

**Does Article 13 Of The Hague Convention On The Civil Aspects Of International Child Abduction, 1980 Protect Victims Of Domestic Violence?**



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## **KEYWORDS**

Abducting (victimised) parent

Best interests of the child

Domestic Violence

Domestic violence defence

Grave risk of harm

International child abduction

Intolerable situation

Left behind parent

Physical or psychological harm

## DECLARATION

‘I declare that the thesis “Does Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, Protect Victims of Domestic Violence?” is my own work, that it has not been submitted before for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references’.



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Signed.....Signed .....

(Student)

(Supervisor)



## CHAPTER 1: INTRODUCTION<sup>1</sup>

This paper analyses whether Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention/Convention) 1980,<sup>2</sup> protects the victims/survivors of domestic violence. The Hague Convention is a multilateral treaty which provides a simple remedy to the contracting States to the effect that if the child has been wrongfully removed or retained across international borders, such a child must be returned promptly to the State of his/her habitual residence.<sup>3</sup> Fundamentally, the Convention is aimed at ensuring that children are kept from being pawns in both parental and political conflicts.<sup>4</sup>

The Convention provides, among others, that applications for the return of internationally abducted children are made to the country where the child is taken or retained by the abducting parent. The aforementioned applications are limited to the issue of return, and considerations of matters relating to custody should be entertained in the child's place of habitual residence. The reason for limiting procedure under the Hague Convention is twofold. The first reason is to avoid children having to remain outside their place of habitual residence for extended periods of time that litigation on the merits of the case would take. Secondly, evidence is generally more readily available in the child's place of habitual residence.<sup>5</sup>

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<sup>1</sup>According to the Hague Conference on Private International Law website, as from 21-23 January 2016, a Working Group will re-convene to continue to develop a Guide to Good Practice on the interpretation and application of Article 13(b) of the 1980 Hague Child Abduction Convention. Reportedly, the relationship between domestic violence and Article 13 will be an issue that will be covered. However, the working papers are not publicly available, and cannot be included in this study.

<sup>2</sup>Convention on the Civil Aspects of International Child Abduction (Concluded 25 October 1980) (hereinafter the Hague Convention/Convention).

<sup>3</sup>Articles 1 - 7, and 12 of the Convention.

<sup>4</sup>Zashin A A, Reynolds C R & Keating A M 'Filling the Gaps with Public Policy: The Application of the Hague Convention Protocol in US Courts in the Absence of a Co-Signing State' (2014) 28 *International Journal of Law, Policy and the Family* 123.

<sup>5</sup>Lowe N, Setright H & Bentley D (2013) 'Abductors Keepers: Is the International Law on Child Abduction Working?' page 2. Available at

Nevertheless, the Convention contains exceptions which justify a departure from the strict return of children who have been wrongfully removed or retained.<sup>6</sup> The aforementioned, if established, would give the courts a discretion as to how to proceed with a Hague abduction application.<sup>7</sup> The said exceptions are contained in Articles 12(2), 13 and 20 of the Convention and are aimed at ensuring that in certain defined circumstances, regard may be paid to the specific situation, including the best interests of the individual child or even the abducting parent. This paper will focus on Article 13.

Article 13 of the Convention establishes three defences which the abducting parent can utilise in opposing an application for the return of a child who was wrongfully removed or retained. The defences are the following:

- the consent or acquiescence defence, which involves the applicant's consent to or acquiescence in the removal or retention of the child;
- the grave risk defence, which arises when the respondent contends that returning the child would place the child at grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; and
- the mature child's objection defence, which arises when the child objects to being returned, and the court finds that the child has attained an age and degree of maturity at which it is appropriate to take the child's views into account.

Research on parental child abductions indicates that increasingly the motivation for leaving the country of habitual residence is to escape an abusive relationship.<sup>8</sup> Most abducting

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<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/InternationalLaw/310113summary.pdf> (accessed 6 November 2015).

<sup>6</sup>Articles 12(2), 13 and 20 of the Convention.

<sup>7</sup>McEleavy P 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' *Netherlands International Law Review* (5 November 2015), para 1.

<sup>8</sup>Kaye M 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191 - 201.

parents are battered women fleeing for their own and their children's safety.<sup>9</sup> However, it is not just mothers who may abduct their children - some abusive men use the courts to extend their harassment of their partners through, for example, lengthy custody fights and actual abductions of their children across international borders.<sup>10</sup> In view of the fact that more recently the large majority of abductors have been primarily mothers,<sup>11</sup> this thesis will focus on mothers who abduct their children across international borders.

The discussion of domestic violence in the context of international child abduction now requires more serious consideration because of the increase in the numbers and nature of domestic violence cases worldwide. Furthermore, the link between domestic violence and international child abductions should be afforded more attention because of the ongoing problems created by the Convention's language, structure and application.<sup>12</sup>

There is no domestic violence defence under the Convention and the term domestic violence is not even mentioned in the language of the Convention. Considering that the Convention was drafted almost 35 years ago, before most of the social science research on domestic/family violence and its effects on children was conducted, the drafters likely had little empirical knowledge of the effects of domestic violence on children and the parent who is the victim of the violence.<sup>13</sup> Research indicates that international child abduction can have

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<sup>9</sup>Weiner M H 'Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases' (2008) 58 *American University Law Review* 336-340; Shetty S, Edleson J (2010) 'International Parental Child Abduction, 'Violence Against Women, 119. Available at [www.vaw.sagepub.com](http://www.vaw.sagepub.com) (accessed 27 October 2015).

<sup>10</sup>Shetty S & Edleson J 'Adult Domestic Violence in Cases of International Parental Child Abduction' *Violence Against Women*, Vol. 11 No. 1, January 2005, 115-138. Available at [www.vaw.sagepub.com](http://www.vaw.sagepub.com) (accessed 27 October 2015).

<sup>11</sup>Silberman L 'The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective From The United States And Europe – Abbott, Neulinger, Zarraga' 2011 *Oklahoma Law Review* 736. Available at [https://www.law.ou.edu/sites/default/files/files/OU\\_LAW\\_ADMIN/07%20silberman%20article%20blu4.pdf](https://www.law.ou.edu/sites/default/files/files/OU_LAW_ADMIN/07%20silberman%20article%20blu4.pdf) (accessed 27 October 2015).

<sup>12</sup>Brown-Williams K 'Fleeing Domestic Violence' 2011 *John Marshall Law Journal* 41-42.

<sup>13</sup>Edleson JL, Lindhorst T, Mehrotra G et al 'Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases'

dire and devastating effects on the wellbeing of the child and can even impair the relationship between the child and the left-behind parent.<sup>14</sup>

This thesis will explore several cases of countries which are contracting States to the Hague Abduction Convention. This study will focus on the Republic of South Africa (RSA), United States of America (USA), United Kingdom (UK) and Switzerland.

The RSA position and cases will be considered because the RSA courts are compelled by the Constitution<sup>15</sup> and legislation<sup>16</sup> to follow a wider approach to the defence in Article 13(b) of the Hague Convention in that the best interests of children is a paramount consideration in all matters affecting children. Furthermore, the RSA position will be explored because it is a signatory to all international instruments<sup>17</sup> dealing with domestic violence and it has extensively legislated against domestic violence to stem the tide of this scourge.<sup>18</sup> Furthermore, the highest court in the RSA, the Constitutional Court, has indicated, among other things, that when considering the application of Article 13, recognition must be accorded to the role which domestic violence plays in inducing abducting parents, especially mothers of young children, to seek to protect themselves by escaping to other jurisdictions.<sup>19</sup>

The USA position will be considered because the USA is currently experiencing an increase in global child abductions because of, among others, culturally diverse families. This problem is compounded by performance issues plaguing the Convention and such deficiencies

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Final Report: Hague Convention and Domestic Violence November 2010, 4. Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf> (accessed 27 October 2015).

<sup>14</sup>Freeman M (2006) 'International Child Abduction: The Effects'. Available at <http://www.reunite.org> (accessed 27 October 2015).

<sup>15</sup>Section 28 of the Constitution of the Republic of South Africa, 1996.

<sup>16</sup>Chapter 2 of the Children's Act No. 38 of 2005.

<sup>17</sup>Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Convention on the Rights of the Child, and the International Covenant on Social, Economic, and Cultural Rights.

<sup>18</sup>Domestic Violence Act No.116 of 1998.

<sup>19</sup>*Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171, para 34.

include, among others, enforceability; procedural slowness; excessive recourse to exceptions; and lack of legal aid for victim's families. These problems are persistent and impact all cases governed by the Convention, which include abduction cases involving domestic violence.<sup>20</sup>

Furthermore, according to research conducted in the USA<sup>21</sup> there are indications, among others, that abducting parents/mothers and children often experienced severe violence from the left-behind fathers who filed Hague Convention petitions and mothers were unable to access helpful resources in the other country, so they left with their children to seek safety and support of family members in the USA. Furthermore, the USA is included in the study because in the USA there is a positive trend that has emerged where courts have decided that returning the child would subject the child to grave risk of harm based, in part, on evidence of the father's abuse of the mother and the fact that the child was merely a witness to the violence rather than the target.<sup>22</sup>

The UK will be considered in the study because English courts are primarily concerned with protecting and adhering to the principles of the Convention and they usually only consider the best interests of children in general. Furthermore, English courts assume that imposing undertakings will sufficiently protect children from exposure to grave risk of harm. As a result, the majority of domestic violence victims who fled with their children to escape domestic violence have had difficulty invoking the Article 13(b) defence successfully.<sup>23</sup>

Furthermore, the UK position will be explored because it has been shown in recent Supreme Court decisions that the UK is now aware of the increasing need to develop a consistent approach in protecting children from situations of domestic violence.<sup>24</sup>

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<sup>20</sup>Brown-Williams K (2011) 41.

<sup>21</sup>Edleson J L, Lindhorst T, Mehrotra G et al (2010), page viii.

<sup>22</sup>See for example the case of *In re Lozano*, 809 F.Supp.2d 197 (S.D.N.Y. 2011) 127.

<sup>23</sup>Fleming K 'Does the United Kingdom's current interpretation of Article 13(1) (b) in the 1980 Hague Convention on International Child Abduction Protect Victims of Domestic Violence?' (2014) Issue 6 *The Student Journal of Law* Chapter 6.

<sup>24</sup>See for example the cases of *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 and *Re S (A Child)* [2012] UKSC 10.

The Swiss law will be considered because during 2007, Switzerland took a decisive and different action to protect children who were being harmed by the application of the Hague Abduction Convention. In 2009 the Swiss Parliament passed the Federal Act on International Child Abduction and the Hague Convention on the Protection of Children and Adults (“Swiss Act”), which gives important guidance to Swiss courts about the phrase “intolerable situation” in Article 13(b) of the Hague Abduction Convention.<sup>25</sup>

It will be shown in this thesis that child abduction is today an international problem, and domestic violence which is linked to some of those abductions, is not sufficiently catered for in the Convention. The provisions of Article 13 of the Convention are lacking and require augmentation by an additional Protocol and the addition of new mechanisms to the protective measures. This will be beneficial to all interested/affected parties and will advance global consistency regarding the interpretation and application of the Convention without frustrating the aims and purpose of the Convention. Due to the global nature of the Hague Convention, the amendment of implementing legislation in contracting States/ regional developments will not suffice. A global solution needs to be agreed upon to improve the protection given to victims of domestic violence and their children fleeing from one country to another, without frustrating the aims and purpose of the Convention.

In the light of the above, the pertinent questions which arise for consideration in this thesis are the following:

Does the language of the Hague Abduction Convention clearly deal with and address domestic and /or family violence? If not, what can be done to ensure that domestic violence-related international child abduction cases are covered?

Are the human rights of all affected parties in international abduction cases in which domestic violence played a role respected/enforced?

Considering the global scourge of domestic violence, is there sufficient protection in international law to cater for all parties in international child abduction cases where domestic and /or family violence is involved?

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<sup>25</sup>Weiner M H (2008) 336.

The Convention does not recognize domestic violence against a spouse as a reason to deny the return of an abducted child.<sup>26</sup> This study will investigate the potential causes of this state of affairs, which could be the inadequacy of legal texts and/or the inconsistent application of the Hague Child Abduction Convention.

Chapter 2 of this thesis will discuss the objectives of the Hague Abduction Convention and all key legal concepts in international child abduction.

Chapter 3 of the study will focus on the definition of and research on particular dynamics of domestic violence. International instruments dealing with domestic violence will also be considered. The chapter will also cover domestic violence legislation in the RSA, USA, UK and Switzerland. Furthermore, Chapter 3 will focus on Article 13(b) of the Hague Abduction Convention. The chapter will also discuss the burden of proof and evidentiary standard under Article 13(b), interpretations of “grave risk”, “physical or psychological harm” and “intolerable situation” in the RSA, USA, UK and Switzerland. Hague abduction cases in the aforementioned jurisdictions will also be discussed.

Chapter 4 will discuss cases in which direct judicial communications were used to resolve Hague abduction cases involving domestic violence allegations. Furthermore, this chapter will address the concerns relating to the following:

The extent of or consistency in some judicial investigations into allegations of domestic violence;

Insufficient recognition of the harmful effects of domestic violence on children, even when directed only at a parent;

Potential risks to the life or safety of the returning parent and / or the child following return orders;

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<sup>26</sup>Report on Compliance With The Hague Convention On The Civil Aspects Of International Child Abduction - Office of Children's Issues of The U.S. Dept. of State (2010) 43. Available at <http://Travel.State.Gov/Abduction/Resources/Congressreport/Congressreport> (accessed 7 April 2015).

The appropriate use of protective measures ordered in conjunction with return orders, including the effectiveness or enforceability of voluntary undertakings or other conditions linked to return orders;

Lack of adequate support (including governmental support) for victims of domestic violence;  
and

Lack of support (including legal aid or/access to justice) for the victim of domestic violence in Hague abduction matters.

Chapter 5 will deal with conclusions and recommendations.



## CHAPTER 2: OBJECTIVES OF 1980 HAGUE CONVENTION AND KEY LEGAL CONCEPTS

### 1. Introduction

Many commentators attribute the rising incidence of international parental abductions to increased globalization and multicultural trends – patterns that have contributed to an increase in international marriages and partnerships and a corresponding increase in the number of children affected by international custodial disputes.<sup>27</sup>

The Convention requires, among other things, that Central Authorities in each contracting State should provide assistance in locating the abducted child and in achieving, if possible, a voluntary return of the child or an amicable resolution of the issues. The Central Authorities are also required to avert further harm to the child by initiating or assisting to initiate proceedings for the return of the abducted child, and by making necessary arrangements to secure the child's safe return.<sup>28</sup>

The Hague Convention was ratified by the RSA in 1997 and is explicitly incorporated in the Children's Act 38 of 2005.<sup>29</sup> In the USA the Convention is enforced according to the International Child Abduction Remedies Act of 1988<sup>30</sup> and in 1993, Congress enacted complimentary legislation called the International Parental Kidnapping Crime Act 18 USA.C.1204 (2006), which provides criminal penalties for parents who abduct children outside of the USA. The latter piece of legislation was intended to fill the gap in the USA law for children who have been abducted to non-Hague countries. Furthermore, in terms of the USA Uniform Child Abduction Prevention Act 7(a)(13), 9 Pt. IA U.L.A. 43 (Supp. 2012), if evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent (abducting parent) and the child, and therefore, should be imposed only

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<sup>27</sup>Buck T, Gillespie A A, Ross L et al *International Child Law*, New York, NY: Routledge 2011.

<sup>28</sup>Chapter II, Hague Convention.

<sup>29</sup>Section 275.

<sup>30</sup>International Child Abduction Remedies Act, 42 U.S.C.A. 11601(a) (1988).

when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent (abducting parent) and the child. The aforementioned legislation admonishes courts to be sensitive to domestic violence issues.<sup>31</sup>

There are indications that a new Bill has been drafted in the USA to amend the International Child Abduction Remedies Act by making an explicit distinction between child abduction and flight to safety as a result of domestic violence.<sup>32</sup> Furthermore, the aforementioned Bill seeks to clarify the circumstances under which a child would not be returned to the left behind parent.

In the UK the Hague Convention was incorporated into law by Chapter 60 of The Child Abduction and Custody Act, 1985.<sup>33</sup>

In Switzerland the Convention was incorporated into law by the Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and of Adults, 2007.<sup>34</sup>

## **2. Aims and Objectives of the Convention**

The Hague Convention is an international treaty with a range of aims and objectives, positive and negative, because it seeks to achieve a balance between the competing interests of the

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<sup>31</sup>Nitz J "Splitting The Baby" Internationally: Evaluating The "Least Restrictive" Conundrum When Protecting Children From International Parental Abduction' 2014 *The Scholar: St. Mary's Law Review on Race and Social Justice* 417 para B.

<sup>32</sup>Princing M 'Professor help craft US Bill to aid women fleeing abuse'. Available at [www.hsnewsbeat.uw.edu/story/professor-helps-craft-us-bill-aid-women](http://www.hsnewsbeat.uw.edu/story/professor-helps-craft-us-bill-aid-women) (accessed 6 November 2015).

<sup>33</sup>Available at [http://www.legislation.gov.uk/ukpga/1985/60/pdfs/ukpga\\_19850060\\_en.pdf](http://www.legislation.gov.uk/ukpga/1985/60/pdfs/ukpga_19850060_en.pdf) (accessed 27 October 2015).

