ *Id.* at 15-16.

tion to conflicts between two or more rights of the CRC.¹²⁸ Thus, when a State action implicates two or more rights of the CRC, then the best interests of the child must be considered. For example, this situation occurs when the cultural defense is used in child abuse cases since, on the one hand, the use of the cultural defense protects culture and, on the other hand, the rejection of the cultural defense protects children from violence. Thus, the best interests principle will determine which right should prevail and whether the defense should be accepted.¹²⁹ Accordingly, the best interests principle acts almost as a balancing test to determine which right should be upheld or what compromise between the rights is advisable in light of the CRC.

The third function of the best interests principle is to mediate conflicts arising outside of the rights of the CRC.¹³⁰ This function extends the CRC beyond its original reach and allows the treaty to influence virtually any conflict regarding children, regardless of the presence of a specific right on point. Accordingly, if the use of the cultural defense is, for some unknown reason, viewed to not implicate any rights of the CRC, then only the best interests of the child should be considered when determining whether to allow the defense. Obviously, as defined, the best interests principle in this situation would include the right to protection from violence and enjoyment of one's culture, as both rights inform what exactly constitutes the best interests of the child.¹³¹ Thus, even when the best interests principle is being used in situations that do not directly implicate rights of the CRC, the rights still inform the analysis.

Beyond those three functions, a look at the text of the CRC is helpful in further determining the scope of the best interests principle. The best interests principle, as recorded in Article 3 of the CRC, is divided into three sections: one proposing the principle, one charging the State with enforcing the principle with respect to the child's guardians, and one charging the State with enforcing the principle with respect to State ac-

¹²⁸ *Id.* at 16.

¹²⁹ *Id.*

¹³⁰ Parker, *supra* note 126, at 27.

¹³¹ Tobin, *supra* note 122, at 287.

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tions.¹³² The first section of the principle is the most important to this article's analysis, as enforcing the principle, against States or guardians, is not at issue here.

The CRC proposes a principle that governs "all actions concerning children . . . [undertaken by] courts of law."¹³³ This particular text is meant to have as broad an application as possible because it refers to "children" and not a "child."¹³⁴ If the principle was supposed to be applied more narrowly, the wording would not refer to the class of "children" but instead only to the individual "child." Similarly, the phrase "courts of law" is also broadly construed to include civil and criminal courts at both the trial and appellate levels.¹³⁵ In view of this broad construction, decisions regarding the use of defenses in cases related to children are "[acts] concerning children" no matter the court of law, and the best interests principle would apply to the determination of the use of defenses.

According to the text, the best interests of the child should be "a primary consideration" for the State.¹³⁶ This language does not imply that the best interests principle should be the utmost concern of the State, just that the principle must be considered as one of the more important interests when making decisions regarding children.¹³⁷ Likewise, the specific weight that should be given to the best interests principle in decisions regarding children is unknown based on the text.¹³⁸ Nevertheless, it is important to note that parents, under Article 3, are not expected to take the best interests of the child into consideration when making decisions.¹³⁹ Instead, the principle requires the State to ensure the best interests of the child when in the care of his or her parents.¹⁴⁰ Thus, the State should determine if an act of the parent, such as use of the cultural defense, is in the best interests of the child.

¹³² CRC, *supra* note 16, art. 3.

¹³³ *Id.*

¹³⁴ FREEMAN, *supra* note 94, at 45-46.

¹³⁵ *Id.* at 48-49.

¹³⁶ CRC, *supra* note 16, art. 3.

¹³⁷ FREEMAN, *supra* note 94, at 60.

¹³⁸ *Id.*

¹³⁹ *Id.* at 47-48.

¹⁴⁰ CRC, *supra* note 16, art. 3.

What constitutes the best interests of the child, however, is not specifically defined in the CRC, and factors for determination of the best interests are not listed within the CRC either.¹⁴¹ The Committee, however, has identified certain practices as supported by the best interests principle, including elimination of child abuse and corporal punishment.¹⁴² Thus, the insights of the Committee are helpful when determining what constitutes the best interests of the child. Furthermore, while the text of the first section of Article 3 does not specifically or indirectly define the best interests principle, the text of the second and third sections does provide some additional insight into the principle.¹⁴³ Specifically, the text further indicates that care and protection are important to the best interests of the child.¹⁴⁴ This text is used to ensure that situations regarding care and protection that are not explicitly covered by the text of the CRC do not slip through the cracks.¹⁴⁵ However, this protection and care must be balanced with the rights of the parents to raise their children and the rights of the State to convict and punish criminals. This conflict is strongest when children need protection from their parents, as in child abuse cases where parents seek to use the cultural defense.¹⁴⁶ In those situations, countries have clearly demonstrated that they can remove the right of a parent to use corporal punishment.¹⁴⁷ Nevertheless, in countries where corporal punishment is still allowed, children must still be protected from abuse.¹⁴⁸

¹⁴¹ Woodhouse, *supra* note 114, at 820-22. These issues are exactly what fuel the debate surrounding the indeterminacy of the best interests principle.

¹⁴² FREEMAN, *supra* note 94, at 43. Corporal punishment is also in direct conflict with Article 19. CRC, *supra* note 16, at art. 19.

¹⁴³ FREEMAN, *supra* note 94, at 60.

¹⁴⁴ *Id.* at 64.

¹⁴⁵ See Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE NEW HANDBOOK OF CHILDREN'S RIGHTS 388 (Bob Franklin ed., 2002).

¹⁴⁶ FREEMAN, *supra* note 94, at 67-70. Under the CRC, parents are usually the guardians of their children's rights. WOODHOUSE, *supra* note 45, at 27. Children also need protection from their parents at the time of the abuse. The use of the cultural defense obviously applies well after the abuse occurs, but it does directly relate to whether the children may be subjected to more abuse in the future.

¹⁴⁷ GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, *supra* note 93.

¹⁴⁸ FREEMAN, *supra* note 94, at 69-70.

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Accordingly, the best interests principle as defined by the CRC performs three functions and carries ambiguous meaning when it's used to analyze a State action, such as the use of the cultural defense in child abuse cases. Nevertheless, the best interests principle should still be an important concern for States seeking compliance with their obligations under the CRC.

B. The Best Interests Principle as Interpreted by the ECtHR

As set forth by the CRC and defined by the Committee, the best interests principle is still a little too ambiguous to definitively determine if an act by a signatory State, such as the use of the cultural defense, is in compliance with the CRC.¹⁴⁹ Accordingly, it is important to look at real world applications of the best interests principle, such as use by the ECtHR, to flesh out its analytical framework.