<sup>34</sup>Adopted 21 December 2007. Available at <https://www.admin.ch/opc/en/classified-compilation/pdf> (accessed 7 April 2015).

child, the left behind parent and the abducting parent.<sup>35</sup> The Convention is designed to enhance multilateral cooperation in an effort to ensure the prompt return of parentally abducted children to their country of origin<sup>36</sup> and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>37</sup> The Convention's primary aim is, therefore, to combat parental child abductions by providing a system of co-operation between Central Authorities of contracting States and a speedy procedure for the return of children wrongfully removed from their habitual residence.<sup>38</sup> Furthermore, the objective of the Convention to return the child expeditiously prevents judges from imposing their own subjective value judgments, thereby protecting the child's interests from erroneous decision-making.<sup>39</sup>

The Convention is premised on three theories. The first theory is that the abduction of a child will be prejudicial to his or her well-being because the child has been removed from his or her familiar environments, family and country. Secondly, the courts in the country of the child's place of habitual residence are suitable to decide custody issues because they are better placed to hear the merits of the custody dispute. Thirdly, the Convention averts the incidence of forum-shopping by abducting parents.<sup>40</sup>

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<sup>35</sup>See for example the discussion in the decision of the Canadian Supreme Court: *W.(V.) v. S.(D.)*, (1996) 2 SCR 108, (1996) 134 DLR 4th 481, [INCADAT cite: HC/E/CA 17]. Available at [www.incadat.com](http://www.incadat.com) (accessed 27 January 2016).

<sup>36</sup>Hague Conference on Private International Law - Outline Hague Child Abduction Convention September 2008. Available at [www.hcch.org](http://www.hcch.org) (accessed 12 May 2015).

<sup>37</sup>Article 1, Hague Convention.

<sup>38</sup>Hague Conference on Private International Law (HCCH). Available at [www.hcch.org](http://www.hcch.org) (accessed 12 May 2015).

<sup>39</sup>Perez-Vera E, 'Explanatory Report on the Hague Child Abduction Convention, 1980' (hereafter Perez-Vera Report); Acts and Documents of the XIVth Session of the Hague Conference on Private International Law, Vol III (1982), para 22. Available at [www.hcch.org](http://www.hcch.org) (accessed 12 May 2015).

<sup>40</sup>Weideman J & Robinson J A 'The interpretation and application of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction' 2011 *Stellenbosch Law Review* 72; Du Toit (2009) 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezaart (ed) *Child Law in South Africa*, at 353-354.

Recently the aims and objectives of the Hague Convention within the RSA context were further explained by Spilg, J in the case of *Central Authority v TK*<sup>41</sup> as follows:

"...[13 ] It appears unnecessary to contextualise the Hague Convention within the framework of our domestic law and in particular our Constitution. It has been considered extensively in leading cases, from *Sonderup* in the Constitutional Court and *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) ([2004] 1 All SA 32) in the Supreme Court of Appeal (SCA) .... The broad general principles are now firmly established and essentially are:

- (a) As a signatory to the Convention ... it is necessary 'to protect children from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence' (*Sonderup* para 10).
- (b) The underlying rationale is directed at protecting the best interests of the child and to act as a deterrent. The expeditious return of the child minimises the harm he or she may be expected to suffer as a consequence of being uprooted from a familiar environment...
- (c) The objective is not to force the returned child to submit to the primary residence of the resident parent...
- (d) 'The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the State parties who are signatories to it, and by implication those who subsequently ratify it, are 'Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.'*(Sonderup* para 28)".

### **3. Key Legal Concepts in International Child Abduction**

#### **3.1 Elements of a prima facie case in Hague Convention cases**

In order for applicants in Hague Convention cases to succeed, firstly, they must prove that prior to removal or wrongful retention, the child was habitually resident in a foreign country.

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<sup>41</sup>2015 (5) SA 408 (GJ) at page 413.

Secondly, the removal or retention was in breach of custody rights under the foreign country's law; and thirdly, the applicant was actually exercising custody rights at the time of the removal or wrongful retention. Lastly, it must be proved that the child is under 16 years of age.<sup>42</sup>

### **3.2 Wrongful removal or retention of child**

In terms of the Convention the removal and retention of the child must be across international borders and away from the place of the child's habitual residence, not just away from the care of a person, body or institution with rights of custody.<sup>43</sup> The removal addressed by the Convention occurs in a situation when one parent unilaterally makes a decision in respect of the country in which the children are to reside in contravention of an existing agreement or the law concerning the country of residence. In terms of the Convention's Preamble, the member States regard the interests of the child as the paramount consideration in custody matters, and the peremptory return will best serve those interests. The aforementioned provision in the Preamble entails that the Convention assumes that the wrongful removal or retention is, in most instances, inherently prejudicial to those interests.<sup>44</sup>

### **3.3 Habitual Residence**

In terms of Article 4 of the Convention, if the court finds that the child was not habitually resident in the requesting State prior to the abduction, the provisions of the Convention will not apply. Increasingly, the motivation for leaving the country of habitual residence is to escape an abusive relationship.<sup>45</sup>

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<sup>42</sup>Articles 3 and 4 of the Convention. In the RSA the question of onus was settled in the Supreme Court of Appeal case of *Smith v Smith* 2001 (3) SA 485(SCA) [2001] 3 All SA 146 at 850.

<sup>43</sup>Article 3 of the Convention.

<sup>44</sup>Nicholson C M A 'Should The Court Look At The Best Interests Of Specific Children In Abduction Cases? An Examination Of *Central Authority of the Republic of South Africa JW and HW* with C Du Toit Intervening' (2014) 131 *South African Law Journal* 760.

<sup>45</sup>Edleson J & Lindhorst T (2012) 'Battered Mothers Seeking Safety Across International Borders: Examining Hague Convention Cases involving Allegations of Domestic Violence' *The Judges Newsletter* XVIII, 22. Kaye M (1999) 191.

The term habitually resident is not defined by the Convention; as a result, the interpretation of this concept which is alluded to in the Preamble, Article 3, and Article 4, has proved increasingly problematic with conflicting interpretations in different contracting States. There is lack of uniformity as to whether in determining habitual residence emphasis should be exclusively on the child, with regard paid to the intentions of the child's care-givers, or primarily on the intentions of the care-givers.

In the RSA, the term 'habitual residence' is given its ordinary meaning with reference to all the facts of the particular case. It is an established fact that when the child is removed from his/her habitual environment, it entails that the child is being removed from the family and social environment in which his/her life has developed. Therefore, the term implies a stable territorial link. This may be achieved through length of stay or through evidence of a strong link between the child and the place. The court stated in the case of *Senior Family Adv v Houtman*<sup>46</sup> that one has to look at whether the child has a factual link with the requesting State, culturally, socially and linguistically to determine whether it was the child's country of habitual residence. However, in practice, it is often difficult to determine the habitual residence of the child, for example when the child is young. When the child is very young and the court cannot determine his/her habitual residence, it is necessary to consider the parents' last shared intention regarding the child's residence. There are several guidelines in case law to determine whether the parents intended to change their habitual residence.<sup>47</sup>

The USA legal system utilises three approaches to determine habitual residence. Firstly, they use the child centred approach. This was advocated in the Court of Appeals for the 6th Circuit in the case of *Friedrich v Friedrich*.<sup>48</sup> Secondly, the United States Courts of Appeals for the 3rd and 8th Circuits, have espoused a child centred approach, but with reference equally paid to the parents' present shared intentions.<sup>49</sup>

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<sup>46</sup>(2006) JOL 16644 (C) at page 13.

<sup>47</sup>*Senior Family Advocate, Cape Town v Houtman* (2006) JOL 16644 (C), at page 13. See also the case of *Central Authority for the Republic of South Africa v ER* [2014] JOL 31502 (GNP) at para 9.

<sup>48</sup>983 F.2d 1396 (6th Cir. 1993) [INCADAT Reference HC/E/UKs 577].

<sup>49</sup>*Feder v. Evans-Feder* INCADAT Reference HC/E/USf 879.

Thirdly, the judgment of the Federal Court of Appeals for the 9th Circuit in *Mozes v. Mozes*<sup>50</sup> has been influential in providing that there should be a settled intention to abandon an existing habitual residence before a child can acquire a new one.

Switzerland utilises the child centred, factual approach.<sup>51</sup> In the UK the criterion for habitual residence is to consider the settled intention of the child's carers<sup>52</sup> and the factual reality of the child's life. Therefore, there are variations of approach.<sup>53</sup> In the USA, the current law does not place any obligation on courts to focus on or tackle domestic violence when determining habitual residence. This loophole in the law falls far short of accounting for the real, lived experiences of abused women and their children.<sup>54</sup>

The dynamics of where to reside and the domestic violence reported by the victim of such domestic violence, indicate that the issue of the child's habitual residence is a complicated matter which does not merely involve the calculation of time or a child's attachment to social institutions. Children may have spent years in another country, and as a result they may have been enrolled in schools, or became part of a social community. However, the aforementioned actions may be rooted in the initial efforts of the father to trap the mother and children through his abusive behaviour. As a result, the issue of habitual residence in the aforementioned families should be carefully scrutinized to ascertain whether the decision to reside in the other country is a joint and voluntary decision. To determine the child's habitual residence merely on the basis of length of time in the other country, without considering the

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<sup>50</sup>239 F.3d 1067 (9th Cir. 2001) [INCADAT Reference: HC/E/USf301].

<sup>51</sup>5P.367/2005/ast, Bundesgericht, II. Zivilabteilung (Tribunal Fédéral, 2ème Chambre Civile) [INCADAT Reference: HC/E/CH 841].

<sup>52</sup>In the case *Bridgend County Borough Council v GM and Another* [2013] 1 FLR 987 (FD) at para. [34]–[38], the court held that the habitual residence of a child normally followed that of those with parental responsibility. Available at <http://www.lexisnexis.com.ezproxy.uwc.ac.za/hottopics/lnacademic/> (accessed 12 May 2015).

<sup>53</sup> *Re O (Child Abduction: Habitual Residence)* [2015] EWFC 16. Available at [www.familylaw.co.uk/.../re-o-child-abduction-habitual-residence-2015-ewfc-16](http://www.familylaw.co.uk/.../re-o-child-abduction-habitual-residence-2015-ewfc-16) (accessed 27 October 2015).

<sup>54</sup>Edleson J L, Lindhorst T, Mehrotra G *et al* (2010) 296.

underlying reasons for this residence, is to further perpetuate abuse of the women and potentially further harm the children.<sup>55</sup>

There are indications that measures which are in place regarding Hague Convention matters have not been effective in ensuring protection of children and the abducting parents when they return to their country of habitual residence.<sup>56</sup> Matters relating to the protection of children and abducting parents are discussed in chapter 4 of this thesis.

### 3.4 Prompt return principle

The Convention's twin objectives are "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one contracting State are effectively respected in the other Contracting States."<sup>57</sup> This is known as the prompt return principle. The underlying objective of the return principle is to restore the pre-abduction or pre-retention position and act as a deterrent for parents crossing international borders 'in search of a more sympathetic forum' or to prevent forum shopping.<sup>58</sup> It is necessary to secure the prompt return of the child, before he or she forms roots in the State to which the child was taken.<sup>59</sup>

In terms of Article 12 of the Convention, there should be the preemptory return of children to the requesting State if the proceedings were instituted within a period of one year of the abduction or retention unless the Court in the receiving or retention State accepts one of the

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<sup>55</sup>Edleson J L, Lindhorst T, Mehrotra G *et al* (2010) 120.

<sup>56</sup>Hoegger R 'What If She Leaves - Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy' *Berkeley Journal of Gender, Law & Justice* (2013) Vol 18, Issue 1 (Article 5) at 199. Available at: <http://scholarship.law.berkeley.edu/bglj/vol18/iss1/5> (accessed 7 April 2015).

<sup>57</sup>Article 1 of the Convention and Perez-Vera Report at 426 and 432.

<sup>58</sup>Boezaart T, *Child Law in South Africa* 2009 at page 354. See also *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996). INCADAT cite HC/E/USf82. See [www.incadat.com](http://www.incadat.com) (last accessed 23 January 2016).

<sup>59</sup>Article 1 of the Convention; Guide To Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I - Central Authority Practice, 19. Available at [www.hcch.org](http://www.hcch.org) (accessed 12 May 2015).



defences to the Convention. Article 12 is mandatory and does not give courts the discretion regarding the return of the child. However, Article 12(2) provides for the exceptions to the peremptory return in instances where the proceedings were launched more than a year after the abduction and it is established that the child has settled in his or her new environment.

The principle that the prompt return of children is in their best interests has been supported by the supposition that parenting and custody disputes are best determined and resolved in the jurisdiction that was the child's habitual residence prior to his or her abduction. The Convention's Explanatory Report explains that "the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child".<sup>60</sup> The prompt return principle was also considered by the drafters of the Hague Convention to be in the interests of children in general, because this would discourage unilateral action by parents, and it would be a useful framework for children of divided international family units to maintain contact with both parents.<sup>61</sup>

There are indications that domestic violence survivors utilise the psychological-harm aspect of the defence in Article 13 to argue that exposure to the violence creates an unhealthy environment for the child. This can contradict the prompt return principle because, in order to support such an argument, the abducting parent requires an expert witness to testify about the psychological harm to the child, and this can be a time consuming exercise because of the unavailability of the witness or the complexity or length of the evidence. Therefore, the Convention's quick-return principle coupled with the tendency to order the return of children create problems for the domestic violence survivors.<sup>62</sup>

It can be argued that if a primary-carer mother removes her child to a country where they have meaningful connections, in an attempt, for example, to flee domestic violence, it is

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<sup>60</sup>Bozin-Odhiambo D 'Re-examining habitual residence as the sole connecting factor in Hague Convention child abduction cases' (2012) 3 *Family Law Review* 2.

<sup>61</sup>McEleavy P (2015) para.1.

<sup>62</sup>Quillen B 'The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction' (2014) 49 *Texas International Law Journal* 626 (hereafter Quillen B (2014)).

questionable whether prompt return of the child is aligned with the Convention return mechanism's true objective. This especially applies in cases where there is a lack of meaningful connections in the child's habitual residence. In these circumstances the instability the child suffers is significantly minimised, as they have not suffered the loss of the parent charged with their primary care, and they have connections with the jurisdiction to which they were taken.<sup>63</sup>

"The remedy of return uniquely disadvantages domestic violence victims who have abducted their children - it reverses the accomplishment of the victim's flight by returning the child to the place from which the domestic violence victim has just fled. The remedy puts the victim's most precious possession, her child, in close proximity to her batterer ..., thereby exposing her to further violence."<sup>64</sup>

They are not only subject to an increased risk of more intense violence, but they are also at an even higher risk of being murdered. The emphasis on using the Convention proceedings as a quick-return mechanism places domestic violence victims who flee their abusers at a higher risk of further violence if they return quickly after their separation.<sup>65</sup>

### **3.5 Rights of custody**

In terms of Article 5 of the Convention, "rights of custody" include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. However, the Hague Convention cases do not focus on or address issues relating to custody because the Convention is merely jurisdictional.<sup>66</sup> "The Convention's focus is simply on whether a child should be returned to her country of habitual residence for custody proceedings."<sup>67</sup>

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<sup>63</sup>Bozin-Odhiambo (2012) 11.

<sup>64</sup>Weiner M H (2008) note13634.

<sup>65</sup>Quillen B (2014) 626.

<sup>66</sup>Article 19 of the Convention provides that... "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

<sup>67</sup>The Pérez-Vera Report, para.19; Williams K B (2011) page 46; *Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).

There appears to be a misapprehension that if the batterers (left behind parents) and the victims are separated, domestic violence will not impact child custody issues. Furthermore, there are indications that most left behind parents who apply for custody of their children are likely to be successful in obtaining custody of their children irrespective of the domestic violence which led to the abduction.<sup>68</sup>

The inclusion of a domestic violence defence in the Hague Convention would ensure that if the left behind parent poses a domestic violence risk to the abducting parent, the abused or abducting parent would not have to return to the country of habitual residence to litigate custody, but the receiving country's court would firstly assess whether there is sufficient and credible evidence of domestic violence, and if there is sufficient proof, the court could then consider the custody matter by applying the law of the receiving country. From a legal point of view, if there is a conflict of laws, courts can apply the law of the adjudicating forum rather than applying the law of the country of habitual residence when there is an allegation of danger to the wellbeing, health and safety of the child, as in domestic violence situations.<sup>69</sup>

### **3.6 Best Interests of the Child**

The Preamble of the Hague Convention provides, among others, that the interests of children are of paramount importance in matters relating to their custody and that the signatory States desire to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.

The term "best interests of children" only appears in the Preamble of the Convention. The concept of the best interests of the child has been subjected to several debates and analysis, but its exact meaning still eludes many.<sup>70</sup> Though the term "best interests" of the child is not defined in the Convention, the Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is

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<sup>68</sup>Hoegger R (2013) 185.

<sup>69</sup>Hoegger R (2013) 206.

<sup>70</sup>Mezmur B M "“Acting Like A Rich Bully”?: Madonna, Mercy, And Malawian Children’s Rights In Adoption”” (2012) 20 *International Journal of Children's Rights* 24-56.

not in the interests of the child.<sup>71</sup> It is apparent from the wording of the Convention that the courts are prohibited from looking at the best interests of the individual child concerned except when dealing with the exceptions. The Convention's point of departure is that the abduction of a child will generally be prejudicial to his or her interests and that in the majority of cases it will be in the best interests of the child to return him or her to the State of his or her habitual residence.<sup>72</sup> According to the Explanatory Report of the Convention<sup>73</sup> the right not to be wrongfully removed or retained is "one of the objective examples of what constitutes the interests of the child."

English law follows the "welfare principle" which entails and requires that the best interests of a child should be paramount in all matters concerning the child.<sup>74</sup> The welfare principle focuses on the best interests of the individual child by requiring that the circumstances of each individual child be considered uniquely and on its own merits in every case involving that child. In the case of *Re M (A Minor) (Child Abduction)* the English Court of Appeal held that the interests of a child in each individual case are not paramount, because it is presumed under the Convention that the welfare of children who have been abducted are best met by the return to their habitual residence.<sup>75</sup>

The "welfare principle" is identical to the RSA "best interests of the child" principle, which is entrenched in section 28(2) of the Constitution. Section 28(2) of the South African Constitution of 1996 provides that the child's best interests are of paramount importance in every matter concerning the child. With regard to the "best interests of the child" principle, the court stated (per Goldstone J) in *Sonderup v Tondelli and Another*<sup>76</sup> that:

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<sup>71</sup>Preamble of the Convention and Article 11 of the United Nations Convention on the Rights of the Child 20 November 1989.

<sup>72</sup>Du Toit C (2009) 369. See also Articles 16 and 19 of the Convention.

<sup>73</sup>Perez-Vera Report, para 24.

<sup>74</sup>See section 1(1) of the English Children's Act of 1989 which provides that in all matters concerning the child, the welfare of the child shall be the court's paramount consideration. This principle is also referred to as the "best interest" principle, the "paramountcy" principle or the "welfare" principle.

<sup>75</sup>[1994] 1 FLR 390 at 392H.

<sup>76</sup>*Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.

" [28] The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. . . .

[29] . . . One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short-term interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. . . .by provisions of section 28 (2) of the South African Constitution which provides that:

"A child's best interests are of paramount importance in every matter concerning the child".

And also on section 9 of the Children's Act, 38 of 2005 which provides that:

In all matters concerning the care protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied".

In terms of Section 7 of the Children's Act No. 38 of 2005, various factors should be considered when determining what is in the best interests of a child. Some of the factors to be taken into account in matters where there are allegations of domestic violence include the following:

(i) the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour;<sup>77</sup>

(ii) the need to protect the child from any physical or psychological harm that may be caused by exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;<sup>78</sup> or

(iii) any family violence involving the child or a family member of the child.<sup>79</sup>

There is no express provision in the Convention which is identical to the principle that the child's best interests "are of paramount importance". However, that was recognized in *Re E*

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<sup>77</sup>Section 7(1)(l)(i) of the Children's Act.

<sup>78</sup>Section 7(1)(l)(ii) of the Children's Act. Apparently, section 7(1)(l) of the Children's Act affirms that Article 13(b) should be interpreted broadly in cases where domestic violence is raised as the basis of an Art 13(b) defence because of the words "the need to protect a child from physical or psychological harm" contained in that section.

<sup>79</sup>Section 7(1)(m) of the Children's Act.

(Children) (*Wrongful Removal: Exceptions to Return*) where it was held that it can be assumed, if there is a dispute about the child's future upbringing, that the interests of the child should be of "paramount importance" in resolving that dispute. "Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them are inspired by the best interests of the child."<sup>80</sup>

In Switzerland, the Swiss believe that the decisions from the European Court of Human Rights require that there should be consideration of the child's best interest in all cases.<sup>81</sup> The USA also believes that the best interest of the child is generally achieved by returning the child to his or her place of habitual residence.<sup>82</sup>

The two objectives of upholding the provisions of the Convention and of securing the well-being of the child may, in some instances, be irreconcilable in that the strict application of the Convention may sometimes result in children's rights being sacrificed.<sup>83</sup> However, in cases where the aforementioned dilemma arises, the RSA courts seem to favour a more child-centred approach.<sup>84</sup>

### **3.7 Conclusion**

The key legal concepts which govern international child abductions are antiquated because they are based on a treaty which was enacted almost 35 years ago. It is crucial that these key legal concepts should accommodate all the legal, social and economic changes that have transpired since the inception of the Hague Convention. In view of the fact that the main objective of the Hague Convention is to guarantee the peremptory return of children wrongfully removed from their place of habitual residence so that the courts in the habitual place of residence can make a ruling on custody rights, the majority of the case law in contracting States are in favour of the peremptory return of internationally abducted children. Apparently, the Convention assumes that the wrongful removal or retention is, in most cases, prejudicial to the child's best interests. However, in many instances the internationally

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<sup>80</sup>*Family Advocate v PF* 2015 JDR 0108 (ECP), para 32.

<sup>81</sup>Weiner M H (2008)340.

<sup>82</sup>Weiner M H (2008)340.

<sup>83</sup>See <http://www.mylexisnexis.co.za/Index.aspx>, at page 1 (accessed 10 November 2015).

<sup>84</sup>See *Senior Advocate, Cape Town v Houtman* 2004 (6) SA 274 (C) at 286F–287B.

abducted children are returned to their place of habitual residence, notwithstanding the circumstances prevailing in that place of habitual residence. Unfortunately, this entails that the welfare of the child is not always the main focus of the court's determination and the parties involved in the matter, particularly the abducting parents and their children, may experience some adversity. In view of the fact that the main objective behind the Convention was to prevent international child abductions and nothing else, the ultimate and main concern must be for the best interests of the child. However unfair the actions of the abducting parent may appear to be, it may be unjust that the requested State should order a child's return to his/her place of habitual residence if such a return order would cause greater emotional or psychological harm or trauma to the child.

I submit that it is a miscarriage of justice to place the additional burden of proof on the abducting parent to show how the country of habitual residence is unable or unwilling to protect the child. To acknowledge that even the most robust and well-resourced legal systems suffer from enforcement gaps is not to denigrate mutual trust and comity; it is simply to embrace reality. Furthermore, by promptly returning the child to his/her habitual place of residence without proper expert investigation of domestic violence allegations made by the abducting parent and giving guarantees that the child's best interests will be served, will amount to a miscarriage of justice. Furthermore, the habitual residence of the child might have been influenced by the abusive left behind parent. This can arise in instances where the abducting parent singlehandedly chose the place of residence and the abducting parent relied on him for survival and had no family, social or economic support.

Some commentators support strict return policies in order to prevent forum shopping. However, in most cases, victims (abducting parents) do not forum shop.<sup>85</sup> Admittedly, there may be cases in which battered women forum shop. The Convention allows courts to retain autonomy and to protect the best interests of children in particular situations. Based on all of the problems with undertakings, as will be further detailed in chapter 4, and the return principle, domestic violence should be one of those particular situations. If victims choose the country with the best interests of the child in mind, then they should be able to utilize the defence.

In view of the above, there is a need for reconsideration of the key legal concepts governing international child abductions to ensure that the Hague Abduction Convention is aligned not

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<sup>85</sup>Hoegger R (2013) 208.

only with the current developments since its inception but also with all laws, including international instruments, governing domestic violence.



## CHAPTER 3: DOMESTIC VIOLENCE, LEGAL FRAMEWORKS AND ARTICLE 13 OF THE HAGUE CONVENTION

### 1. Introduction

Women's and children's right to live free from any form of violence is endorsed by international agreements such as the 1993 UN Declaration on the Elimination of Violence against Women;<sup>86</sup> the Convention on the Elimination of All Forms of Discrimination Against Women;<sup>87</sup> the Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child;<sup>88</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women In Africa.<sup>89</sup> Furthermore, though many treaties do not specifically mention domestic violence against women, they are interpreted as relevant to domestic violence, and these include the Universal Declaration of Human Rights;<sup>90</sup> the International Covenant on Civil and Political Rights;<sup>91</sup> the International Covenant on Social, Economic, and Cultural Rights;<sup>92</sup> and the Convention against Torture and Other Cruel, Inhuman or

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<sup>86</sup>GA Res 48/104 UN Doc A/48/104 (adopted 20 December 1993) [‘the Violence Declaration’]. Available at [www.un.org/documents/ga/res/48/a48r104.htm](http://www.un.org/documents/ga/res/48/a48r104.htm) (accessed 7 April 2015).

<sup>87</sup>Resolution 34/180 of 18 December 1979. Available at [www.un-documents.net/a34r180.htm](http://www.un-documents.net/a34r180.htm) (accessed 7 April 2015).

<sup>88</sup> OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. Available at [www.ohchr.org](http://www.ohchr.org) (last accessed on 22 January 2016).

<sup>89</sup>Adopted by the African Union on 11 July 2003. Available at [www.pages.au.int/.../protocol-african-charter-human-and-peoples-rights-rights-women-africa](http://www.pages.au.int/.../protocol-african-charter-human-and-peoples-rights-rights-women-africa) (accessed 7 April 2015).

<sup>90</sup>Adopted by the United Nations on 10 December 1948. Available at [www.un.org/documents/ga/res/48/a48r104.htm](http://www.un.org/documents/ga/res/48/a48r104.htm) (accessed 7 April 2015).

<sup>91</sup>Adopted by United Nations on 19 December 1966. Available at [www.un.org/documents/ga/res/48/a48r104.htm](http://www.un.org/documents/ga/res/48/a48r104.htm) (accessed 7 April 2015).

<sup>92</sup>Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with Article 27. Available at [www.un.org/documents/ga/res/48/a48r104.htm](http://www.un.org/documents/ga/res/48/a48r104.htm) (accessed 7 April 2015).

Degrading Treatment or Punishment.<sup>93</sup> Furthermore, various international conferences, including the Conference in Copenhagen, the World Conference on Women in Nairobi, and the Beijing Conferences were held to discuss domestic violence against women. Though the documents produced at the aforementioned conferences are not binding, they serve as useful and important resources for tackling domestic violence throughout the world.<sup>94</sup>

While some of the aforementioned treaties do not explicitly address domestic violence, they articulate a State's obligations to protect fundamental human rights that are commonly violated in domestic violence cases. Those rights include the right to life, the right to physical and mental integrity, the right to equal protection of the law and the right to be free from discrimination.<sup>95</sup> Most countries in the world, including the RSA, USA, UK and Switzerland have ratified at least one of the aforementioned treaties, and are, therefore, accountable for the respect for, protection of and realization of the rights of individuals in their country.

The concerns regarding domestic violence within the framework of the operation of the Hague Convention, mainly in relation to the Article 13(b) "grave risk" exception, have been raised on several occasions as a matter of concern which requires investigation.<sup>96</sup> Considering the various negative social, economic and political impacts that domestic violence has, it is crucial that every incidence of domestic violence should be handled with the sternness that it deserves.

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<sup>93</sup>Resolution 39/46 of 10 December 1984 entry into force 26 June 1987. Available at [www.unhcr.org/49e479d10.html](http://www.unhcr.org/49e479d10.html) (accessed 7 April 2015).

<sup>94</sup>UN WOMEN. The Advocates for Human Rights, USA. Available at [www.theadvocatesforhumanrights.org/womens\\_human\\_rights](http://www.theadvocatesforhumanrights.org/womens_human_rights). (accessed 6 November 2015).

<sup>95</sup>Advocates for Human Rights Domestic Violence – Law and Policy. Available at <http://www1.umn.edu/humanrts/svaw/domestic/laws/international.htm> (accessed 7 April 2015).

<sup>96</sup>The Permanent Bureau Reflection Paper - 'Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' May 2011, page 3. Available at [www.hcch.net](http://www.hcch.net) (accessed 7 April 2015).

## 2. Definition of Domestic Violence

In terms of Article 1 of the Declaration on the Elimination of Violence against Women (Violence Declaration) violence against women is defined as ‘any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’

According to the General Recommendations by the Committee on the Elimination of Discrimination against Women, the definition of discrimination includes gender-based violence, specifically, violence that is directed against a woman because of her gender or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.<sup>97</sup>

The term "domestic violence" may, depending on the definition used, include many different aspects of abuse within the family and such abuse may be physical, psychological and/or economic; it may be directed towards the child and/ or to an intimate partner or other family members.<sup>98</sup> Some definitions of domestic violence suggest that it should be conceived as an “on-going pattern of intimidating behaviour in which the threat of serious physical violence is present and may be carried out with the overall goal of controlling the partner”.<sup>99</sup>

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<sup>97</sup>Recommendation No. 19 (11<sup>th</sup> session, 1992). Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 7 April 2015).

<sup>98</sup>The Permanent Bureau Reflection Paper, page 3; For examples of expansive definition of domestic violence in national legislation, including physical, sexual, and psychological abuse see the South African Domestic Violence Act No.116 of 1998; Criminal Law (Sexual Amendment and Related Matters) Amendment Act No. 32 of 2007.

<sup>99</sup>Dutton M A and Goodman LA, 'Coercion in intimate partner violence: Toward a new conceptualization' *Sex Roles* (2005)52 743-756.

Several treaties used the basic formulation set out in Article 1 of the Violence Declaration regarding the definition of domestic violence/violence, which clearly indicate that “mental/psychological violence” includes “exposure to domestic violence.”<sup>100</sup>

In terms of Article 3(b) of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 7 April 2011) domestic violence means “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shared or has shared the same residence with the victim.”<sup>101</sup>

### **3. DOMESTIC VIOLENCE IN INTERNATIONAL AND REGIONAL INSTRUMENTS**

#### **3.1 Convention on the Elimination of All Forms of Discrimination Against Women**

By accepting the Convention on the Elimination of All Forms of Discrimination Against Women, the contracting States commit themselves to undertake to end discrimination against women in all forms. In terms of the General Recommendations made by the Committee on the Elimination of Discrimination against Women,<sup>102</sup> gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. Furthermore, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of

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<sup>100</sup>For example the UN World Conference on Women in Beijing 1995; the Southern African Development Community; Convention on the Elimination of All Forms of Discrimination Against Women; International Covenant on Social, Economic, and Cultural Rights; The African Charter on Human and Peoples' Rights; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women etc.

<sup>101</sup>Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTM> (accessed 7 April 2015).

<sup>102</sup>Recommendation No. 19 (11th session, 1992). Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 7 April 2015).

violence. The Committee on the Elimination of Discrimination against Women recommended, among others, that States parties should take appropriate and effective measures to eradicate all forms of gender-based violence, whether by public or private acts.<sup>103</sup>

### **3.2 Convention on the Rights of the Child**

The CRC provides in the Preamble, among others, that "...Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. "The CRC also contains strong provisions which denounce any form of family strife and any acts of violence in the child's life. The Preamble to the CRC also recognises that for "the full and harmonious development" of the child's personality, he or she "should grow up in a family environment, in an atmosphere of happiness, love and understanding". The Committee on the Rights of the Child in General Comment No. 13 reiterates that children have the right to freedom from all forms of violence and also clarifies that "mental violence" includes "exposure to domestic violence".<sup>104</sup>

In terms of Article 19(1) of the CRC, State Parties "shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse."

During 2003, following the recommendation of the Committee on the Rights of the Child, the former Secretary-General of the United Nations, Mr Kofi Annan, appointed Mr. Paulo Sérgio Pinheiro, as an independent expert, to conduct an in-depth global study into violence against children, and his report was presented to the General Assembly in 2006.<sup>105</sup> The aforementioned study by Mr Pinheiro recommended, among others, the appointment of a Special Representative of the Secretary General on Violence against Children (SRSG). As a

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<sup>103</sup>Recommendation No. 19 (11th session, 1992), para 24.

<sup>104</sup>Committee on the Rights of the Child, General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, paragraph 21.

<sup>105</sup>Pinheiro P S 'World Report on Violence Against Children' 2006. Available at <http://www.unicef.org> (accessed 7 April 2015).

result, on the 1<sup>st</sup> of May 2009, the Secretary General announced the appointment of Marta Santos Pais as SRSG. The mandate of the SRSG entails, among others, the following: being a world-wide independent advocate in favour of the prevention and elimination of all forms of violence against children; acting as a facilitator, bridge builder and promoter of actions in all instances and everywhere violence against children may occur; promoting behavioural and social change, the universal ratification and effective implementation of relevant international conventions; and promoting cooperation with national institutions and civil society organizations, including children.<sup>106</sup>

The challenges involving violence against children were also addressed by the Committee on the Rights of the Child in their Day of General Discussions. The purpose of the aforementioned general discussions is to raise a deeper understanding of the provisions of the CRC on specific topics. The discussions are open to members of the public, government representatives, United Nations bodies, non-governmental organizations and individual experts who are invited to take part in the discussions. The Days of General Discussions on violence against children were held during September 2000 and September 2001. However, prior to the aforementioned dates, the Committee had already held several discussion days on topics which are relevant to violence against children.<sup>107</sup>

The SRSG has emphasized that 2016 is an important year for the protection of children against violence because this year marks the 10th anniversary of the United Nations Study on Violence against Children and the resumption of the implementation of the new global development agenda with its strategic target towards the elimination of all forms of violence against children by the year 2030. The SRSG also stated, among others, that: “These goals are within reach and the international community needs to act as one, sparing no effort and

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<sup>106</sup>Pais M S, Special Representative of the Secretary-General on Violence Against Children. The Office of the SRSG. See <http://srsg.violenceagainstchildren.org/> (accessed 7 April 2015).