As all of the members of the European Convention have ratified the CRC, the ECtHR interprets the CRC as if it were a law of the European Convention.¹⁵⁰ Thus, as the most significant ruling body to interpret the CRC besides the Committee, the ECtHR's analysis shows how the international community perceives its obligations under the CRC. Since Europe is also the destination of a significant portion of the world's immigrants,¹⁵¹ the ECtHR's interpretation of the CRC is also particularly relevant to this article's analysis.

The ECtHR has applied the best interests principle in several cases.¹⁵² However, at the time of this writing, all of these cases stem from child abduction by parents rather than child abuse cases.¹⁵³ Nevertheless, the commentary from these cases

¹⁴⁹ Eric Engle, *The Convention on the Rights of the Child*, 29 QUINNIPIAC L. REV. 793, 805 (2011).

¹⁵⁰ See *Status of Convention on the Rights of the Child*, supra note 97.

¹⁵¹ See supra Part I.A.

¹⁵² *Neulinger v. Switzerland*, Ap. No. 41615/07, Eur. Ct. H.R. (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817>.

¹⁵³ See Franco-British-Irish Colloque on Family Law, *The Best Interests of the Child in the Recent Case-Law of the European Court of Human Rights* EUR. CT. OF HUM. RTS. (May 14, 2011), http://www.echr.coe.int/NR/rdonlyres/E6F5D437-C49A-47C5-9772-578F54FB5C86/0/20110514_COLLOQUE_Dublin_FR.pdf [hereinafter *Recent Case-Law*].

is valuable because it can be compared to the cases that the ECtHR has adjudicated regarding child abuse.¹⁵⁴ This comparison will lead to a better understanding of the best interests of the child in child abuse cases.

In *Neulinger and Shuruk v. Switzerland*, for example, the Grand Chamber of the ECtHR laid out a detailed analysis of the best interests principle.¹⁵⁵ In this case, a Swiss mother removed her child from Israel to Switzerland without the consent of the child's father.¹⁵⁶ Citing the best interests principle, the ECtHR determined that the child should remain with the mother in Switzerland.¹⁵⁷ While this specific use of the best interests principle by the ECtHR is highly controversial because most believe the ECtHR was not the appropriate court to apply the principle,¹⁵⁸ *Neulinger* is useful as an example of how, not when, the ECtHR should apply the principle. Most importantly, the ECtHR highlighted the considerable weight that the best interests principle must be given in cases involving children, noting the "primary consideration" language of the CRC.¹⁵⁹ The ECtHR continued to say there is a "broad consensus" in international law that the best interests of the child must be paramount.¹⁶⁰ The emphasis that the ECtHR placed on the best interests principle shows its centrality to issues surrounding children.

On a more analytical level, the Court in *Neulinger* indicated that the best interests principle can only be applied on a case-by-case basis and cannot be generalized to apply across the board.¹⁶¹ The ECtHR noted that the CRC and the Committee have not proposed criteria for assessment of the best inter-

¹⁵⁴ *Factsheet – Child Protection*, EUR. CT. OF HUM. RTS. (Oct. 2012), http://www.echr.coe.int/NR/rdonlyres/8987C3BA-4F29-4D62-9C01-29FCC45B5A63/0/FICHES_Child_Protection_EN.pdf [hereinafter *ECtHR Factsheet*].

¹⁵⁵ *Neulinger*, Ap. No. 41615/07 ¶¶ 49-53.

¹⁵⁶ *Id.* ¶¶ 15-47.

¹⁵⁷ *Id.* ¶ 151.

¹⁵⁸ Linda J. Silberman, *The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe*- Abbott, *Neulinger*, Zarraga, 63 OKLA. L. REV. 733, 749 (2011).

¹⁵⁹ *Neulinger*, Ap. No. 41615/07 ¶ 50.

¹⁶⁰ *Id.* ¶ 135.

¹⁶¹ *Id.* ¶ 138.

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ests of the child, instead indicating that the “values and principles of the [CRC]” should be applied to each particular case.¹⁶² Accordingly, the court specified that the spirit of the CRC as a whole should be used to determine the best interests of the child.¹⁶³ Further, the ECtHR implicitly indicated that the best interests principle applies to all State actions including judicial decisions, as that is the State action at issue in the case.¹⁶⁴ The ECtHR continued to say that, in a child-relocation case, the child’s age and level of maturity, presence or absence of the child’s parents, and the child’s environment and experiences would be relevant.¹⁶⁵ Due to this variety of factors, the court reasoned that the best interests must be assessed in each individual case.¹⁶⁶

At the time of writing, the ECtHR has only considered the best interests principle in the context of relocation of a child to another country to be with one parent or the other after the parents have separated.¹⁶⁷ In each of the cases, regardless of the dissimilarities in the facts, the ECtHR considered similar factors as those considered by the Court in *Neulinger*.¹⁶⁸ Thus, while, according to the ECtHR, the best interests principle must be applied only on a case-by-case basis,¹⁶⁹ when the cases are similar, the analysis will be similar as well. Therefore, all cases involving the use of the cultural defense to child abuse should employ a similar best interests analysis. Further, while the ECtHR refuses to apply the best interests principle on anything but a case-by-case basis,¹⁷⁰ often only a few decisions are needed to determine the path a country’s legislation will take. In response to *A. v. United Kingdom* and a few others, corporal punishment was outlawed in schools in the United Kingdom.¹⁷¹ Thus, likely only one or two cultural defense child abuse cases

¹⁶² *Id.* ¶ 51.

¹⁶³ *Id.*

¹⁶⁴ *Id.* ¶¶ 47-57.

¹⁶⁵ *Id.* ¶¶ 52-55.

¹⁶⁶ *Id.* ¶ 138.

¹⁶⁷ *Recent Case-Law*, supra note 153.

¹⁶⁸ *Neulinger*, Ap. No. 41615/07 ¶ 52.

¹⁶⁹ *Id.* ¶ 138.

¹⁷⁰ *Id.*

¹⁷¹ ECtHR *Factsheet*, supra note 154.

will be needed to determine the legitimacy of the defense.

In *A. v. United Kingdom*, while the best interests principle was not explicitly used, the ECtHR did determine that the use of corporal punishment on a child was in conflict with Article 19 of the CRC, the right to protection from all forms of violence.¹⁷² In the case, a nine year-old boy was beaten by his stepfather with a garden cane, leaving bruises all over his body.¹⁷³ In the United Kingdom, the boy's stepfather was charged with assault occasioning actual bodily harm and was found not guilty by a jury.¹⁷⁴ At that time in the United Kingdom, parents could administer corporal punishment, which is moderate and reasonable under the circumstances to their child.¹⁷⁵ The boy appealed to the ECtHR, claiming that the State failed to protect him from the ill-treatment.¹⁷⁶

The ECtHR determined that the United Kingdom failed to protect the boy from the ill-treatment.¹⁷⁷ In its reasoning, the ECtHR indicated that, under the CRC, children are "entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."¹⁷⁸ Even though the stepfather's case was tried by jury, the moderate and reasonable punishment exceptions to the United Kingdom's laws were in violation of the State's obligations because of the discretion those exceptions gave to the adjudicator.¹⁷⁹ In the case, beatings of considerable force occurring on more than one occasion reached the prohibited level of severity.¹⁸⁰

As the best interests principle, according to the ECtHR, is based on the spirit of the CRC,¹⁸¹ the holding in *A. v. United*

¹⁷² *A. v. United Kingdom*, Ap. No. 25599/94, Eur. Ct. H.R. ¶ 22 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232>.