<sup>107</sup>See the United Nations – Office of the High Commissioner <http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx>. (accessed 1 February 2016).

counting on each country, organization and individual to build a world in which all children can thrive.”<sup>108</sup>

### **3.3 African Charter on the Rights and Welfare of the Child**

The ACRWC is the only African regional instrument which provides for the protection of the rights of children and it was enacted to ensure the protection of children from the oppressive apartheid system as well as harmful traditional practices including child marriages.<sup>109</sup> In terms of Article 16 of the ACRWC, member States are required to ensure that children are protected from all forms of torture and inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse by parents and others caring for them. Furthermore, Article 21 compels member States to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare and dignity of the child.

In 2011, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) issued a statement on violence against children. The ACERWC stated, among other things, that beliefs which accept, tolerate and encourage violence against children, should be condemned and eliminated. Part of the statement opines that: “... The Committee of Experts calls for the firm engagement of African States, at the highest level, to support the eradication of all forms of violence against children... A clear and unambiguous rejection of all forms of violence, even moderate ones, against children should be encouraged by society as a whole... The harmful consequences that all forms of violence can have on children should be widely publicised.”<sup>110</sup>

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<sup>108</sup>Pais M S, Special Representative of the Secretary General on Violence against Children, ‘The Countdown to 2030 has started!’ 15 January 2016. Available at <http://srsg.violenceagainstchildren.org/> (last accessed on 1 February 2016).

<sup>109</sup>The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Concept Note on the Day of the African Child 2015, para. 2. Available at <http://acerwc.org/day-of-the-african-child-2015/> (last accessed on 1 February 2016).

<sup>110</sup>Available at [www.endcorporalpunishment.org/.../ACERWC-statement-on-VAC-2011](http://www.endcorporalpunishment.org/.../ACERWC-statement-on-VAC-2011) (accessed 13 January 2016).

### **3.4 The African Charter On Human And Peoples' Rights and the Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa**

The African Charter On Human And Peoples' Rights (ACHPR) provides, among others, that everyone should have equal protection of the law (Article 3) and to respect for personal integrity (Article 4). The ACHPR also prohibits torture and cruel, inhuman or degrading punishment and treatment (Article 5).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Maputo Protocol) is the main instrument through which the African Commission on Human and Peoples' Rights drafted principles and rules which are aimed at solving legal problems pertaining to women's rights and freedoms and provides guidance to African governments regarding the basics to be contained in their legislation that may affect the rights of women.<sup>111</sup>

The Maputo Protocol provides, among others, for the rights of women to freedom from discrimination (Article 2); the right to dignity (Article 3); the rights to life, integrity and security of the person (Article 4); the right not to be subjected to harmful practices (Article 5); and access to justice and equal protection before the law (Article 8). Furthermore, the Protocol provides in Article 18(3) that State parties must "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman."

With regard to women's right to life, integrity and security of the person articulated in Article 4, it has been rightly observed that "...the state is made responsible for violence including forced sex in the private sphere raising the possibility that those African states which have not already done so, may have to legislate to make rape within marriage illegal."<sup>112</sup>

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<sup>111</sup>Mujuzi JD 'The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' *Law, Democracy & Democracy*, Vol 2, No 2 (2008). Available at <http://www.ajol.info/index.php/idd/article/view/52893/41494> (last accessed 18 January 2016).

<sup>112</sup>Banda F 'Blazing a trail: The African Protocol on Women's Rights comes into Force' (2006) 50 *Journal of African Law* 72.



The Maputo Protocol is relevant to this thesis because the RSA, which is one of the countries covered in this thesis, ratified the Protocol with some reservations.

### **3.5 Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women**

In the USA, the Organisation of American States accepted in 1994 the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (‘the Convention of Belém do Pará’),<sup>113</sup> which explicitly entrenches women’s right to freedom from violence.

### **3.6 The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (the ICCPR) provides for the right to security (in the sense of personal integrity).<sup>114</sup> In terms of Article 2(1) of the ICCPR, States Parties undertake to ‘respect and ensure’ to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language and so on.

In terms of a General Comment<sup>115</sup> adopted by the Human Rights Committee (the Committee) which was established to manage the implementation of the ICCPR, State parties to the ICCPR have certain legal obligations. The aforementioned General Comment also elaborates on the duties arising from the rights guaranteed in the ICCPR. The Committee also elucidated

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<sup>113</sup>Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) OAS/Ser.L.V/II.92/doc31 rev.3 (1994), signed 9 June 1994, entered into force 3 March 1995. See also Combrinck H ‘The Role Of International Human Rights Law In Guiding The Interpretation Of Women’s Right To Be Free From Violence Under The South African Constitution’ LLD Thesis University of the Western Cape 8 July 2010 page 4. Available at [www.uwc.co.za](http://www.uwc.co.za) (last accessed 12 January 2016).

<sup>114</sup>Article 9 of ICCPR.

<sup>115</sup>Human Rights Committee General Comment No. 31 (80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev.1/Add.13 (dated 26 May 2004) [hereafter ‘General Comment No. 31’].

that the legal obligations under Article 2(1) are both negative and positive in nature and States Parties must refrain from violation of the rights recognised by the ICCPR, and furthermore, any limitations placed on these rights must be permissible under the ICCPR. Furthermore, under no circumstances may the limitations be applied in a manner that would be prejudicial to any right contained in the ICCPR. The positive obligations on States Parties on the implementation of the ICCPR rights will however only be fully complied with if individuals are protected by the State against violations of ICCPR rights by its agents, private persons or entities that would be prejudicial to the enjoyment of ICCPR rights insofar as they are applicable between private persons or entities.<sup>116</sup>

The provisions of Article 2(2) entail that State Parties must give effect to the ICCPR rights in an unqualified manner and with immediate effect, and any failure to do so cannot be justified by reference to political, social, cultural or economic considerations within the State.<sup>117</sup> In terms of Article 2(3) of the ICCPR States Parties are compelled to ensure that "individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children".<sup>118</sup>

Article 7 of the ICCPR compels States Parties to take positive measures to ensure that private individuals or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In terms of Article 26 of the ICCPR all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

### **3.7 European Convention on Violence against Women and Domestic Violence**

The European Convention on Violence against Women and Domestic Violence, which was opened for signature on 11 May 2011, in Istanbul, is the Council of Europe Convention aimed at addressing violence and domestic violence against women. The aforementioned

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<sup>116</sup>Combrinck H (2010) 49-51.

<sup>117</sup>Combrinck H (2010) 52.

<sup>118</sup>Combrinck H (2010) 52.

Convention is based on the understanding that any violence against women is a form of gender-based violence that is committed against women because they are women.<sup>119</sup>

### **3.8 European Convention on Human Rights**

In terms of the provisions of Article 8 of the European Convention on Human Rights, “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society.”<sup>120</sup>

### **3.9 Domestic Violence Legislation in the RSA**

The RSA has extensive and progressive legislation and supplementary legislation to regulate the scourge of domestic violence. The aforementioned legislation is also supported by policies. The provisions of the aforementioned legislation are mostly derived from the international treaties discussed above and the Constitution of the Republic of South Africa.

The Constitution is the supreme law in the RSA and it provides for a wide range of human rights in the Bill of Rights. Domestic violence violates several fundamental rights contained in the Constitution including the right to equality;<sup>121</sup> the right to dignity;<sup>122</sup> the right to life;<sup>123</sup> and the right to freedom of security of the person, which includes the right to be free from all forms of violence.<sup>124</sup>

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<sup>119</sup> Available at <https://www.coe.int/.../violence-against-women/Conv> (accessed on 18 January 2016).

<sup>120</sup> Opened for signature Nov. 4, 1950, (entered into force 3 September 1953). Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last accessed on 18 January 2016).

<sup>121</sup> Section 9.

<sup>122</sup> Section 10.

<sup>123</sup> Section 11.

<sup>124</sup> Section 12. “(1) Everyone has the right to freedom and security of the person, which includes the right —

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

Section 28 of the Constitution of the Republic of South Africa provides for children's rights. Every child in the RSA has the right to, among others, the right to "family care or parental care, or to appropriate alternative care when removed from the family environment."<sup>125</sup> Concomitantly, the RSA Constitution also recognises a child's right to be protected from maltreatment, neglect, abuse or degradation.<sup>126</sup> Furthermore, section 28(1)(h) of the RSA Constitution provides for children's right to legal representation, at State expense, in civil proceedings affecting them, if there's a possibility that there will be substantial injustice.

Other relevant RSA legislation includes, among others, the Domestic Violence Act No. 116 of 1998. The Preamble to the Domestic Violence Act acknowledges and recognizes that domestic violence is "a serious social evil and that there is a high incidence of domestic violence within the South African society." Furthermore, the definition of domestic violence in the aforementioned Act is very expansive and includes, among others, any abuse which is of a physical, sexual, emotional, psychological or economic nature.

The Criminal Law (Sexual Offences and Related Matters) Act No. 32 of 2007 was promulgated, among others, to protect children against any violence as defined in the Act. The aforementioned Act also provides, among others, that any person who has knowledge of child abuse must report the abuse to a police official. Furthermore, the Criminal Law (Sexual Offences and Related Matters Act) and the Films and Publications Act No.65 of 1996 (as amended) deal with exposure, distribution or creation of child pornography.

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(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way, and

(e) not to be treated or punished in a cruel or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right —

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.”.

<sup>125</sup> Section 28(1)(b).

<sup>126</sup> Section 28(1)(d).

The Children's Act No. 38 of 2005 provides in the Preamble, among others, that one of the objectives of the Act is to set out "principles relating to the care and protection of children". As discussed paragraph 3.6 above, section 7 of the Children's Act provides for the best interests of the child standard.

Another relevant RSA legislation is the Protection from Harassment Act No.17 of 2011 which provides for the issuing of protection orders against harassment. The harassment covered by this legislation covers rights enshrined in the Bill of Rights, for example the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance. In terms of the aforementioned Act, harassment means directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person or amounts to sexual harassment of the complainant or a related person.

Other provisions dealing with domestic violence in the RSA can be found in the South African Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000. In terms of section 8 of the aforementioned Act no person may unfairly discriminate against any person on the ground of gender, including by perpetrating gender-based violence.

### **3.10 Domestic Violence Legislation in the UK**

In the UK there are a number of national laws that deal with domestic violence<sup>127</sup> and which also include provisions that directly recognise the harm caused to children by exposure to family or domestic violence. For instance, in terms of English law, a child witnessing or hearing domestic violence is regarded as raising a child protection issue, and the meaning of harm to a child has been amended by the Adoption and Children Act 2002 to include "impairment suffered through seeing or hearing the ill treatment of another."<sup>128</sup>

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<sup>127</sup>See for example the Domestic Violence, Crime and Victims Act 2004. Available at <https://www.gov.uk/government/publications/the-domestic-violence-crime-and-victims-act-2004> and <http://www.legislationline.org/topics/country/53/topic/7/subtopic/25> (accessed 7 April 2015).

<sup>128</sup>Section 31(9).

The UK's Domestic Violence, Crime and Victims Act 2004 provides for a wide range of reforms and provisions in three distinct areas (viz. domestic violence, crime and victims). Sections 5 and 6 of the aforementioned Act also introduced a new offence of causing or allowing the death of a child or vulnerable adult and new procedural measures linked to the offence. The aforementioned offence is only applicable in instances where a person had a duty to protect the victim from harm.<sup>129</sup> In November 2012 the Protection from Harassment Act, 1997 was amended and updated by provisions made in the Protection of Freedoms Act 2012, by creating two new offences for stalking.<sup>130</sup> Other primary legislation on violence in the UK includes the Criminal Justice and Public Order Act (1994), Criminal Procedure (Scotland) Act (1995), Criminal Law (Consolidation) (Scotland) Act (1995), Family Law Act (1996) and Protection from Harassment Act (1997).<sup>131</sup>

### 3.11 Domestic Violence Legislation in the USA

The federal government in the USA took several legislative measures in recognizing and addressing the problem of domestic violence. For example, the following laws were enacted: the Family Violence Prevention and Services Act of 1984<sup>132</sup> (authorizing the expenditure of \$65 million, among others, to assist States to provide shelter for victims of domestic violence and to coordinate research and training); the Crime Victims Fund Act of 1984<sup>133</sup> (providing federal money for both crime victim compensation and state agency services for domestic abuse victims); Battered Women's Testimony Act of 1992;<sup>134</sup> Child Abuse, Domestic

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<sup>129</sup> See <https://www.gov.uk/government/publications/the-domestic-violence-crime-and-victims-act-2004>. The text of the Act is available at <http://www.hmso.gov.uk/acts/acts2004.htm> (accessed 7 April 2015).

<sup>130</sup> Policy Paper- 2010 to 2015 'Government policy: violence against Women and Girls'. Available at <https://www.gov.uk/government/publications/2010-to-2015-government-policy-violence-against-women-and-girls/2010-to-2015-government-policy-violence-against-women-and-girls>.

<sup>131</sup> Available at <http://www.legislationline.org/topics/country/53/topic/7/subtopic/25> (accessed 7 April 2015).

<sup>132</sup> Act of 1984, 42 USA.C. § 1040.

<sup>133</sup> Act of 1984, 42 USA.C. § 10601.

<sup>134</sup> Pub.L.No.102-527, 106 Stat. 3459 (1992).

Violence, Adoption and Family Services Act of 1992;<sup>135</sup> and the International Parental Kidnapping Crime Act of 1993.<sup>136</sup>

In 1994, the USA government responded to the nationwide issue of domestic violence by enacting the Violence Against Women Act, 1994 (VAWA). This Act was enacted because of the need for a national solution aimed at improving services rendered to victims of violence and issues relating to arrest, investigation and prosecution of batterers.<sup>137</sup> After VAWA was enacted, other pieces of legislation were also passed to address the scourge of domestic violence.<sup>138</sup> Furthermore, in 1996, Congress enacted the Domestic Violence Offender Gun Ban, 1996 (commonly referred to as “the Lautenberg Amendment”).<sup>139</sup> Furthermore, there are Enhanced Penalties Statutes (2005),<sup>140</sup> which describe the different kinds of enhanced penalties for domestic violence that have been enacted in different States in the USA.

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<sup>135</sup> Act of 1992, Pub.L.No.102-295.

<sup>136</sup> Act of 1993 Pub.L.No.103-173, § 2, 107 Stat.

<sup>137</sup> Available at <http://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf> (accessed 12 May 2015). See also, The Advocates for Human Rights. ‘Stop Violence Against Women’ A Project by Advocates for Human Rights. Available at [http://www.stopvaw.org/state\\_and\\_federal\\_domesticviolence\\_laws\\_in\\_the\\_united\\_states](http://www.stopvaw.org/state_and_federal_domesticviolence_laws_in_the_united_states) (accessed 12 May 2015).

<sup>138</sup> See, for example, Pub. L. No. 101-112, 103 Stat. 685 (1989) (declaring October National Domestic Violence Awareness Month); Pub. L. No. 104-191, 110 Stat. 1936 (1996) (preventing insurance discrimination based on domestic violence); Pub. L. No. 104-201, § 1069, 110 Stat. 2655 (1996) (creating the crime of interstate stalking); Pub. L. No. 104-208, 110 Stat. 3004 (1996) (providing vital public health services for victims of domestic abuse); Pub. L. No. 104-208, 110 Stat. 3009-371- 72 (1996) (making the possession of firearms criminal for those convicted of domestic violence); Pub. L. No. 105-244, § 821, 112 Stat.1581(1998). Available at

[http://www.bwjp.org/files/bwjp/articles/Enhanced\\_Penalties\\_2005.pdf](http://www.bwjp.org/files/bwjp/articles/Enhanced_Penalties_2005.pdf) (accessed 6 November 2015).

<sup>139</sup> See Legal Information Institute at <https://www.law.cornell.edu/uscode/text/18/922> (accessed 7 April 2015).

<sup>140</sup> Available at [http://www.bwjp.org/files/bwjp/articles/Enhanced\\_Penalties\\_2005.pdf](http://www.bwjp.org/files/bwjp/articles/Enhanced_Penalties_2005.pdf) (accessed 7 April 2015).

Every State in the USA has legislation criminalising domestic violence.<sup>141</sup> However, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>142</sup> was enacted in 52 USA jurisdictions to address issues relating conflicts of law in the USA jurisdiction. Basically, UCCJEA seeks to expressly integrate the concerns of victims of domestic violence moving across jurisdictional boundaries because of safety concerns.

### 3.12 Domestic Violence Legislation in Switzerland

Primary legislation on domestic violence in Switzerland includes the Penal Code of 1937 which was amended in 2004 and Law on Equality between Men and Women of 1995 which was updated in 1996.<sup>143</sup> Articles of the Criminal Code of the Swiss Confederation which may be applicable to domestic violence are Articles 123, 126, 180, 181, and numerous others.

Article 123 Criminal Code of the Swiss Confederation provides, among others, that any person who wilfully causes injury to any person in any other way is liable to a custodial sentence. In terms of Article 126 of the Criminal Code of the Swiss Confederation, any person who commits acts of aggression against another that does not cause any injury to another person can also be held legally liable. Article 180 of the aforementioned Code on the

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<sup>141</sup> For example Minnesota's Domestic Abuse Act, Section 518B.01 of Minnesota's statutes, which, among others creates a civil remedy of an Order for Protection and it also describes the kind of relief that can be granted to victims of domestic violence. In New York, New York State's Domestic Violence Prevention Act (2004) created a comprehensive network of services for victims of domestic violence. New York State also passed a law creating an Office for the Prevention of Domestic Violence, which is charged with advising the governor and legislature "on the most effective ways for state government to respond to the problem of domestic violence". Available at <http://www.justice.gov/ovw/about-office> (accessed 6 November 2015).

<sup>142</sup>Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9 (1A) U.L.A. 657 (1999). Available at [http://www.nccusl.org/LegislativeFactSheet.aspx?title=Child\\_Custody\\_Jurisdiction\\_and\\_Enforcement\\_Act](http://www.nccusl.org/LegislativeFactSheet.aspx?title=Child_Custody_Jurisdiction_and_Enforcement_Act) (accessed 6 November 2015).

<sup>143</sup>See <https://www.admin.ch/gov/en/start/federal-chancellery.html><http://www.legislationline.org/topics/country/48/topic/7/subtopic/25> (accessed 7 April 2015).



other hand provides that any person who places another in a state of fear and alarm by making a serious threat can be held liable.

Article 181 of the Criminal Code of the Swiss Confederation provides that “Any person who, by the use of force or the threat of serious detriment or other restriction of another's freedom to act compels another to carry out an act, to fail to carry out an act or to tolerate an act, is liable to a custodial sentence not exceeding three years or to a monetary penalty.”.

#### **4. Due diligence, human rights obligations and dynamics of domestic violence**

It is a well-known fact that domestic violence is a social scourge worldwide and a criminal problem which causes damage and violation of human rights of adults and children who are victims of such violence. International law imposes an obligation on States to act with ‘due diligence’ to ensure that there is prevention, investigation, punishment and provision of remedies for acts of violence irrespective of whether those acts are committed by private individuals or the State.<sup>144</sup>

The significance of due diligence in human rights matters was established by the Inter-American Court of Human Rights in the key judgment of *Velásquez Rodríguez v Honduras*,<sup>145</sup> where it was held that Honduras had failed to fulfil its obligations under Article 1(1) of the American Convention on Human Rights and concluded that - "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."<sup>146</sup>

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<sup>144</sup>Combrinck H (2010) page 53 quoting J Bourke-Martignoni ‘The history and development of the due diligence standard in international law and its role in the protection of women against violence’ in C Benninger-Budel (ed) *Due Diligence and its Application to Protect Women from Violence* (2008) 47.

<sup>145</sup>Inter-American Court of Human Rights *Velásquez Rodríguez v Honduras* (Judgment Dated 29 July 1988) Series C: Decisions and Judgments, No. 04.

<sup>146</sup>*Velásquez Rodríguez v Honduras* at paragraph 172.

For every right there is a corresponding duty.<sup>147</sup> Every basic right assumes three types of duties: a duty to avoid violating the right in question, a duty to protect from violation of the right, and a duty to aid those whose rights have been violated.<sup>148</sup> All of these duties have to be performed if the basic right is to be fully honoured. The right to physical security, to which abducting parents are also entitled, therefore has the following three correlative duties: duties not to eliminate a person's security (avoidance); duties to protect people against deprivation of security by others (protection); and duties to provide for the security of those unable to provide for their own (aid).<sup>149</sup>

The consequences of violence on children are more dire because violence has the potential to cause children significant physical, mental, and emotional harm with long-term effects that can last into adulthood. Furthermore, violence against children erodes family structures, jeopardises children's education, generates social insecurity and consumes precious national resources.<sup>150</sup> Furthermore, the exposure of children to violence increases their risk of accrual of violent experiences, including later intimate partner violence.<sup>151</sup>

There are indications that women constitute the majority of domestic violence victims and according to a 2013 global review of available data, 35 per cent of women worldwide have experienced domestic violence/violence. Furthermore, national violence studies indicate that up to 70 per cent of women have experienced physical and/or sexual violence in their lifetime from their partners.<sup>152</sup> Research also indicates that there is a great probability for further

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<sup>147</sup>Nickel J 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 77 at 86.

<sup>148</sup>Shue H (1996) *Basic Rights: Subsistence, Affluence and Foreign Policy* 2 ed, 52.

<sup>149</sup>Shue (1996) 52-53.

<sup>150</sup> The African Report on Violence Against Children. Addis Ababa: The African Child Policy Forum (ACPF) (2014) x. Available at [www.africanchildforum.org](http://www.africanchildforum.org) (accessed 7 April 2015).

<sup>151</sup>Pinheiro P S, Independent expert for the United Nations Secretary-General's study on violence against children, World Report on Violence against Children (Geneva, 2006),p. 63-66. Available at [www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13\\_en.pdf](http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf) (accessed 7 April 2015).

<sup>152</sup>World Health Organization, Global and Regional Estimates of Violence against Women, 2013. Available at

violence when the abused person (mainly women) takes measures to return after that person had fled across the borders for safety.<sup>153</sup> Furthermore, most abused women experience what is called “Battered Women’s Syndrome” and Post-Traumatic Stress Disorder (PTSD) which may affect their psychological well-being and compromise the credibility of their testimony in court.<sup>154</sup>

A recent USA research report<sup>155</sup> found, among others, regarding domestic violence and the Hague Convention that:

- Prior to the abductions, the abducting mothers and their children were frequently subjected to brutal violence from the left-behind parents who lodged Hague Convention applications. Furthermore, those mothers who succeeded to keep their children in the USA were often faced with the challenge of continued threats or harassment from their ex partners.
- Mothers who have abducted their children to the USA were incapable of accessing supportive resources in the other country, so they left with their children to pursue safety and support of family members in the USA.
- The courts and relevant authorities in the USA were not amenable to mothers’ safety anxieties. For example, most women had their children returned to their habitual residence, and in most instances the children are returned to a life with violent husbands.
- Mothers and their children faced great adversities after a Hague Convention decision. For example, most of the women and/or their children who returned to their habitual residence were victims of renewed violence by the fathers on their return and most mothers stated that none of the court undertakings which were aimed at protecting them and/or their children were executed.

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[http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf)(accessed 7 April 2015); UN Women, 2012, Violence against Women Prevalence Data: Surveys by Country

<sup>153</sup>Artz L & Smythe D ‘Case attrition in rape cases: a comparative analysis’ (2007) 20 *SACJ* 158-181.

<sup>154</sup> Long G J ‘Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions, National District Attorneys Association, American Prosecutors Research Institute’ August 2007, pages 13-16. Available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf) (accessed 7 April 2015).

<sup>155</sup>Edleson JL, Lindhorst T, Mehrotra G et al (2010), pages vii –xii.

- Most women experienced challenges regarding payment of legal fees and legal representation in order to respond to Hague Convention applications. In some instances the left behind parents utilise intimidatory litigation.
- The Hague Convention decisions have not reflected on the research involving child exposure to domestic violence when deciding on grave risk for the past 20 years.
- There are indications that evidence of harm to children presented by legal representatives and through expert witness testimony was an important factor in cases where grave risk was found.
- The results of interviews with mothers and legal representatives and the analysis of Hague Convention rulings clearly indicate that there is a need for more awareness and training of legal representatives and judges in three areas: the meaning of the Hague Convention, including exceptions; the social science literature on the effects of children's exposure to domestic violence; and the experiences of mothers and children before they leave to the USA and then after Hague case decisions are made.

Considering the improvements that the USA has made in Hague Convention matters, it is highly probable that most of the above problems are experienced by abducting parents in the UK, Switzerland and RSA. The results of the above research clearly indicate that there are still a lot of challenges that need to be addressed with regard to Hague Convention domestic violence cases.

## **5. CONCLUSION**

There is no doubt that violence against children affects their confidence in the adult world, more so in instances where this violence is exercised by the child's own parent, or by someone close to them. In view of the above international treaties, including the Hague Convention, ratified by the USA, UK, RSA and Switzerland and reflected in their domestic legislation, the aforementioned countries are compelled to ensure that there is full implementation of the law without any compromise. The dire situation brought about by the scourge of domestic violence requires that all loopholes which may allow domestic violence to thrive should be closed. The State has therefore a duty to create and implement the juridical framework for protecting children against all kinds of violence. Furthermore, States can work collaboratively towards universal prohibition of any violence against children by highlighting any injustice, danger and inhumanity of laws which provide children with less protection from interpersonal violence than adults.

## **6. ARTICLE 13 OF THE CONVENTION**

### **6.1 Introduction**

Article 13 of the Convention provides, among others, that:

"...the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

*a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

*b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Apparently, Article 13 establishes three affirmative defences under the Hague Convention: The consent or acquiescence defence, which involves the left behind parent's consent to or acquiescence in the removal or retention of the child by the abducting parent; the grave risk defence, which arises in situations when the abducting parent asserts that returning the child would place the child at grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; and the mature child's objection defence, which arises in situations when the child objects to being returned, and the court finds that the child has attained an age and degree of maturity at which it is appropriate to take the child's views into account.

It has been widely accepted that the Convention and its exceptions were created for the purposes of protecting the child and not the abducting parent. Therefore, an abducting mother cannot establish a defence under article 13(b) if the danger does not affect the child.

Consequently, grave risk can only exist when the return puts the child in imminent danger prior to the resolution of a custody dispute.<sup>156</sup> In most cases the grave risk defence has been narrowly interpreted and courts have consistently stated that there should be a narrow interpretation because to do otherwise, they hold, would undermine the Convention's policy goal of returning children who are wrongfully removed from their habitual residence.<sup>157</sup>

It appears that in most instances abducting parents who allege domestic violence in Convention proceedings rely on Article 13(b), and therefore its interpretation is key in ensuring that there is a balancing of the rights of abducting parents, the children involved and the left-behind parents.<sup>158</sup>

## 6.2 Burden of proof and evidentiary standard under Article 13

Concerning the issue of who is to bear the burden of proof under Article 13(b), the Convention text and Explanatory Report are clear that the burden rests on the abducting parent.<sup>159</sup> The abducting parent is obliged to prove the article 13(b) defence on a balance of probabilities.<sup>160</sup> However, some courts places victims at a disadvantage by creating an artificial two-prong test by requiring the abducting parent to show that there is a grave risk of psychological and physical harm but also that there are no mitigating measures that can be taken in the country of habitual residence to reduce that risk.<sup>161</sup> While Article 13(b) explicitly

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<sup>156</sup>*Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996). INCADAT cite HC/E/USf82. See [www.incadat.com](http://www.incadat.com) (accessed 23 January 2016).

<sup>157</sup>For example, in the USA case of *Dallemagne v Dallemagne* 44-0 F Supp 2<sup>nd</sup> 1283 (MD Fla (2006) 299, where the father had previously punched the children's mother until she was unconscious and had tried to run her over with a car. Nevertheless, the court did not find grave risk because "there was no credible evidence that the petitioner has ever physically harmed the children". See also *Simcox v. Simcox* 511 Supp 3d 594(6<sup>th</sup> Cir 2007) available at [www.incadat.com](http://www.incadat.com) (accessed 27 January 2016).

<sup>158</sup>Quillen B (2014) 626.

<sup>159</sup>Pérez-Vera Report, 76.

<sup>160</sup>In the RSA case of *Penello v Penello* 2004 (3) SA 117 (SCA) 138D-F the court held that the words "grave risk" did not introduce an onus greater than that ordinarily applicable in civil proceedings.

<sup>161</sup>Quillen B (2014) 623 – 624.

requires the first prong, the second prong of the grave risk defence is not present in the language of the Convention.<sup>162</sup> Professor Merle H. Weiner on the other hand explains it best: "This perspective reinforces the domestic[-]violence victim's view that legal solutions will not help her... It tells the batterer that the system will help him exercise power and control over his victim, ... The children are taught that violence is rewarded, and that the system does not care about their mother's plight."<sup>163</sup>

### **6.3 Article 13(a) - Non-exercise of custody rights and/or Acquiescence or Consent**

In terms of Article 13(a) of the Convention, the court is not bound to return a child to the place of habitual residence if the abducting parent can prove that the left behind parent was not actually exercising his or her rights of custody or had acquiesced or consented to the removal of the child. The aforementioned defences turn on the left behind parent's subjective intent, but they are distinctly different. The defence of consent relates to the left behind parent's conduct before the child's removal or retention, whereas the defence of acquiescence relates to "whether the left behind parent subsequently agreed to or accepted the removal or retention."<sup>164</sup>

Left behind parents confronted with the defence of acquiescence face wide disparities in the requirements to rebut it. In the UK<sup>165</sup> some courts require that the consent be in writing, while

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<sup>162</sup>Quillen B (2014) 623 – 624; *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 001) INCADAT case: HC/E/USf 585. Available at [www.incadat.com](http://www.incadat.com) (accessed 27 January 2016). See also Sutherland C 'The Balancing Act of the Grave Risk of Harm Exception Under the Hague Convention of Civil Aspects of International Child Abuse - Ermini v. Vittori, 758 F.3d 2015 *Suffolk Transnational Law Review* 267 note 27. Available at <http://www.lexisnexis.com.ezproxy.uwc.ac.za> (accessed 6 November 2015).

<sup>163</sup>Weiner M H 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 631.

<sup>164</sup>Sweeney M B L & MacKenzie R 'Child Abduction: The Hague Convention On The Civil Aspects Of International Child Abduction: A Guide For New Hampshire Practitioners' 2013 *New Hampshire Bar Journal*, Spring/Summer, at para B.

<sup>165</sup>The meaning of consent was considered in, among others, the English Court of Appeal decision of *Re P-J (Abduction: Habitual Residence): Consent* 5 - *Re P.-J. (Children)(Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2010] 1

in the RSA, the consent needs to be for a permanent stay.<sup>166</sup> In Switzerland the consent could be express or tacit, but the left behind parent must clearly agree. In the USA<sup>167</sup> the courts require a subjective assessment of the intent of the left behind parent, and the nature and scope of the consent.<sup>168</sup>

#### **6.4 Application of Article 13(b) Exception - Grave Risk of Physical or Psychological Harm**

According to the paragraph 34 of the Explanatory report<sup>169</sup> there should be a restrictive interpretation of the grave risk of harm defence, as well as of other defences, in order to ensure that there is no collapse of the entire structure of the Convention. Paragraph 34 states that:

“[T]he three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. [A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.”

The most commonly used exception in the Hague Convention is Article 13(b)<sup>170</sup> and it is the only relevant defence for the purposes of dealing with a parent who abducts the child to

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W.L.R. 1237. INCADAT cite. HC/E/UKe1014. The court held that consent must be clear and unequivocal and can include future removal, provided that it is in force at the time of the removal and has not been withdrawn.

<sup>166</sup>*Central Authority v Houwerts* 2008 (1) SA 49 (SCA); *Central Authority for the Republic of South Africa v Odionye Charles Iguwa* (10/15111) 27 August 2010 (Unreported). Available at [www.justice.gov.za](http://www.justice.gov.za) (last accessed 6 November 2015).

<sup>167</sup>*Nicolson v Pappalardo*, 605 F.3d 100, 106 (2010).

<sup>168</sup>*Brown-Williams* K B (2011) page 61.

<sup>169</sup>Perez-Vera Report, para 34.

<sup>170</sup>Lowe N ‘A Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’ Part I (Global Reports) 2011, 29.



escape domestic violence.<sup>171</sup> This defence is sometimes called the grave-risk defence. Neither "grave risk" nor "intolerable situation" are defined by the Convention and there are difficulties in defining "grave risk of harm" in Convention cases. As a result, there are myriad definitions of the terms. However, an application relating to the grave risk defence does not involve consideration of the merits of the custody issues. Furthermore, the three separate components to article 13(b) – physical harm, psychological harm and intolerable situation – can be used individually or collectively.<sup>172</sup> Therefore, it appears that the drafters of the Convention envisioned that courts should interpret and develop the term. As a result, different courts in countries that ratified the Convention have interpreted Article 13(b) in different ways and in line with the laws and principles applicable in their countries.<sup>173</sup>

In the USA case of *Friedrich v. Friedrich*<sup>174</sup> in describing the grave risk definition, the court indicated that grave risk of harm arises in situations where firstly, the return of the child places the child in imminent danger before the resolution of the custody dispute; secondly, where there is serious abuse or neglect, or extraordinary emotional dependence and when the court in the country of habitual residence may be incapable or reluctant to give the child adequate protection.

Apparently, courts frequently experience challenges in drawing a distinction between a "risk of harm" and a "grave risk of harm." However, the aforementioned distinction requires a subjective judgment by the courts. The courts may in this regard consider the probability of the threat of harm and also the nature of the possible harm to the child.<sup>175</sup>

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<sup>171</sup>Browne NL 'Note, Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' 2011 *Duke Law Journal* 1196–97.

<sup>172</sup>Beaumont P & McEleavy P 'The Hague Convention on International Child Abduction' Oxford University Press (1999) at page 139.

<sup>173</sup>Weideman J and Robinson J A (2011) 75.

<sup>174</sup>78 F.3d 1060, 1069 (6th Cir. 1996).

<sup>175</sup>Townsend K 'Litigating International Child Abduction Cases under the Hague Convention Guide' (2012) at page 50. Available at [www.missingkids.com/en.../HagueLitigationGuide/hague-litigation-guide.pdf](http://www.missingkids.com/en.../HagueLitigationGuide/hague-litigation-guide.pdf) (accessed 6 November 2015).