¹⁷³ *Id.* ¶¶ 8-9.

¹⁷⁴ *Id.* ¶¶ 10-11.

¹⁷⁵ *Id.* ¶ 14.

¹⁷⁶ *Id.* ¶ 16.

¹⁷⁷ *Id.* ¶ 24.

¹⁷⁸ *Id.* ¶ 22.

¹⁷⁹ *Id.* ¶ 23.

¹⁸⁰ *See id.* ¶ 21.

¹⁸¹ *Neulinger v. Switzerland*, Ap. No. 41615/07, Eur. Ct. H.R. ¶¶ 49-53 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817>.

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Kingdom can be used to show that corporal punishment is not in the best interests of the child. In that case, the ECtHR determined that corporal punishment that reaches such a level of severity that it is child abuse is in conflict with Article 19 of the CRC and, thus, violates the CRC.¹⁸² If such acts are not in the spirit of the CRC, then it follows that those acts are not in the best interests of the child.¹⁸³ Therefore, the ECtHR would hold that the best interests principle does not allow for child abuse. The specific factors that the ECtHR would use in that best interests analysis remain to be seen, but a synthesis of the factors from *Neulinger* and from *A. v. United Kingdom* is a reasonable inference to make. Accordingly, the child's age and maturity, the presence or absence of the child's parents, the child's environment and experiences, and the severity of the physical acts against the child would likely be considered to determine the best interests of the child in a child abuse case.¹⁸⁴

The principle of the best interests of the child, as it is ambiguously defined in the CRC and through its tripartite function under the CRC, is an important analytical tool for determining decisions concerning children. As clarified by the EC-ECtHR, the best interests principle begins to take more shape and accordingly becomes more relevant to decisions regarding children, especially those cases involving child abuse.

III. ANALYSIS OF THE CULTURAL DEFENSE

The use of the cultural defense in child abuse cases implicates a child's right to protection from all forms of violence,¹⁸⁵ a child's right to enjoy his or her culture,¹⁸⁶ and the principle of the best interests of the child,¹⁸⁷ among others.¹⁸⁸ A defendant asserting the cultural defense asks a court to decide which culture, the parents' native culture or their current culture, the child wants to enjoy and whether the protection from violence

¹⁸² *A. v. United Kingdom*, Ap. No. 25599/94 ¶¶ 22-23.

¹⁸³ *Neulinger*, Ap. No. 41615/07 ¶¶ 49-53.

¹⁸⁴ *See id.* ¶ 52.

¹⁸⁵ CRC, *supra* note 16, art. 19.

¹⁸⁶ *Id.* art. 30.

¹⁸⁷ *Id.* art. 3.

¹⁸⁸ *See, e.g., id.* art. 37.

is more important than that enjoyment and in the child's best interests.¹⁸⁹ At the most fundamental level, if the cultural defense is honored, then a child is not protected from violence but that child's culture is respected. Likewise, if the cultural defense is rejected, then a child is protected from violence but that child's culture is ignored. Therefore, to determine if the use of the cultural defense in these situations complies with the State's obligations under the CRC, a comparison of these two rights (to protection from violence and to enjoyment of culture) must be performed using the best interests principle.¹⁹⁰

The use of the cultural defense passes all of the threshold questions regarding whether the best interests principle is an appropriate framework for this analysis.¹⁹¹ Use of the cultural defense is a judicial act; the court determines if the defense can be used and whether it is successful.¹⁹² Therefore, the use of the cultural defense, like other court actions, falls within the scope of the best interests principle as a form of State action.¹⁹³ Furthermore, the use of the cultural defense in child abuse cases directly concerns children by determining how quickly their abusers return to the home after facing prosecution for child abuse and, thus, also falls within the scope of the best interests principle.¹⁹⁴ The successful use of the cultural defense allows a child abuser to interact with his or her victims more quickly than if the defense is rejected.¹⁹⁵ Instead of receiving harsh or rehabilitative punishments for their acts, the child abusers are able to re-establish contact with the victim, a child, with minimal reformatory or punitive measures taken.¹⁹⁶ Accordingly, analysis of the use of the cultural defense with the best interests principle is appropriate.

The best interests principle has three relevant functions

¹⁸⁹ See Renteln, *supra* note 11, at 49-50.

¹⁹⁰ See Alston, *supra* note 118, at 16.

¹⁹¹ See FREEMAN, *supra* note 94, at 44-49.

¹⁹² Renteln, *supra* note 11, at 49.

¹⁹³ FREEMAN, *supra* note 94, at 48-49.

¹⁹⁴ *Id.* at 59-60.

¹⁹⁵ Of course, not all people who use the cultural defense are child abusers, but at least some of the population using the cultural defense did abuse their children. *Supra* Part II.B.

¹⁹⁶ See *R. v. Derriviere*, [1969] 53 Crim. App. 637, 638-39 (U.K.).

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under the CRC.¹⁹⁷ The most important function to this article's analysis is comparing the two conflicting rights to determine which supersedes the other. Nevertheless, to be safe, this article analyzes the use of the cultural defense with all three functions of the best interests principle. The first section analyzes the cultural defense under the separate individual rights to determine the best interests of the child. Then, the second section analyzes the cultural defense by comparing the implicated rights against each other under the best interests principle. Finally, the third section analyzes the use of the cultural defense as if it did not implicate the rights of the CRC.

A. The Cultural Defense and the Individual Rights of the CRC

The use of the cultural defense in child abuse cases, as stated above, implicates at least two distinct rights under the CRC.¹⁹⁸ The right to protection from all forms of violence is involved because child abuse is, by definition, violence towards children; condoning such actions by honoring the cultural defense does not protect the child from said violence.¹⁹⁹ The right to enjoyment of culture is concerned because the cultural defense, by definition, permits or obfuscates a parent's use of his or her native culture to raise his or her child.²⁰⁰

In accordance with the first function of the best interests principle,²⁰¹ this article analyzes the use of the cultural defense in child abuse cases to determine the best interests of the child with respect to the individual rights implicated: first, protection from violence; then, enjoyment of culture.

1. The Right to Protection from All Forms of Violence

At first glance, the use of the cultural defense in child abuse cases most directly impacts the child's right to protection from violence.²⁰² Allowing parents to abuse their children and

¹⁹⁷ FREEMAN, *supra* note 94, at 32-33.