It appears that at the time when Article 13(b) of the Convention was drafted, the classic child abductor was thought to be a non-custodial father, and issues relating to domestic violence were insignificant, but only became salient during the early 1990's.<sup>176</sup>

#### 6.4.1 The UK approach regarding the grave risk defence

In the UK the "grave risk of harm" defence is normally raised by abducting parents, but rarely won. Even in instances of serious physical abuse, the UK courts are hesitant to deny the return of a child under the grave risk of harm defence, and will often rely on the implementation of "undertakings" that may be used to protect a child during his or her return to the place of habitual residence.<sup>177</sup>

The decisions of UK courts indicate that the UK is interpreting the provisions of Article 13(b) of the Convention narrowly by requiring clear and convincing evidence.<sup>178</sup> In several English court decisions, there are indications that Article 13(b) defence was rejected or overturned on the basis that allowing such a defence would undermine the intention of the Convention.<sup>179</sup> The narrow interpretation and application of the grave risk defence in the UK has resulted in domestic violence victims who flee with their children to escape domestic violence experiencing complexities in invoking the Article 13(b) defence successfully.<sup>180</sup> The reason behind the UK's very narrow interpretation is owing to the fact that English courts are mainly

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<sup>176</sup>Quillen B (2014) 625; Weiner M H (2000) 611–14.

<sup>177</sup>Sweeney M B L and MacKenzie R (2013) para C.

<sup>178</sup>Bruch C 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 532. In the case of *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899 an abducting mother argued that her children would face a grave risk of harm in that her husband was prone to domestic violence and had a history of alcohol abuse. However, the court rejected her argument and indicated that clear and convincing evidence was required. The reason advanced by the court was that the mother was still prepared to let her children have contact with their father, despite her allegations against him.

<sup>179</sup>See, for example, *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465; *Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam); *Re A (A Minor) (Abduction)* [1988] 1 FLR 365.

<sup>180</sup>Weideman J and Robinson J A (2011) Abstract.

concerned about adhering to the principles of the Convention and not only considering the best interests of children in general. Furthermore, the English courts presume that imposing undertakings will sufficiently ensure that children are protected from exposure to grave risk of harm.<sup>181</sup> Furthermore, English courts assume that courts in the requesting State will ensure that any harm to the child is minimised or eliminated upon his or her return.<sup>182</sup>

In *Re A (A Minor) (Abduction)*<sup>183</sup> it was held that exceptions in Article 13(b) are to be interpreted strictly, and physical or psychological harm must be proven by obvious, incontrovertible evidence. The grave risk of physical or psychological harm entails something more than an ordinary risk because the risk must not only be a trivial, but a substantial one.

In *Re W (Abduction: Domestic Violence)*<sup>184</sup> it was held that, as English law now stands, Article 13(b) has no realistic chance of ever being established unless there has been violence or other specific abuse to the child him or herself.<sup>185</sup> In this case there was an application by the father for the return of his child to the RSA. The child had unilaterally been removed by the mother from the family home in the RSA to UK. The mother alleged that her husband was physically, emotionally and sexually abusive towards her and raised three arguments supporting her unwillingness to return with the child to RSA. Firstly, it was argued that the child would be harmed by continued exposure to her father's behaviour towards her mother because this would affect her mother's ability to care for her. Secondly, it would damage the child psychologically and emotionally to see her mother under continual stress in circumstances where she was isolated and under continued threat of her father. In the third place it was argued that the father would attempt to deny the mother the ability to care for the child independently and sabotage any attempts by her to seek protection in the RSA courts.<sup>186</sup> The court held that domestic violence by a father to a mother is not in itself enough to trigger the Article 13(b) defence, there was no real evidence of grave distress of the child, the court ruled that the mother had not proven the Article 13(b) defence and ordered that the child be returned to the RSA.

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<sup>181</sup>Weideman J and Robinson J A (2011) Abstract.

<sup>182</sup>*C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 473.

<sup>183</sup>[1988] 1 FLR 365.

<sup>184</sup>[2004] EWHC 1247 (Fam).

<sup>185</sup>*Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam) 505 para 3(w).

<sup>186</sup>*Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam) 507 para 4(c).

In *Re E (Children) (Abduction: Custody Appeal)*<sup>187</sup> the High Court held that the provisions of Article 13(b) of the Convention were clear and they needed neither elaboration nor gloss; and that the provisions of Article 13(b) by themselves demonstrated the restricted availability of the defence. As a result, the Court held that where the left behind parent or applicant denies the allegations of domestic violence, the Court should first ask whether those allegations are true and whether there would be a grave risk that the child would be placed in an intolerable situation. If the aforementioned questions are answered in the affirmative, the court must then ask how the child in question can be protected against the risk. In instances where the child cannot be protected, the court should endeavour to determine the truth of the disputed allegations of domestic abuse.

Research indicates that the challenges in proving any of the exceptions in the Hague Convention applications and the narrow interpretation utilised by English courts permits hard and insensitive results for abducting parents and their children in cases where abuse is involved.<sup>188</sup> Countless research conducted over the past four decades indicates that children who have witnessed domestic violence are likely to face long term repercussions in respect of, among other things, their psychological and behavioural development.<sup>189</sup> Despite the aforementioned consequences that domestic violence has on children, service support and delivery is still fragmented in the UK. The UK government needs to reconsider the evidence from research and practice that indicates the extent of the aforementioned problem and its effects on children so that the government can recognise the need to appropriately fund and deliver supportive services.<sup>190</sup>

Despite the fact that all member States of the European Union are party to the Hague Abduction Convention, certain provisions of the ‘Brussels II *bis*’ Council Regulation<sup>191</sup> viz.

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<sup>187</sup>[2011] UKSC 27.

<sup>188</sup>Bruch (2004) *Fam LQ* 534.

<sup>189</sup>Milner B A ‘Recognising Children and Young People Living and the Context of Domestic Violence’ 2010 *Internet Journal of Criminology* 1. Available at [www.internetjournalofcriminology.com](http://www.internetjournalofcriminology.com) (accessed 6 November 2015).

<sup>190</sup>Milner B A (2010) *Internet Journal of Criminology* 1.

<sup>191</sup>Council Regulation (EC) No. 2201/2003 on Jurisdiction, Recognition and Enforcements of Judgments in Matrimonial Matters and Matters of Responsibility Repealing Regulation (EC)

Articles 10, 11, 40, 42 and 55 prevail over rules in the Convention in relevant applications made between Member States. Article 11 of the ‘Brussels II *bis*’ Regulation aims to tighten the summary return regime, due to concerns that Article 13(b) of Hague Abduction was not being strictly construed.<sup>192</sup> The European Union position is discussed in detail in paragraph 7 below.

#### 6.4.2 The USA approach regarding the grave-risk defence

Initially, the USA courts utilised the narrow approach regarding the grave risk defence for example, in the case of *Friedrich v Friedrich*<sup>193</sup> where the Court of Appeal held that a "grave risk" only existed in two situations. Firstly, where returning the child would place the child in imminent danger before the resolution of a custody dispute and secondly, where there was evidence of serious abuse of the child, or an extraordinary emotional dependence, and the courts in the country of habitual residence were incapable or unwilling to give the child adequate protection. The Court further held that Article 13(b) of the Convention was not intended to be utilised by defendants as a vehicle to litigate or re-litigate the child's best interests. Furthermore, only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The court also held that the defendant must show that the risk to the child is grave, not merely serious.

The issue relating to the nature of the harm entails that the harm must be “a great deal more than minimal.” Therefore, the courts will deny the return of a child only in situations when the child’s danger is “grave” or “severe” and not just “serious.”<sup>194</sup> “[E]ven incontrovertible proof of a risk of harm will not satisfy” this defence if the “risk of harm proven lacks gravity.”<sup>195</sup>

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No 1347/2000, [2003] OJ L338/1-29 (Brussels II *bis* Regulation). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201> (last accessed on 5 February 2016).

<sup>192</sup>Fleming K (2014), para 3.2. See also [http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm) (last accessed 5 February 2016).

<sup>193</sup>78 F.3d 1080 8 (6th Cir. 1996) para III.

<sup>194</sup>See *Karpenko v Leendert*, No. 09-03207, 2010 WL 831269, at 8 (E.D. Pa. Mar. 4, 2010).

<sup>195</sup>*Laguna v Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at 8.

The *Friedrich* approach was followed by various USA courts in the past.<sup>196</sup> However, in some cases, USA courts made some effort to find ways to avoid the aforementioned narrow approach. For example, in *Blondin v. Dubois*,<sup>197</sup> the Second Circuit upheld the District Courts refusal to return children to France because the expert's testimony indicated that they would face a repetition of traumatic stress disorder.

In some of the USA courts where the grave risk defence was raised, the courts also examined whether the country of habitual residence had the means to protect the child from potential abuse.<sup>198</sup> However, during 2008, the Eleventh Circuit in the case of *Baran v. Beaty* held that neither the Hague Convention, the International Child Abduction Remedies Act nor the Perez-Vera Report require that a court should review evidence of whether the habitual residence can protect at-risk children.<sup>199</sup> The court indicated that the review of the aforementioned evidence would require evidence of the habitual residence's "legal and social service systems" which can lead to "difficult problems of proof" because the abducting parent left the habitual residence.<sup>200</sup> As a result, the court declined to "impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return."<sup>201</sup>

Unlike the UK courts, the USA courts started since approximately the year 2000 to adopt a new approach in cases where domestic violence is raised as the basis of a defence under Article 13(b) of the Hague Convention. According to Jeremy Morley, an American legal

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<sup>196</sup>*Friedrich v Friedrich* 78 F.3d 1080 8 (6th Cir. 1996) para III. The *Friedrich* approach was followed for example in *Rydder v Rydder* 49 f.3d 369, 372 (8th Cir. 1995); *Nunez-Escudero v Tice-Menley* 58 F.3d 374, 377-378 (8th Cir.1995).

<sup>197</sup>238 F.3d 153 (2d Cir. 2001) [*Blondin IV*]; See also *Danaipour v. McLarey*, 286 F.3d 1, 4 (1st Cir. 2002).

<sup>198</sup>*Walsh v Walsh* 221 F.3d 204 (1st Cir. 2000).

<sup>199</sup>526 F.3d 1340, 1347-48 (11th Cir. 2008) (affirming district court's decision not to return child due to a grave risk of harm).

<sup>200</sup>*Baran v Beaty* 526 F.3d 1340 (11th Cir. 2008). INCADAT cite. HC/E/USf 1142. Available at [www.incadat.com](http://www.incadat.com) (accessed 28 October 2015).

<sup>201</sup>*Baran v Beaty* at 1348.

expert in international family law: “There has been a dramatic shift in recent years in the USA law concerning grave risk of harm and a growing realization that it is inappropriate to order that children be sent back to face domestic violence without a full evaluation of the nature of the prior abuse & of the likelihood that the authorities in the country to which the children are being returned will indeed fully protect them & their abused mother.”<sup>202</sup> Furthermore, there are indications that the incidence of successful grave risk defences has increased globally.<sup>203</sup>

Examples of cases in which the USA Courts discarded the narrow approach to the interpretation of Article 13(b) of the Convention include the case of *Walsh v Walsh*<sup>204</sup> where the court recognised that the child's exposure to domestic violence is a sufficient risk to prevent a child's return under the Convention. In this case the children had witnessed the abuse and assault of their mother by the father. The court held that there was credible social science literature that established and proved that serious spousal abusers are also likely to abuse their children.<sup>205</sup>

In *Reyes Olguin v. Cruz Santana*,<sup>206</sup> the court held that there was a great risk of “severe” psychological harm upon the child’s return to Mexico because expert evidence indicated that if sent back, the child would experience “suicidal impulses generated by his prior trauma” of witnessing his father assault his mother, as well as his own experience of the abuse.

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<sup>202</sup>Morley J D ‘The Future of the Grave Risk of Harm Defense in Hague Cases’ 2007 *International Family Law* at the Conclusion. Available at [http://www.international-divorce.com/grave\\_risk\\_harm\\_defense.htm](http://www.international-divorce.com/grave_risk_harm_defense.htm) (accessed 12 May 2015).

<sup>203</sup>2011 Hague Global Statistical Analysis, page 30. Available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed 7 April 2015); 2011 Hague Statistical Analysis National Reports, page 205. Available at <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf> (accessed 7 April 2015). According to the report “USA courts have higher than average judicial return rates and fall below the global average in applying the grave risk defence as a basis for refusing a return”.

<sup>204</sup>221 F.3d 204, 218 (1st Cir. 2000).

<sup>205</sup>*Walsh v Walsh* 221 F.3d 204, 218 (1st Cir. 2000) 58.

<sup>206</sup>2004 WL 1752444 (E.D.N.Y), at 7. [http://www.missingkids.com/en\\_US/HagueLitigationGuide/Olguin.pdf](http://www.missingkids.com/en_US/HagueLitigationGuide/Olguin.pdf) (accessed 7 April 2015).

In the case of *Van de Sande v Van de Sande*<sup>207</sup> a mother abducted her two children from Belgium and retained them in the USA. Subsequently, the father lodged a Hague application for the return of the children and the abducting parent presented evidence showing that she was a victim of severe domestic violence at the hands of the left behind parent. She also alleged that the left behind parent had threatened to kill her and the children. The Court of Appeals held that the evidence presented by the abducting parent was sufficient to establish a *prima facie* case of "grave risk of harm" to the children and ordered that the children should not be returned to Belgium because they would face a grave risk of harm if returned to the left behind parent, taking into account the left behind parent's propensity for violence and his disregard for the children's welfare by beating their mother in their presence. The Court further held that a court must satisfy itself that a child will actually be protected if returned to the left behind parent; and it is not sufficient that this protection exists only in theory. Furthermore, although comity among nations requires a narrow interpretation of the "grave risk" defence, the safety of children is of paramount importance and should take preference.<sup>208</sup>

In the recent USA case of *Ermini v. Vittori*,<sup>209</sup> the Court of Appeals for the Second Circuit indicated that abuse alone is sufficient enough to trigger the grave risk exception. The court had to decide whether severe forms of physical and psychological harm caused by separating a child from autism treatment are sufficiently serious to trigger the Hague Convention's grave risk of harm exception.<sup>210</sup> The court held that the result of an autistic child being separated from autism treatment was grave enough to deny return back to the place of habitual residence.

Several reasons have been advanced for the need for the less strict interpretation and application of the grave risk exception by the USA courts. Firstly, it is apparent that when the Convention was drafted, the assumption on the part of the drafters was that the abductors of children would primarily be non-custodian fathers. However, the aforementioned assumption is erroneous in that there are indications that currently most of the abductors are mothers who

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<sup>207</sup>431 F.3d 567 (7th Cir. 2005).

<sup>208</sup>*Van de Sande v Van de Sande* 431 F.3d 567 (7th Cir. 2005) 10.

<sup>209</sup>758 F.3d 153 (2d Cir. 2014)758 F.3d at 164-65.

<sup>210</sup>*Erminiv.Vittori* at 156.



are the primary caretakers of their children who escape with their children to break out of domestic violence and abuse.<sup>211</sup> Therefore, no consideration was given to the fact that the remedy of return required by the Convention would not be in the best interest of a child if the child is placed in the care of a violent left behind parent or non-custodian father.<sup>212</sup>

Most of the USA court decisions delivered since the beginning of the millennia clearly indicate that Article 13(b) can be subject to different interpretations and application by USA courts, and as a result, some experts have argued that courts should use more common sense and be more reasonable in refusing to send children back to conditions where they will possibly be subjected to further domestic violence. Apparently, previous USA court decisions indicate that courts have been far too "grudging" when faced with an Article 13(b) defence by abducting parents.<sup>213</sup> Furthermore, courts should realise that domestic violence and the fear of violence can in most cases be sufficient for the abducting parents to successfully invoke the grave risk of harm defence.<sup>214</sup>

The USA case law also indicates that States are becoming increasingly sensitive to the relevance of domestic violence for the grave risk of harm defence because numerous courts took cognisance of the fact that physical abuse perpetuated against the abducting parent is relevant to the Article 13(b) defence, even if the children involved were not subjected to such physical abuse.<sup>215</sup>

### **6.4.3 The RSA approach regarding the grave-risk defence**

In most of the RSA cases involving the grave risk defence, the courts are following a wider approach to the defence due to the fact that the best interests of a child will be of paramount

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<sup>211</sup>Wills M 'Interpreting the Hague Convention on International Child Abduction: Why American Courts need to reconcile the Rights of Non-Custodial Patents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention' (2006) 25 *Rev Litig* 447-448.

<sup>212</sup>Wills (2006) *Rev Litig* 454.

<sup>213</sup>Bruch (2004) *Fam LQ* 529.

<sup>214</sup>Wills (2006) *Rev Litig* 457.

<sup>215</sup>For example see *Baran v. Beaty* where it was held that the left behind parent's previous violent acts contributed to the grave risk of harm.

importance. This approach is firmly entrenched in the RSA Constitution of 1996 and the Children's Act No 38 of 2005.<sup>216</sup> In the case of *Sonderup v Tondelli* the Constitutional Court indicated, with regard to "grave risk of harm" that "an Article 13 enquiry is directed to the risk that the child may be harmed by a court ordered return. The risk must be a grave one. It must expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The words "otherwise place the child in an intolerable situation" indicate that the harm that is contemplated by the section is harm of a serious nature."<sup>217</sup> Apparently, there must be objective evidence indicating that there is risk that the child may be harmed.<sup>218</sup>

The RSA courts have embraced the fact that the grave risk exception allows the courts to make an enquiry into the child's best interests, but this enquiry is restricted.<sup>219</sup> In the case of *Penello v Penello (Chief Family Advocate as Amicus Curiae)*<sup>220</sup> the abducting mother argued that her relationship with her husband had irretrievably broken down to the extent that cohabitation with her husband had become physically and psychologically intolerable.<sup>221</sup> The court held that the grave risk defence is always focused on the interests of the child in question and the risk of harm to which the child may be exposed if the child is ordered to return to the left behind parent.<sup>222</sup> The court further indicated that the conduct of the abducting parent may be one of the relevant factors to consider in determining if grave risk exists and the court found that the abducting parent had herself to blame for the situation she found herself in.<sup>223</sup> Furthermore, the court indicated that the age of the child concerned may also be a relevant factor in determining if the grave risk defence exists, but there are no grounds to differentiate in principle on the basis of age, or to be influenced by some kind of

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<sup>216</sup>*Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.

<sup>217</sup>*Sonderup v Tondelli and Another*, paragraph 44.

<sup>218</sup>The court in *Sonderup v Tondelli* relied on *WS v LS* 2000 (4) SA104 (C) at 115E–F).

<sup>219</sup>*Chief Family Advocate & another v G* 2003 (2) SA 599 (W) at 611J–612C; *Family Advocate v B* [2007] 1 All SA 602(SE) paras 11, 13.

<sup>220</sup>2004 (3) SA 117 (SCA).

<sup>221</sup>Page 140 G-H.

<sup>222</sup>Page 144 B-C

<sup>223</sup>Page 145 C-E.

"tender years" principle when applying the Convention.<sup>224</sup> The court held that the abducting parent did not discharge the onus resting on her and the court ordered that the child be returned to the left behind parent in the USA.

In *Family Advocate v B*<sup>225</sup> the abducting parent removed the child from the UK to the RSA without the required consent. The left behind parent instituted return proceedings in terms of the Convention and the abducting parent raised the grave risk defence. The court considered the abducting parent's evidence regarding the left behind parent's acts of domestic violence against her which compelled her to flee her home and seek refuge elsewhere.<sup>226</sup> Furthermore, the court took the child's views into account that he does not desire to be separated from the abducting parent.<sup>227</sup> The court found that although the child was only seven years old, he was mature enough to make an informed decision.<sup>228</sup> Furthermore, the court considered the expert opinion of the curator *ad litem* and the psychologist who evaluated the child and concluded that it was in the best interest of the child to remain in the RSA with the abducting parent.<sup>229</sup> The court dismissed the left behind parent's application.

In the recent case of *Central Authority of the Republic of RSA v KT*<sup>230</sup> the court held that the grave risk defence had been established because the left behind parent was aggressive and disposed to losing his temper, that this was “not a case where one parent has absconded with the child to an unfamiliar country”. The court also held that the abducting parent as a party to an abusive relationship had no one to turn to and had no ties with the country at all and consequently she would find it difficult to return to the country of the child's habitual

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<sup>224</sup>Page 144 F-G.

<sup>225</sup>2007 (1) All SA 602 (SE).

<sup>226</sup> Page 605 para 5.

<sup>227</sup>Art 13(2) of the Convention provides that an application for the return of the child may be dismissed if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. See also section 278(3) of the Children's Act which deals with issues relating to the child's objection.

<sup>228</sup>Paras 13-14.

<sup>229</sup>See pages 608-609 at para 9-10.

<sup>230</sup>2015 JDR 0036 (GI).

residence. Furthermore, the court also held that the child had “fully integrated into his life in the country and was well adjusted”.<sup>231</sup>

Apparently, the decision in *Central Authority v KT* drives a “coach and four” through the Hague Convention because the “grave risk” was no more than the risks asserted by the abducting parent in *Penello v Penello* and the other cases discussed above. It is an inconsistency in RSA Hague Convention jurisprudence.<sup>232</sup>

#### **6.4.4 The Swiss approach regarding the grave-risk defence**

The Swiss established that the Hague Convention defences, including the grave risk defence, are interpreted too narrowly in various situations, resulting in harsh outcomes for the children involved. These situations include instances where the abducting parent abducted the children in order to escape domestic violence and courts sometimes returned the child despite the fact that the abducting parent cannot safely return with the child.<sup>233</sup>

Though the Convention was found to be compatible with Swiss Constitution,<sup>234</sup> the Swiss government and reformers became concerned about the application of the Hague Convention defences following the 2006 case of Russell Wood and Maya Wood-Hosig (“the *Wood* case”).<sup>235</sup> In the *Wood* case, the abducting parent took her two children from Australia to Switzerland and when she was discovered in Switzerland, her children were forcibly removed from her and institutionalized for a year until they could be returned to Australia. Upon arrival in Australia, they were again placed in foster care because the father was unable to care for the children. Eventually, the Australian court gave the mother custody and the children were ordered to be returned to Switzerland.

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<sup>231</sup>Paragraph 50.

<sup>232</sup>Julyan J, The Hague Convention on the Civil Aspects of International Child Abduction Recent Developments in South Africa, 2<sup>nd</sup> Annual Johannesburg Family Law Conference, 2 October 2015.

<sup>233</sup>Weiner M, 2008 page 340.

<sup>234</sup>5P.1/1999, Bundesgericht (Tribunal fédéral), [INCADAT cite: HC/E/CH 427.

<sup>235</sup>Available at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard> (accessed 7 April 2015).

Switzerland succeeded in dealing with the limitations caused by, among others, the interpretation of Article 13(b) in instances where there are allegations of domestic violence.<sup>236</sup> The Swiss Parliament passed a law to the effect that an “intolerable situation”

exists for purposes of Article 13(b) when, but not only when, the following criteria are met:

- a. placement with the parent who filed the application is manifestly not in the child’s best interests;
- b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent; and
- c. placement in foster care is manifestly not in the child’s best interests.<sup>237</sup>

The Swiss Act also requires the court to “hear the child in an appropriate manner or appoint an expert to carry out this hearing unless the age of the child or another valid reason prevents this.”<sup>238</sup> Furthermore, the Swiss legislation has extensive provisions regarding the handling of the Hague Convention cases and also judiciously provides that the Central Authority should involve specialists with multidisciplinary knowledge to assist the family in reaching a voluntary resolution, by utilising alternative dispute resolution like conciliation and mediation, if necessary.<sup>239</sup>

In Swiss law the term “intolerable situation” in Article 13(b) is a separate defence to the Convention’s remedy of return. As a result, the Swiss courts cannot ignore the “intolerable situation” language or presuppose that it is coextensive with the “grave risk of harm” language.<sup>240</sup> The rationale behind two separate defences in Article 13(b) is that failure to separate the “grave risk of harm” and “intolerable situation” has unnecessarily limited the scope and application of the “intolerable situation” defence because something may create an “intolerable situation” for the child, but not cause that child a “grave risk of physical or psychological harm”, for example, the separation of siblings.<sup>241</sup>

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<sup>236</sup>Weiner M, 2008 page 341.

<sup>237</sup>Weiner M, 2008 page 343.

<sup>238</sup>Weiner M, 2008 page 344.

<sup>239</sup>See Swiss Federal Act arts. 3, 4, Dec. 21, 2007.

<sup>240</sup>Weiner M, 2008 page 345.

<sup>241</sup>Weiner M, 2008 page 348.

There are a few cases where the Swiss Courts have rejected the abducting parent's arguments regarding domestic violence. For example, in *Obergericht des Kantons Zürich (Appellate Court of the Canton Zurich)*, 28/01/1997, U/NL960145/II.ZK<sup>242</sup> the abducting parent argued that the left behind parent was a danger to the children because, among other things, he had sexually abused the daughter. The court rejected the abducting parent's assertions because she had previously left the children with the left behind parent whilst she travelled abroad. Furthermore, there are examples of cases where the Swiss courts took a very strict approach regarding the Article 13(b) exception in instances where the abducting parent who was a primary caregiver threatened not to accompany a child back to the State of habitual residence if a return order was made.<sup>243</sup>

Apparently the Swiss legislation highlights the challenges which may arise if the abducting parent who was a victim of domestic violence and the child are returned without proper consideration of the post-return situation in the requesting State. By allowing the child to stay with the abducting parent in the requested State, far away from the abusive left behind parent, the "best interests" approach of the Swiss law appears to be the most suitable solution for protecting victims of domestic violence and their children.<sup>244</sup>

## **7. European Union and Jurisprudence of the European Court of Human Rights**

According to the Status Table for the Hague Abduction Convention, all the member States of the European Union are members of the Hague Abduction Convention.<sup>245</sup> During the negotiation of what became known as the Brussels II Regulation, a European solution was needed which would provide 'added value' for the European citizens with regard to child abduction matters because there were concerns regarding the prompt return principle and the fact that Article 13(b) of the Hague Convention was not strictly applied. However, the

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<sup>242</sup>INCADAT Reference: HC/E/CH 426.

<sup>243</sup>See for example the cases of 5A\_285/2007/frs, IICour de droit civil, arrêt du TF du 16 août 2007 [INCADAT Reference: HC/E/CH 955] and 5A\_479/2012, IICour de droit civil, arrêt du TF du 13 juillet 2012 [INCADAT Reference: HC/E/CH 1179].

<sup>244</sup>Fleming K (2014), Chapter 6.

<sup>245</sup>Status Table for the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last accessed on 3 February 2016).

Brussels II Regulation preserved the Hague Convention for intra-Member State abductions. However, some of the provisions of the ‘Brussels II *bis*’ Council Regulation<sup>246</sup> prevail over provisions of the Hague Abduction Convention in applications which are made between member States.<sup>247</sup>

In terms of the provisions of Article 11(4) of the Brussels II Regulation, the return of a child cannot be refused under Article 13(b) of the Hague Convention, if it is established that adequate arrangements have been made to secure the protection of the child after his/her return to his/her place of habitual residence. The Practice Guide to the Regulation states that it is not sufficient that procedures exist within the Member State of origin: it must be established that the authorities have taken *tangible measures* to protect the child in question.<sup>248</sup> Apparently, Article 11(4) has the potential to be of great assistance in child abduction cases involving domestic violence because it encourages the use of protective measures. Unfortunately, the Practice Guide to the Regulation does not provide a definition of what constitutes “adequate arrangements”; as a result this weakens the provision’s ability to provide a more positive outcome in child abduction cases involving domestic violence. The other weakness that is evident in the aforementioned Regulation is that it does not provide any protective measures for the abducting parents. According to Ruth Lamont, the aforementioned Regulation has the potential to protect all the victims of domestic violence in abduction matters, if it can be interpreted more broadly. She asserts that “if a return is initially refused on the grounds of one of the exceptions, the courts in the State of origin may decide the substantive custody dispute, with the child remaining abroad during litigation.”<sup>249</sup>

There are indications that in the past the Strasbourg Court interpreted the European Convention based on the principles of the Hague Convention. For example, in *Maumousseau*

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<sup>246</sup>Council Regulation (EC) No. 2201/2003 on Jurisdiction, Recognition and Enforcements of Judgments in Matrimonial Matters and Matters of Responsibility Repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1-29 (Brussels II *bis* Regulation), articles 10, 11, 40, 42 and 55.

<sup>247</sup>McEleavy P (2015) para 2.2.

<sup>248</sup>Practice Guide for the application of the new Brussels II Regulation, 32 (emphasis added) Available at [http://ec.europa.eu/civiljustice/divorce/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf) (last accessed on 5 February 2016).

<sup>249</sup>Lamont R ‘Mainstreaming Gender into European Family Law: The Case of International Child Abduction and Brussels II Revised’ (2011) 17 *European Law Journal* 382.

*and Washington v France*,<sup>250</sup> the European Court recognised that it is within the child’s best interests to be returned to the State of habitual residence and also acknowledged that the return mechanism is not “automatic”; the exceptions of the Hague Abduction Convention can be raised “based on objective considerations concerning the child and its environment.”<sup>251</sup> The aforementioned approach in the *Maumousseau* case harmonised the European Convention with the aims and purpose of the Hague Abduction Convention, but unfortunately, subsequent decisions by the Strasbourg Court created a conflict between the two Conventions. For example, in 2010 the court in *Neulinger and Shuruk v Switzerland*<sup>252</sup> utilised the principles of the European Convention in dealing with a case involving domestic violence.

The primary focus for the Grand Chamber in the European Court of Human Rights in the *Neulinger v Switzerland* case was whether the interference in the family life of the child and mother as provided for in Article 8 of the European Convention on Human Rights was necessary in a democratic society. The case involved a unilateral relocation by a custodial mother (abducting parent) despite the existence of a *ne exeat* restriction. The abducting parent (a Swiss national) decided to abduct her son after the Israeli courts refused to lift a *ne exeat* restriction to travel with her son to Switzerland. The abducting parent unilaterally removed the child to Switzerland, where she hid the whereabouts of the child for sometime. However, the left behind parent managed to locate the child and he filed a Hague abduction application within a year of the wrongful removal. The Swiss courts had considered the Article 13(b) defence and decided that the abducting mother was able to return with the child to Israel and commence proceedings there. Nevertheless the Grand Chamber held that the situation must be assessed at the time of the enforcement of the return order – that is more than two years after the return order was made and more than 4 years after the initial abduction. The Grand Chamber held that the settlement of the child in the new country and the difficulties the abducting parent would face if she returned to Israel were sufficient reasons to establish that enforcement of a return order would interfere with family life. The Court of Human Rights indicated that that the best interests of the child must be assessed in each individual case and that it was obliged to “ascertain whether the domestic courts conducted an in-depth

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<sup>250</sup>App No. 39388/05 (ECtHR, 6 December 2007) para 71.

<sup>251</sup>Para 72.

<sup>252</sup>App no. 41615/07 (ECtHR, 6 July 2010), Application No 41615/07). INCADAT cite. HC/E/ 1001.



examination of the entire family situation and of a whole series of factors” as to what would be best for an abducted child in the context of an application for return.<sup>253</sup>

The subsequent decision of *Raban v Romania*<sup>254</sup> reiterated the principles in the *Neulinger* case. In the *Raban* case, the Strasbourg Court upheld the Romanian decision that returning the abducted child to Israel would not be in the child’s best interests because, among others, of the “state of insecurity” in Israel. The aforementioned decision appears to be a more liberal interpretation of Article 13(b) of the Hague Abduction Convention because in the past the UK held that the “state of insecurity” in Israel does not give rise to a successful defence of Article 13 (b).<sup>255</sup>

Though the Grand Chamber decision of *Neulinger and Shuruk v Switzerland* is contrary to the primary objectives of the Hague Abduction Convention, it appears to be in favour of domestic violence victims, who would benefit from an examination of the domestic violence allegations. It will be of great assistance if the approach utilised in the aforementioned cases can be utilised in all Hague abduction cases involving domestic violence.

According to recent research, there are indications that there have been many high profile abduction cases where the new rules in the European Union have been ignored or they failed to operate as intended. Furthermore, the preliminary conclusions from an empirical study indicates that in most instances abducted children are seldom returned to their State of origin under the Article 11(8) of the Brussels II Regulation.<sup>256</sup> Furthermore, in Strasbourg the picture continues to be mixed because some judgments supported the objective of return and a strict interpretation of the exceptions in their application of Article 8 of the Brussels II Regulation and some of the judgments appear to reject the fundamental premise of the Hague Convention.<sup>257</sup>

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<sup>253</sup>Para 138 -139.

<sup>254</sup>App no 25437/08 (ECtHR, 26 October 2010) INCADAT cite HC/E/1330.

<sup>255</sup>See *Re S (A Child)* [2002] EWCA Civ 908.

<sup>256</sup>McEleavy P (2015) para 2.2.

<sup>257</sup>McEleavy P (2015) para 3.3.4.

## **8. Subjective perception of risk**

Article 13(b) does not deal with situations where there is subjective perception of risk. In *E (Children)* (Abduction: Custody Appeal), *Re* [2011] UKSC 27; [2012]1 A.C.144 (SC) the Court found that where the fears were genuinely held (albeit not objectively established) and were of such an intensity as to impact significantly on functioning (and parenting) then they had a genuine role in creating “risk” for the children who were the subject of the proceedings. The aforementioned decision may be criticised for diluting the aims of the Convention or raising the bar against the making of return orders. However, the Court of Appeal reiterated that it had not changed the test or raised the bar to return in its decision in *Re S (A Child)* [2012] UKSC 10.

Considering that the conduct which constitutes “abuse” differs in magnitude, degree and from case to case, how is the court then to deal with the potentially very real fear of abuse which fear does not appear to be objectively made out on the evidence? Abducting parents are placed in a difficult situation, more so that a discretion ultimately rests with the judge whether to deny or allow the return of the child and the judge’s discretion is fallible and subject to human error.