¹⁹⁸ See CRC, *supra* note 16, arts. 19, 30.

¹⁹⁹ See *id.* art. 19.

²⁰⁰ *Id.* art. 30.

²⁰¹ See Alston, *supra* note 118, at 15-16.

²⁰² CRC, *supra* note 16, art. 19.

claim it was culturally acceptable seems at odds with a mandate to protect children from all forms of violence. If a parent can perform any type of violence and receive a reduced punishment or even no punishment at all, the child does not seem to be protected, as there is no deterrent or rehabilitation preventing the reoccurrence of the acts.

As explained in the above section, successful invocation of the cultural defense allows an abusive parent to escape conviction or receive a lessened sentence.²⁰³ A parent who successfully raises the cultural defense to criminal charges might continue to abuse his or her child instead of spending a larger amount of time in jail or in counseling because he or she will likely not comprehend the illegality of his or her acts.²⁰⁴ In the parent's thinking, if the defense works once, it will surely work twice.²⁰⁵ Further, other parents in the immigrant's social circle, presumably from the same culture, will use the accused parent's successful defense as justification for continuing to act in a similar manner.²⁰⁶ While the parents may not believe they are abusing their child, some cultural practices, despite their intentions or beliefs, are still child abuse. Most child abuse statutes do not require *mens rea* for child abuse; instead, the parent must only intend to make contact with the child.²⁰⁷ Thus, common sense indicates that the use of the cultural defense does not protect a child from violence and may place the child at risk of more violence, regardless of the intent of the parent.

The *Derriviere* case shows how the cultural defense is at odds with the right to protection from all forms of violence.²⁰⁸ The courts released an abusive, immigrant father without find-

²⁰³ *Supra* Part II.B.

²⁰⁴ This article will not discuss the merits of separating children from their parents.

²⁰⁵ No matter how incorrect this belief actually is. See *R. v. Derriviere*, [1969] 53 Crim. App. 637 (U.K.).

²⁰⁶ See Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. Rev. 723, 745 (1994). Of course, it also possible that the parents and their social circle learn from the child abuse prosecution and stop the acts they are in front of the court for.

²⁰⁷ See, e.g., *State v. Lucero* 647 P.2d 406, 408-09 (N.M. 1982); *State v. Williquettee*, 385 N.W. 2d 145 (Wis. 1986); ABRAMS & RAMSEY, *supra* note 74.

²⁰⁸ *Derriviere*, 53 Crim. App. at 639.

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ing him culpable for fracturing his daughter's wrists.²⁰⁹ In less than a year, the father was convicted of abuse for punching his son in the face.²¹⁰ The court had an initial opportunity to protect the child from violence through counseling, imprisonment, or other punishment but instead chose to let the father go.²¹¹ This case shows how contradictory to the CRC and the right to protection from violence the cultural defense actually is. Instead of protecting children from violence, the cultural defense essentially condoned violence in this case, resulting in more violence towards children.

The use of the cultural defense is not in the best interests of any child. Using the best interests principle as modified by the ECtHR, the defense must be analyzed according to the spirit of the CRC.²¹² The CRC seeks to protect vulnerable children and does not condone violence.²¹³ Here, the analysis is clear: allowing a parent to more easily become a repeat abuser is not in the best interests of the child. Children of immigrants are in an even more vulnerable position than non-immigrant children because they are in a unique and culturally-isolated situation.²¹⁴ These first-generation children are likely to have fewer resources and a shallower understanding of their rights in this new culture. Protecting these children from violence is in accordance with the right to protection and is, thus, in the spirit of the CRC.²¹⁵ However, the use of the cultural defense does not protect these children. By promoting or condoning violence, the use of the cultural defense in child abuse cases is not in the best interests of the child and fails the best interests

²⁰⁹ *Id.*

²¹⁰ *Id.* at 638-39.

²¹¹ *Id.* at 639.

²¹² *Neulinger v. Switzerland*, Ap. No. 41615/07, Eur. Ct. H.R. ¶ 51 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817>. This article will not discuss the use of the cultural defense in international courts, like the ECHR. For a discussion on that topic, see Alison D. Renteln, *Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues*, 18 SW. J. INT'L L. 267 (2011).

²¹³ *Neulinger*, Ap. No. 41615/07 ¶ 51; *A. v. United Kingdom*, Ap. No. 25599/94, Eur. Ct. H.R. ¶ 22 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232>.

²¹⁴ *Supra* Part I.B.

²¹⁵ FREEMAN, *supra* note 94, at 43.

principle as modified by the ECtHR.

A comparison to *A. v. United Kingdom* supports this analysis of the use of the cultural defense. In that case, the exemptions in the statute that determined what constitutes reasonable punishment despite the severity of the beating violated the CRC.²¹⁶ Similarly, the cultural defense acts as an exemption of certain culturally-influenced acts from conviction for child abuse despite the severity of the abuse and must violate the CRC as well. Any State action that does not protect a child from harm is in violation of the CRC.²¹⁷ A court accepting the cultural defense is a State action that does just that: permits violence, instead of protecting children from violence. Therefore, the use of the cultural defense is not in the best interests of the child.

The use of the cultural defense violates the best interests principle as modified by the ECtHR because it does not protect children from violence. As established by the CRC, any practice that violates the right to protection from violence is in violation of the best interests principle.

2. The Right to Cultural Enjoyment

The use of the cultural defense in child abuse cases does, theoretically, allow a first-generation child to enjoy a minority culture - the native culture of his or her parents. However, the right to enjoy a minority culture must be framed within the context of human rights.²¹⁸ The Committee indicated that any violent cultural act, such as corporal punishment, would not be condoned by the right to enjoy the culture.²¹⁹

The cultural defense allows parents to use their native culture to raise their child.²²⁰ If the abusive acts were accepted in the native culture, then the courts adapt and allow the acts to go unpunished.²²¹ Thus, the parent is free to raise the child in line with his or her cultural heritage, and the child can enjoy

²¹⁶ See *A. v. United Kingdom*, Ap. No. 25599/94 ¶¶ 22, 24.

²¹⁷ See *id.* ¶ 22.

²¹⁸ IMPLEMENTATION HANDBOOK, *supra* note 18, at 458.

²¹⁹ *Id.*

²²⁰ Renteln, *supra* note 11, at 49.

²²¹ Fischer, *supra* note 68, at 678.

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his or her minority culture heritage.²²²

Nevertheless, the use of the cultural defense is not in the best interests of the child here. For this analysis, the ECtHR again indicates the spirit of the CRC is controlling. According to the spirit of the CRC as delineated by the Committee, the enjoyment of culture must be secondary to any human rights concerns, such as protecting children from violence.²²³ The analysis is clear: allowing a parent to abuse a child does not comply with the human rights concerns of protecting children from violence. The Committee has unequivocally stated that this right cannot be used to justify corporal punishment or child abuse.²²⁴ Thus, justifying the use of the cultural defense with this right is in violation of the CRC because it promotes culture over safety and is not in the best interests of the child.

Accordingly, the use of the cultural defense in child abuse cases violates two distinct rights of the CRC and is in conflict with the best interests principle. Therefore, a comparison of the two rights under the best interests principle is necessary.

B. The Cultural Defense and the Conflicting Rights of the CRC

Since both rights under the CRC, protection from violence and enjoyment of culture, are implicated by the use of the cultural defense in child abuse cases, it makes sense that the appropriate analysis is actually a comparison of the conflicting rights to determine the best interests of the child. In a comparison of the rights, the protection from violence clearly trumps the enjoyment of culture. Thus, the use of the cultural defense in these situations is not in the best interests of the child and is contrary to the CRC.

The Committee already favors the protection from violence in a comparison with the enjoyment of culture. As stated above, the Committee indicated that the child's right to enjoy a minority culture must be constrained by the framework of hu-

²²² This fact pattern also indicates that if the parent is removed from the home, then the child will likely not be raised in the culture at all.

²²³ IMPLEMENTATION HANDBOOK, *supra* note 18, at 458.

²²⁴ *Id.*

man rights.²²⁵ Further, the Committee continued to say that cultural corporal punishment, and similarly violence, cannot be condoned by the right to cultural enjoyment.²²⁶ Consequently, the comparison between the right to protection from violence and the right to cultural enjoyment is obvious. In the Committee's view, the child's right to protection from violence trumps the right to cultural enjoyment.²²⁷

The ECtHR additionally indicates that the right to protection from violence trumps the right to cultural enjoyment. In *A. v. United Kingdom*, the ECtHR held that the statutory factors used in the United Kingdom to determine whether punishment is appropriate under the circumstances were in violation of the CRC.²²⁸ The use of the cultural defense, in comparison, is no more than a factor to determine whether punishment is appropriate under the circumstances and is accordingly in violation of the CRC. Therefore, the comparison between the right to protection from violence and the right to cultural enjoyment shows that the ECtHR favors the right to protection from violence.

Following the best interests principle as modified by the ECtHR, the use of the cultural defense is not in the best interests of the child. The best interests should be determined on a case-by-case basis with the spirit of the CRC in mind.²²⁹ In this particular comparison, the spirit of the CRC holds that basic human rights are more important than cultural enjoyment.²³⁰ Thus, the right to protection from violence will always trump the right to cultural enjoyment. Given that the Committee has indicated that human rights must be protected at all times, the use of the cultural defense is in violation of the CRC.²³¹ Thus, looking to the ECtHR factors for the best interests of the child

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *A. v. United Kingdom*, Ap. No. 25599/94, Eur. Ct. H.R. ¶ 22 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232>.

²²⁹ *Neulinger v. Switzerland*, Ap. No. 41615/07, Eur. Ct. H.R. ¶ 51 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817>.

²³⁰ IMPLEMENTATION HANDBOOK, *supra* note 18, at 458.

²³¹ *Id.*

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from *Neulinger* and *A. v. United Kingdom*, the age of the children and their need to be with their parents are unimportant when the protection of the child from violence is at stake.²³² No matter the age of the child, preventing permanent harm is more important than being raised by a biological parent.²³³ Accordingly, the use of the cultural defense in any case incorrectly elevates culture over protection from violence and fails to consider the primary concern, which is in the best interests of the child.

The *Derriviere* case provides support for the right to protection from violence. In the case, the argument for use of the cultural defense is that the children should be able to be raised under the influence of their heritage.²³⁴ However, when that heritage results in beatings and fractured wrists as punishment for disobedience, the right to culture seems to be condoning the use of violence.²³⁵ In this case, the use of the cultural defense does not protect human rights at all times and is not in the best interests of the child. Two children are harmed for the sake of a culture that abhors disobedience, and none are protected from violence. Thus, using the cultural defense in child abuse cases does not protect children from violence.

Both the Committee and the ECtHR agree that in a comparison between the right to protection from violence and the right to cultural enjoyment, the right to protection from violence takes precedent. Accordingly, the use of the cultural defense in child abuse cases violates the best interests of the child.

C. *The Cultural Defense Outside of the Rights of the CRC*

If the use of the cultural defense in child abuse cases did not implicate any rights under the CRC, then, in accordance with the third function of the best interests principle under the CRC, the analysis of the use of the cultural defense must focus

²³² See *Neulinger*, Ap. No. 41615/07 ¶ 51.

²³³ SUSAN H. BITENSKY, *CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION* 8-23 (2006).

²³⁴ *R. v. Derriviere*, [1969] 53 Crim. App. 637 (U.K.).

²³⁵ *Id.*

solely on the best interests of the child.²³⁶ Considering the indeterminacy of the best interests of the child, the ECtHR modifications to the best interest principle are useful for this analysis. Nevertheless, the use of the cultural defense is not in the best interests of the child and is therefore contrary to the obligations of a State under the CRC.

Since the Committee has given no specific factors in regard to assessing the best interests of the child, the ECtHR's analysis of the best interests principle provides some guidance.²³⁷ To determine the best interests of the child, the ECtHR will look to the spirit of the CRC.²³⁸ However, in terms of the spirit of the CRC, the ECtHR has not listed factors regarding the best interests of the child in child abuse cases, only providing best interests factors to consider in child-relocation cases.²³⁹ Adapting those factors to child abuse cases and combining them with factors from ECtHR child abuse cases gives some definition to the best interests principle for this analysis.²⁴⁰ Accordingly, an analysis using the best interests principle will consider the age and maturity of the child involved, the presence of the parents, the child's experiences and environment, and the severity of the accused's acts.²⁴¹

No matter the age or maturity of the child, severe corporal punishment is harmful and not in the best interests of the child. A young or immature child is just as affected, if not more so, than an older, more mature child.²⁴² The younger child has less ability to explain the acts of his or her parents.²⁴³ While age may lessen the effects of corporal punishment, it does not

²³⁶ FREEMAN, *supra* note 94, at 32-33.

²³⁷ *Id.* at 50-51.

²³⁸ Neulinger v. Switzerland, Ap. No. 41615/07, Eur. Ct. H.R. ¶ 51 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817>.

²³⁹ *Id.* ¶ 52.

²⁴⁰ *Id.* ¶¶ 51-52; A. v. United Kingdom, Ap. No. 25599/94, Eur. Ct. H.R. ¶ 22 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232>.

²⁴¹ Neulinger, Ap. No. 41615/07 ¶¶ 51-52; A. v. United Kingdom, Ap. No. 25599/94 ¶ 22.

²⁴² BITENSKY, *supra* note 233, at 8-23 (listing several studies that look at different factors and the effects of corporal punishment on them).

²⁴³ *Id.*

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stop them.²⁴⁴ Thus, the use of the cultural defense in these cases would be against the best interests of the child regardless of the child's age.

Consideration of the presence of the parents to determine if the cultural defense is in the best interests of the child leads to a stalemate in the analysis. If the parent is abusive, the child is potentially better served by not having the parent around. However, the presence of both parents in the child's life is usually viewed as a good thing.²⁴⁵ Further, the absence of a parent may limit the child's access to that parent's native culture and force the child into foster care if the parent is a single parent, neither of which are desirable outcomes. Thus, the presence of the parents is not dispositive of the best interests of the child.

Looking at the environment and experiences of the child indicates that the use of the cultural defense in child abuse cases is against the best interests of the child.²⁴⁶ Given that the courts often seek to reform abusive parents through education and that the use of the cultural defense eliminates or significantly reduces the available punishments,²⁴⁷ the cultural defense functions to eliminate a court's ability to change a parent's understanding of what constitutes abuse. If the parent's knowledge does not change, then the child's environment will not change either. Even in the situation where the parents are aware of the impropriety of their acts but believe their native culture is more important, the cultural defense still allows the abusive environment to continue. As a result, the environment and experiences of the child show the use of the cultural defense is not in the best interests of the child.

The severity of the acts also indicates that the use of the cultural defense is against the best interests of the child. The cultural defense is used to eliminate culpability or reduce liability for acts that would be severe enough to be considered

²⁴⁴ *Id.*

²⁴⁵ Sara McLanahan, *Father Absence and the Welfare of Children*, in *COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE* 117 (M. Hetherington ed. 1999).

²⁴⁶ Neulinger, Ap. No. 41615/07 ¶ 52.

²⁴⁷ See SAUL SPIGEL, *CHILD ABUSE PREVENTION AND PUNISHMENT*, R-0836 (Conn. 2002); *supra* Part I.C.

child abuse without the defense.²⁴⁸ Analogously, the cultural defense can be used in cases where the acts are much less severe. Accordingly, the use of the cultural defense, similar to the statute in *A. v. United Kingdom*,²⁴⁹ does not consider the severity of the acts and, because of this oversight, is against the best interests of the child. Consequently, the severity of the acts shows the use of the cultural defense is against the best interests of the child.

While there is no indication as to which factors are more important in the best interests analysis, the majority of the factors indicate the use of the cultural defense in child abuse cases is against the best interests of the child. Three factors indicate that the use of the cultural defense in child abuse cases is against the best interests of the child,²⁵⁰ and one factor is of no use in the analysis.²⁵¹ Considering both the ECtHR and the CRC aversion to corporal punishment,²⁵² a defense that allows a parent to use corporal punishment will decidedly be in conflict with the CRC as well. Therefore, the use of the cultural defense is neither in the spirit of the CRC nor in the best interests of the child.

Accordingly, no matter the function of the best interests principle, the use of the cultural defense in child abuse cases is in violation of the best interests of the child and the CRC. By accepting the cultural defense in these cases, the State is violating its obligations under the CRC by not protecting a child from violence. The enjoyment of culture is secondary to this protection from violence and, thus, not violated by a court's refusal to accept the use of the cultural defense. The State is in a peculiar position where use of a common law defense places it in violation of its international obligations and must now determine a solution to bring it within compliance with its inter-

²⁴⁸ See *supra* Part I.C.

²⁴⁹ *A. v. United Kingdom*, Ap. No. 25599/94, Eur. Ct. H.R. ¶ 22 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232>.

²⁵⁰ The presence of the parents, the child's experiences and environment, and the severity of the accused's acts.

²⁵¹ The age and maturity of the child.

²⁵² See *A. v. United Kingdom*, Ap. No. 25599/94 ¶ 22; WOODHOUSE, *supra* note 45, at 18.

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national obligations.

IV. SOLUTION: COMPARISON WITH AN INTERNATIONALLY - DERIVED STANDARD

Given that the use of the cultural defense in child abuse cases clearly violates a State's obligations under the CRC,²⁵³ signatory States must establish rules for the relevant use of the cultural defense in child abuse cases. This article proposes that the States provide their court systems with an internationally-derived standard with which to compare acts of abusive, immigrant parents to determine culpability and liability. This comparison will solve the States' international compliance issues and provide additional advantages over the status quo.

The proposed solution is advantageous for many reasons. Implementation of the standard will minimally impact the court systems and requires little additional time or resources of the court. Further, it will comply with the domestic obligations of due process and equal protection, as well as the international obligations of the CRC. Finally, the proposed solution will provide judicial outcome clarity to these cases. To establish these benefits, the first section further defines and explains the proposed solution. The second section outlines and analyzes the advantages and limitations of the solution. The final section uses a real world example to illustrate the proposed solution.

A. Solution: Definition and Clarification

A court should compare an immigrant's acts with an internationally-derived standard. Instead of looking at the immigrant's native culture, the court would compare the immigrant's acts to an internationally-derived standard and determine if the acts were in compliance with the norms established by the standard. Internationally accepted acts would not be considered child abuse, but internationally unacceptable acts would be child abuse.

The internationally-derived standard would be a set list of

²⁵³ See *supra* Part III.

which acts constitute child abuse and which do not. Using the CRC as the basis for this standard is impossible because the CRC's treatment of violence in Article 19 is not concrete enough to be considered a standard.²⁵⁴ In fact, several scholars have advocated for an international standard delineating what does and does not constitute child abuse under the CRC.²⁵⁵ The internationally-derived standard proposed here could be similar, if not identical, to the list of what constitutes violence proffered by the Committee in its comment from April 2011.²⁵⁶ That list is more than specific enough to serve as a standard with which an immigrant's acts could be compared.²⁵⁷ Whatever the basis for the list in the standard, the internationally-derived standard should parallel the *jus cogens* surrounding children's human rights norms. Accordingly, the internationally-derived standard will delineate what does and does not constitute child abuse from an international perspective.

To determine the substance of the internationally-derived standard, a State's legislative body would create the standard from its own research, adopt the standard of the Committee, or allow the judiciary to create a common law standard.²⁵⁸ The standard would thus define categories of which actions constitute abuse and which do not, in accordance with the best interests principle. Accordingly, those definitions would be as flexible or transitory as any other standard in the State. Thus, the State will be responsible for determining its own international-

²⁵⁴ Michael D.A. Freeman, *Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children*, 73 LAW & CONTEMP. PROB. 211, 219-21 (2010).

²⁵⁵ Abdullahi An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, in THE BEST INTEREST OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 62, 78-79 (Philip Alston ed., 1994). Of course, some scholars have argued that a bright line rule in cultural defenses is impossible. See Sikora, *supra* note 71, at 1711-13.

²⁵⁶ Comm. Comment 13, *supra* note 100, ¶¶ 22-23 (defining physical violence as "[a]ll corporal punishment and all other forms of torture, cruel, inhuman or degrading treatment," amongst other acts).

²⁵⁷ See *id.*

²⁵⁸ This step in the creation of the internationally-derived standard is necessary to avoid due process issues. Thus, the standard is actually a domestically established standard. Nevertheless, the acts constituting child abuse according to the standard would be what are considered child abuse on an international level not a State level.

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ly-derived standard for comparison.

The proposed solution, an internationally-derived standard with which the courts could compare an immigrant's acts, will be dependent on the State to take shape. Consequently, the advantages and limitations of the solution will also depend on the State.

B. Solution: Advantages and Limitations

As with any proposed change, there are associated advantages and limitations to this solution. The solution will obviously bring the States into compliance with international standards. However, by requiring only minimal changes by the courts, the proposed solution will continue to comply with any domestic obligation and will be easy for the courts to implement. Finally, the proposed standard will provide judicial clarity to a situation that is currently very opaque.

First, the proposed standard will bring the offending States into compliance with their obligations under the CRC. Instead of condoning violent conduct through the use of the cultural defense, the courts would be comparing the accused's acts with the internationally-derived standard to determine if the acts were acceptable or not. If the internationally-derived standard delineates what constitutes appropriate and inappropriate acts, then a comparison with it would protect a child from all forms of violence and be in the child's best interests. The comparison would allow jurors to more easily determine who was culpable, and it would prevent abusers from repeating or avoiding reprimand for their actions. Accordingly, the comparison to an internationally-derived standard is in compliance with international obligations.

The use of an internationally-derived standard will protect the State from sanctions relating to its violation of its international obligations. As the use of the cultural defense in child abuse cases is likely to increase in the near future, the number of opportunities to seek redress for a child who has been harmed by the State's violation of its obligations will also increase,²⁵⁹ especially in Europe where the CRC can be enforced

²⁵⁹ See Third Optional Protocol, *supra* note 21.

by the ECtHR.²⁶⁰ This increase in redress opportunities means that States are likely to be held accountable for allowing the use of the cultural defense. The proposed solution, through compliance with the CRC, will allow States to escape culpability in these situations. If the alleged abusive act was in compliance with the internationally-derived standard and based in *jus cogens*, a court, like the ECtHR, is unlikely to find that a State must be more diligent than the international community in preventing child abuse. A State will not be liable for acts that are in line with *jus cogens*.²⁶¹ Thus, the liability of the States will decrease with acceptance of this article's proposal, comparison to an internationally-derived standard.

Of course, the proposed standard will not necessarily narrow a State's definition of child abuse. While the use of the cultural defense arguably broadens a State's definition of child abuse in that specific case to include acts that are usually criminalized, the use of an internationally-derived standard for comparison is only as narrow as the drafters allow. The standard put forth by the Committee is extremely detailed and far-reaching.²⁶² If an internationally-derived standard is put into place, the end result chosen by the legislature may in fact be a definition of child abuse that is narrower than that already in the criminal statutes. It may, however, be broader and not include some of the acts that are included in the current child abuse statutes. Nevertheless, at least vulnerable first-generation children will be provided with more protection from violence than if the use of the cultural defense was still permitted.

Second, the proposed solution will only minimally change the current infrastructure surrounding child abuse in the States. While comparison to an internationally-derived standard will prevent a judge or jury from deciding between two cultures, there will be no due process or equal protection issues related to the change. With the current cultural defense, the

²⁶⁰ T. v. United Kingdom, App. No. 24724/94, Eur. Ct. H.R. ¶ 44 (1999), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58593>.

²⁶¹ BEDERMAN, *supra* note 9, at 44.

²⁶² Comm. Comment 13, *supra* note 100, ¶¶ 19-32.

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judge or jury must decide if the previous culture's ideals should obfuscate the ideals of the current culture.²⁶³ Looking at an internationally-derived standard, however, the judge or jury does not even need to know the cultural background of the immigrant parent seeking to use the cultural defense. There will be no feelings of prejudice and no need for a judge or jury to decide which ideals merit consideration. All cultures and immigrant parents will be treated equally under the law and compared to the same standard.²⁶⁴ Nevertheless, an immigrant's diverse cultural background will still receive some consideration.²⁶⁵ Accordingly, there would be no issues of due process or equal protection.²⁶⁶ Both of these standards are cited in favor of the use of the cultural defense,²⁶⁷ but if the entire world is treated similarly under the law, there can be no arguments of discrimination or unfair trials and no challenges to the proposed solution under domestic laws.

The comparison to an internationally-derived standard will not redefine the crime of child abuse and will therefore require minimal effort by the judicial system to implement it. It will instead delineate the boundaries of what is considered child abuse. This minimal clarification will not unduly burden the judicial system by requiring immense changes in the process. For example, in some states of the United States, child abuse has no *mens rea* component.²⁶⁸ The parent does not have to intend to abuse the child, only to cause the contact which is considered abuse.²⁶⁹ By comparing the accused's acts to an internationally-derived standard to determine if an act is child abuse, a parent would still be guilty of child abuse without the

²⁶³ Renteln, *supra* note 11, at 49.

²⁶⁴ See U.S. CONST. amend. XIV § 1. Non-immigrant citizens could also be subject to the comparison to the internationally-derived standard.

²⁶⁵ See *id.* amend. V, XIV.

²⁶⁶ *Id.*

²⁶⁷ Renteln, *supra* note 11, at 48.

²⁶⁸ See, e.g., *State v. Lucero* 647 P.2d 406, 408-09 (N.M. 1982); *State v. Williquettee*, 385 N.W. 2d 145, 149-50 (Wis. 1986).

²⁶⁹ ABRAMS & RAMSEY, *supra* note 74. Consider the case where a parent strikes a child intending to hit the child's posterior but the child moves and the parent instead strikes the child in the face. This act would likely be considered child abuse even though the parent only intended to strike the posterior, not the face.

criminal intent or *mens rea*. If the parent intended the contact, then the parent is culpable. The difference is that the internationally-derived standard delineates which contacts constitute child abuse. Consequently, adoption of the proposed solution will require minimal effort by the judicial system.

Finally, the comparison to an internationally-derived standard will decrease the judicial error and uncertainty in child abuse litigation that currently accompanies the use of the cultural defense.²⁷⁰ With a bright line standard, judges, juries, and litigants would know exactly what constitutes acceptable conduct and what does not. Instead of attempting to define cultural ideals, the predefined list would set the boundaries of abusive conduct without the need for extensive interpretation. By removing the need for judges or juries to understand another culture's ideals, the standard would avoid judicial error and uncertainty associated with incorrect interpretation of those ideals.

Cultural standards are not always easy to identify, especially from sometimes several thousand miles away. Use of the cultural defense in some child abuse cases has been questioned on the grounds of misinterpreting the culture.²⁷¹ Sometimes, the immigrant's native culture is changing without his or her knowledge, but the court accepts the explanation as if the cultural reality in the native culture was different.²⁷² Comparison to an internationally-derived standard will avoid these errors by removing the need to define a culture. The litigants will be able to more easily determine if their acts are legal according to the standard or not. Instead of trying to define a potentially nebulous concept, the courts will be doing statutory interpretation, a task they are capably equipped to handle.

Accordingly, implementation of the proposed solution will bring States into compliance with their international obliga-

²⁷⁰ See *Man Gets Probation After Pouring Pepper on Boy*, HOUS. CHRON., Jan. 15, 1988, § 1, at 18.

²⁷¹ See Farah Sultana Brelvi, "News of the Weird": Specious Normativity and the Problem of the Cultural Defense, 28 COLUM. HUM. RTS. L. REV. 657, 681-83 (1997); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 124, 132 (1997); *Man Gets Probation After Pouring Pepper on Boy*, *supra* note 270.

²⁷² Renteln, *supra* note 89, at 268.

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tions. This compliance will not come at the expense of the judicial system and will in fact result in increased judicial clarity and certainty.

C. Solution: An Example

The proposed solution, an internationally-derived standard, lacks persuasiveness in its abstract form.²⁷³ To further support this solution, this section applies the standard to an actual case. This example demonstrates the benefits of using an internationally-derived standard to determine culpability and sentencing in culturally influenced child abuse cases.

In the *Osho* case from 1987, a Nigerian immigrant successfully used the cultural defense to mitigate his punishment for beating his nephew with an electrical cord and placing pepper in the wounds.²⁷⁴ Before accepting the cultural defense, the judge should have answered two important threshold questions regarding the Nigerian culture: did the Nigerian culture actually condone this type of behavior when and where the uncle lived in Nigeria; and, since the uncle's departure, does that culture still condone this type of punishment.²⁷⁵ The court in this case, however, did not answer either question.²⁷⁶ Despite testimony that the uncle did not punish in this manner when he was in Nigeria and does not punish his children in a similar manner, the court accepted the argument that in Nigeria, generally, this form of corporal punishment was culturally accepted.²⁷⁷ However, Nigeria's culture is compartmentalized according to tribes, and no proof was given to show that the uncle's specific tribe condoned his acts.²⁷⁸ Further, critics argue that it is possible that the uncle's native culture discarded this form of punishment in the 1980's, after the uncle left Nigeria, in line with the national and international movements seeking to do just that, without the uncle's knowledge.²⁷⁹ Therefore, the use

²⁷³ WOODHOUSE, *supra* note 45, at 45.

²⁷⁴ Renteln, *supra* note 89, at 268.

²⁷⁵ *See id.* at 268-69.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 268.

²⁷⁹ *Id.* at 268 n.75.

of the cultural defense here is marked with uncertainty resulting from the potential judicial error and is, per the analysis of this article,²⁸⁰ in conflict with the State's obligations under the CRC.

By comparing with an internationally-derived standard, instead of the Nigerian culture proposed by the experts, the judge would have avoided the uncertainty and potential error now associated with the case. The judge would neither have to ask nor answer either of the two questions in the previous paragraph. There would be no uncertainty surrounding the past or present status of the accused's acts in Nigeria. Instead, the question would be if the acts were validated or prohibited by the internationally-derived standard. The court would conclude that a beating with an electrical cord, as severe violence not in the best interests of the child, is prohibited by the internationally-derived standard. Thus, the uncle could not use the cultural defense to avoid punishment for his crime, and there would be no basis for appeal of the court's holding.

Because the uncle could not use the cultural defense, the State would not be in violation of its international and domestic obligations. Because his acts would be punished, the uncle could not return to abuse his nephew without counseling or incarceration. Thus, the nephew, a child, would be protected from violence. This protection is in the nephew's best interests and complies with the best interests principle of the CRC.²⁸¹ This compliance protects the State from any potential sanctions on an international level.²⁸² Further, since all immigrants' acts, regardless of their country of origin, would be compared to the same standard, there would be no violations of domestic obligations of due process or equal protection.²⁸³ Accordingly, the use of the proposed solution would satisfy the State's obligations.

With the use of a comparison to an internationally-derived standard instead of the cultural defense in child abuse cases, a State would be in compliance with its international obligations

²⁸⁰ See *supra* Part III.

²⁸¹ See CRC, *supra* note 16, art. 19.

²⁸² See Third Optional Protocol, *supra* note 21.

²⁸³ See U.S. CONST. amend. V, XIV.

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under the CRC, would be in compliance with its domestic obligations, and would prevent judicial error. As almost every nation in the world is a party to the CRC and the use of the cultural defense is likely to increase, every nation should consider implementing an internationally-derived standard for comparison in child abuse cases.

CONCLUSION

Reflecting back on the story of the young girl from the Introduction, her story ends on a more positive note than most children in her situation. Her mother significantly modified her parenting style after an argument during which the child expressed the pain her mother's acts caused her.²⁸⁴ Although the novel's tone suggests that the mother did not truly change,²⁸⁵ at least she did not seek to use the cultural defense to justify her abuse towards her child.

In those child abuse cases where immigrant parents do raise the cultural defense, States must recognize that use of the defense conflicts with their obligations under the CRC.²⁸⁶ The use of the cultural defense in child abuse cases is not in the best interests of the child and violates at least two rights established by the CRC: the right to protection from all forms of violence and the right to enjoyment of one's culture.²⁸⁷ If a State allows the use of the cultural defense in child abuse cases, the State is essentially providing justification for child abuse.

If the use of the cultural defense in child abuse cases increases,²⁸⁸ States must determine an alternative for these unfortunate situations. This article's proposed solution, comparison of the immigrant parent's acts to an internationally-derived standard, is in the best interests of the child and, thus, complies with the State's obligations under the CRC and prevents liability under the Third Optional Protocol.²⁸⁹ Further-

²⁸⁴ CHUA, *supra* note 1, at 221.

²⁸⁵ *Id.*

²⁸⁶ *See supra* Part III.

²⁸⁷ *See supra* Part III.

²⁸⁸ *See supra* Part I.

²⁸⁹ *See supra* Parts I, IV.

more, this solution requires minimal changes on behalf of the courts while increasing judicial clarity and still promoting some cultural understanding and leniency.²⁹⁰ Most importantly, however, first-generation children will receive the protection from violence of which they are entitled. Comparison to an internationally-derived standard is in the best interests of all parties.

²⁹⁰ See *supra* Part IV.