## **9. Application of Article 13(b) exception - "Intolerable Situation"**

International jurisprudence is not clear and is divided on whether the second part of Article 13(b) on "intolerable situation" should play a greater role in instances where the abducting parent raises the issue of domestic violence. “Intolerable situation” is not defined in the Convention, but the words “grave risk” and “intolerable” clearly suggest that the defence is narrow. This is confirmed by the Pérez-Vera Explanatory Report, which calls for all the defences to be interpreted in a “restrictive fashion.”<sup>258</sup> There are indications in the Pérez-Vera Explanatory Report that “intolerable situation” was intended to refer, among other things, to

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<sup>258</sup>Pérez-Vera, Explanatory Report, Note 59, at 434.

instances where there was domestic/family violence, but the child was not the direct target of such physical or psychological abuse.<sup>259</sup>

There are arguments that the abducting parent's perception of intolerability caused by domestic violence would be inextricably linked to the child's psychological well-being. However, such arguments were not always successful in court, but the courts often affirmed the validity of assessing intolerability by considering the abducting parents'/primary carer's wellbeing, as that the child's "interests are inextricably tied to their mother's psychological and physical security."<sup>260</sup>

In the USA there are no indications that a "grave risk of physical or psychological harm" is required for an "intolerable situation," it is believed that a "grave risk of physical or psychological harm" was an "intolerable situation."<sup>261</sup> Therefore, in the USA, the intolerable situation defence is rarely utilised, as a result there is lack of case law on the intolerable situation defence and little precedent for courts to follow.<sup>262</sup> In the UK the courts are generally following a strict interpretation of Article 13(b) and there are suggestions that the extension of an otherwise restrictive interpretation of Article 13(b) will create a legal loophole, which would leave the exception open to some manipulation.<sup>263</sup>

Apparently, the "intolerable situation" defence is established in situations when the disadvantage faced by an individual child affected by the abduction outweighs the potential benefits all children receive from deterring international abduction. The Swiss formulation of

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<sup>259</sup>For instance in *Sonderup v Tondelli* where the harm foreseen upon the child's return was "the natural consequence of her removal", despite the alleged presence of domestic violence prior to the abduction.

<sup>260</sup>In the RSA case of *Pennello v Pennello* the Supreme Court of Appeal held that the abducting parent's evidence indicating that cohabitation with the left behind parent had become physically and psychologically intolerable was sufficient despite the fact that there was no "established pattern of domestic violence."

<sup>261</sup>Weiner M, 2008 page 346 -7.

<sup>262</sup>Brown-Williams K (2011) 70.

<sup>263</sup>Fleming K (2014), para 4.3.

“intolerable situation” covers instances which most observers would find morally intolerable.<sup>264</sup>

## 10. Mature Child Objection to Removal Defence

There is also an exception in Article 13 which relates to a child’s objection to being returned where she/he has reached an age and degree of maturity at which it is appropriate to take account of his/her views. In terms of Article 12 of the CRC, the child has the right to express his or her views and to have them given due weight, considering the age and maturity of the child. As indicated by the Committee on the Rights of the Child, "participation" in Article 12 of the CRC can be described as: ‘[The] ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.’<sup>265</sup> Article 12 is considered as the “soul” of the CRC because children are recognised as independent bearers of human rights,<sup>266</sup> and they have the right to some self-determination and are no longer regarded as mere property.<sup>267</sup> Apparently, Article 12 dispels the myth that children are incompetent, irresponsible and are in need of protection, shortly that "the child is an incomplete human being."<sup>268</sup> However, it seems that some countries still lack the understanding of what constitutes an obligation to hear children.<sup>269</sup>

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<sup>264</sup>Weiner M, 2008, page 355.

<sup>265</sup>Committee on the Rights of the Child, General Comment No. 12 (2009) - The right of the child to be heard, para 5.

<sup>266</sup>Sloth-Nielsen J, 2015 Children’s rights, the digital era and freedom of expression: an analysis from the African perspective. Available at <https://www.apc.org/en/system/files/Chapter/pdf> (last accessed 23 January 2016).

<sup>267</sup>Sloth-Nielsen ‘Ratification Of The United Nations Convention On The Rights Of The Child: Some Implications For South African Law’ 1995 SAJHR, 404; Mezmur B M, 'The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SAPR/PL*. 1

<sup>268</sup>Krappmann L ‘The weight of the child’s view (Article 12 of the Convention on the Rights of the Child)’ (2010) 18 *International Journal of Children’s Rights* 503.

<sup>269</sup>UNICEF - Every Child’s Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child - General Comment No.12 (2011) page 1. Available at <http://www.unicef.org> (last accessed 5 February 2016).

The CRC's Committee on the Rights of the Child specifically addressed, among others, issues relating to the views of the child, thereby reaffirming their commitment to the realisation of Article 12 of the Convention and stating that '[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention'.<sup>270</sup> In view of the aforementioned Committee's commitment, Article 12 is not only a right in itself, but it should also be taken into consideration when interpreting and implementing all other rights.<sup>271</sup>

There is a wide divergence of practice amongst the Convention's signatory States as to the age at which it is appropriate to take account of a child's views and how these views should be ascertained.<sup>272</sup> In terms of Article 12 of the Convention, it is clear that age is not the determining factor regarding the weight that should be attached to the views which were expressed by the child. There are indications that certain factors like the child's experiences, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form or express a view. Furthermore, the children's capacity to form and express a view should be assessed on a case-by-case basis.<sup>273</sup>

It is crucial that the feelings of the abducted child should be explored at an early stage of the return proceedings and, where a return is ordered, the child's expressed views should be taken into consideration regarding the return. Furthermore, depending on the child's age or maturity, the child should be fully informed about all the consequences of the return order.<sup>274</sup> In most democratic countries, including the four countries covered in this thesis, there is

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<sup>270</sup>General Comment No.12 (2009) 'The right of the child to be heard' (Fifty - First session, Geneva, 25 May – 12 June 2009) para 2, 5 and 71.

<sup>271</sup> The other fundamental values identified by the Committee on the Rights of the Child are non-discrimination (Article 2), the best interests of the child (Article 3) and the right to life, survival and development (Article 6).

<sup>272</sup>Freeman M, International Centre For Family Law Policy And Practice 'Parental Child Abduction: The Long-Term Effects' (5 December 2014) page 14. Available at [www.famlawandpractice.com](http://www.famlawandpractice.com) (last accessed 28 January 2016).

<sup>273</sup>General Comment No.12 (2009) 11.

<sup>274</sup>Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, at page xii. Available at [www.hcch.net](http://www.hcch.net) (accessed on 20 January 2016).

generally a growing understanding of the importance of listening to the children in cases affecting them. In order to address the challenges brought about by domestic violence in Article 13(b) applications, it is crucial that the children affected by international abductions should be heard in all cases, if that is possible.

## **11. Conclusion**

The provisions of Article 13, like other key provisions of the Hague Abduction Convention, have generated a lot of litigation, and in some instances with different interpretations emerging throughout the 90 ratifying States. This is understandable, because the Hague Convention is a global instrument and the Contracting States enjoy procedural autonomy in respect of the manner in which they handle return proceedings.<sup>275</sup> Due to the different interpretations given to Article 13 of the Convention, in many instances it operates against the rights and interests of domestic violence victims. There is tension between the interest in discouraging international child abduction and protecting victims of domestic violence. The aforementioned challenges are caused by, among others, the fact that the Convention is silent about the evidentiary standard that is required from abducting parents to prove grave risk under Article 13(b); the Convention merely states that the exceptions must be “established”. As a result, the evidentiary standard varies among Contracting States. This challenge can be addressed by providing an explicit domestic violence defence and specifying the evidentiary standard that is required from the abducting parents.

Apparently, when Article 13(b) of the Hague Abduction Convention was drafted, domestic violence was not salient in the public eye and the drafters did not foresee that child abductions can be carried out by victims fleeing domestic violence, particularly mothers. There are indications that the Convention operates on the basis that the abduction itself is a form of domestic violence.<sup>276</sup> In view of the fact that the profile of abductors has changed, the courts in contracting States are placed in a difficult position because they are applying the provisions of Article 13(b) to cases that the Convention’s drafters did not anticipate when the Convention was drafted. I submit that this problem can be tackled by providing for a domestic violence defence which accommodates abducting mothers who abduct their children to flee from domestic violence.

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<sup>275</sup>McEleavy P (2015) para 2.1.

<sup>276</sup>Quillen B (2014) 625.

The other challenge involving Article 13 relates to the meaning of "grave risk of harm". The absence of a definition of "grave risk of harm" has resulted in different interpretations of the term by the Contracting States. This challenge can be addressed by defining "grave risk of harm" in the Convention. In addition to the aforementioned challenge, the court's scrutiny of the Article 13(b) grave-risk defence could be impacted by the Convention's prompt return principle. For example, domestic violence victims may require expert witnesses to testify about the "grave risk of harm" to the child, and this process may result in delays in the finalisation of the return proceedings. The latter challenge can be addressed by legislating an explicit domestic violence defence. The prompt return principle can be suspended in instances where there is evidence of domestic violence on the part of the left behind parent.

In instances where the Convention defences were interpreted too narrowly it resulted in harsh outcomes for the children involved. For example, some of these children ended up in foster care or with the alleged abuser.<sup>277</sup> In only a few Convention cases have judges in different member States accepted that children's exposure to their mothers' victimization at the hands of an abusive left behind parent represents a grave risk of harm to the children and denied the left behind parents' applications for their children's return.<sup>278</sup> The inclusion of an explicit domestic defence would assist in furthering the best interests of children because it will alleviate the challenge faced by the courts in recognizing that domestic violence is harmful to children. The reticence of the majority of courts to connect domestic violence with a grave risk of harm to children runs counter to the weight of social science research, which has clearly established possible risks to children exposed to domestic violence that may be as significant as those children who have directly been victims of physical or sexual abuse.<sup>279</sup> An explicit domestic violence defence will also promote the social science research conducted after enactment of the Hague Abduction Convention which indicates that in most instances the abuse does not stop when the parents separate. Furthermore, an explicit domestic violence exception would force judges to be consistent with current and accepted

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<sup>277</sup>Malhotra A 'To Return or Not to Return: Hague Convention versus Non-Convention Countries' (2010) 13 *Journal of Family Law and Practice* 59.

<sup>278</sup>*Walsh v. Walsh* (1st Cir. July 25, 2000) *INCADAT* cite. HC/E/USf326. Available at [www.incadat.com](http://www.incadat.com) (accessed 7 April 2015). The Court looked to social science literature for support in accepting a grave risk defence raised by the abducting parent.

<sup>279</sup>Edleson J L (2010) 298.

social science. I concur with the assertion that the prevailing restrictive approach to the interpretation of Article 13(b) which suggests: "...[T]hat only too often courts have failed to provide adequate protection for children and that their zealousness not to determine the long-term interests of children has also led them to ignore their immediate interests. Whilst undertakings, judicial liaison and other provisional measures appear to provide the optimal solution to the tension between the need to protect the child and the danger of undermining the Convention, these measures are of little value unless courts ensure that they are really effective".<sup>280</sup>

Making the abuse of the victimized abducting parents irrelevant to an Article 13(b) defence often deprives them of the only defence available to them, rendering them powerless.<sup>281</sup> The strict application of Article 13(b) does not meet the needs of the victims of domestic violence and their children and the courts have been far too grudging in their application of the Article 13(b) defence. Courts should exercise more common sense in refusing to send abducting parents and children back to circumstances of domestic abuse.<sup>282</sup>

The challenges that currently plague the abducting parents who raise the grave risk defence can also be addressed by also looking into other aspects affecting international child abductions. Issues like judicial communications, judicial investigations into allegations of domestic violence, harmful effects of domestic violence on children, potential risks to the life or safety of the returning parent and/or the child following return orders, the effectiveness or enforceability of undertakings and the support for victims of domestic violence in the requesting or requested jurisdiction should also be considered in order to ensure that justice is served in all Hague Abduction cases involving domestic violence.

Consideration of the abovementioned aspects will ensure that in instances where the courts have ordered the return of the abducted children to their place of habitual residence, the courts will not place the abducting parents in an undesirable position by unrealistically believing that the abducting parents will be protected from further domestic violence upon

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<sup>280</sup>Schuz R, *The Hague Child Abduction Convention* (2013) Hart Publishing, page 315.

<sup>281</sup>Browne N L 'Note, Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' 2011 *Duke Law Journal* 1202.

<sup>282</sup>Bruch (2004) *Fam LQ* 529.



their return. Furthermore, consideration of the above issues will ensure that the children who are returned to their place of habitual residence are not further traumatised for example by having to travel alone back to their habitual place of residence or erroneously being compelled to stay with the abusive left behind parent who abused them or the abducting parent.

## CHAPTER 4: DIRECT JUDICIAL COMMUNICATIONS, JUDICIAL INVESTIGATIONS, UNDERTAKINGS AND RELATED MATTERS

### 1. Direct Judicial Communications

Direct judicial communications refer to communications between sitting judges concerning a specific case before them. These communications arise in cases where there are concurrent proceedings in different jurisdictions with the same parties. These communications can be utilised in both the requested and requesting States in Hague abduction cases.<sup>283</sup> One of the overarching principles involving direct judicial communications is that the judge who is involved in direct judicial communications must maintain his/her independence and must respect the law of his/her State. Furthermore, in Contracting States in which direct judicial communications are utilised, the judges are required to follow certain procedural safeguards. For example, the parties who are involved in the case should be notified about the nature of such communications and there should be proper recording of such communications. The Central Authorities in the Hague Abduction cases may also assist the judges by facilitating direct judicial communications.<sup>284</sup>

Generally, there is extensive support for the utilisation of direct judicial communications in matters relating to child protection, including in countries considered in this thesis.<sup>285</sup>

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<sup>283</sup>Hague Conference on Private International Law, 'Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges' 2013, page 12. Available at [www.hcch.net](http://www.hcch.net). (accessed 27 January 2016).

<sup>284</sup>Hague Conference on Private International Law, Direct Judicial Communications (2013). pages 12 - 13.

<sup>285</sup>Lord Justice Thorpe 'The case for judicial activism' pages 72 - 77 in Sloth- Nielsen J & Du Toit Z (eds) 'Trials & Tribulations, Trends & Triumphs – Developments in International, African and South African Child and Family Law' (2008) Juta. Available at <https://books.google.co.za/books> (last accessed on 22 January 2016). In 2013, the Permanent Bureau of the Hague Conference published the brochure 'Direct Judicial Communications -

Apparently, since the first case in 1996<sup>286</sup> where a direct judicial communication was used, the number of cases where such communications have been taking place has grown. There are indications that the Special Commission tasked with reviewing the operation of the Hague Abduction Convention supports direct judicial communications as a valuable tool in the implementation of the Convention between member States, including in cases where there are domestic violence allegations. Furthermore, there are indications that direct judicial communications can be very beneficial for resolving some of the practical issues in Hague abduction cases and they may result in immediate resolution of cases.<sup>287</sup> The legality of direct judicial communications has been considered and approved by the Court of Justice of the European Union<sup>288</sup> and the Supreme Court of the United Kingdom.<sup>289</sup>

The objective of direct judicial communications is, among others, to deal with any lack of information that the competent judge in the requesting State may encounter about the situation and legal implications in the State of the habitual residence of the abducted child. In

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Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges'. See [www.hcch.net](http://www.hcch.net) (accessed 7 April 2015).

<sup>286</sup>*D v B*, 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. A summary of the decision available at <http://www.incadat.com/> (accessed 7 April 2015) - Ref. HC/E/CA 369 [17/05/1996]. See also Beaumont P R & McElevay P E, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, at page 168.

<sup>287</sup>See Special Commission, Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children 2006, at page 9. Available at <http://www.hcch.net/upload/concl28sc5e.pdf> (accessed on 18 January 2016).

<sup>288</sup>*Purrucker v Valles Perez* (no 1) [2012] 1 FLR 903; [2011] Fam 254; [2011] 3 WLR 982 and *Purrucker v Valles Perez* (no 2) [2012] 1 FLR 925; [2011] Fam 312; [2011] 3 WLR 1040.

<sup>289</sup>*Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144.

this context, International Hague Network of Judges may be roped in to assist in facilitating, among other things, the following: the prompt and safe return of internationally abducted children; the establishment of measures of protection; the establishment of whether protective measures are available for the child or the abducting parent in the requested State; the provision of information about custody or access involving the abducted child; measures for addressing domestic violence allegations; the making of interim orders; ascertaining whether the court of the requested State can accept and enforce undertakings made by the court in the requesting State; ascertaining whether the court in the requested State can issue a mirror order; confirming whether any orders were made by the court in requested State; verifying whether findings about domestic violence were made by the court in the requested State etc.<sup>290</sup> Hence domestic violence is directly implicated in the judicial communication process.

There are indications that direct judicial communications operate in the best interests of children because they often result in significant time savings and better use of resources.<sup>291</sup> Furthermore, direct judicial communications are beneficial in child protection matters because they can achieve the following: they can assist regarding the assessment of the children's rights to be heard; improve cooperation and coordination in child protection matters; assist in promoting a consistent interpretation of child protection laws; restore family links; and assist the judges to keep abreast of country of origin laws or information.<sup>292</sup>

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<sup>290</sup>Hague Conference on Private International Law 2013 - Direct Judicial Communications 'Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges. page 7. Available at [www.hcch.com](http://www.hcch.com) (accessed on 22 January 2016).

<sup>291</sup>Hague Conference on Private International Law 2013, page 12. Available at [www.hcch.com](http://www.hcch.com) (accessed on 22 January 2016).

<sup>292</sup>9th European Forum on the Rights of the Child - Coordination and Cooperation in Integrated Child Protection Systems , Judicial Involvement - Brussels, 3-4 June 2015. Page 10 Available at [http://ec.europa.eu/justice/fundamental-rights/files/rights\\_child/9th\\_f\\_j\\_forcada\\_miranda.pdf](http://ec.europa.eu/justice/fundamental-rights/files/rights_child/9th_f_j_forcada_miranda.pdf) (accessed on 4 February 2016).

In the UK direct judicial communication was successfully utilised, for example, in the case of *RA v DA [2012] NIFam9*<sup>293</sup>; in the USA it was applied in the case of *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997).<sup>294</sup> Furthermore, in the USA special provision is made for judicial communication in the Uniform Child-Custody Jurisdiction and Enforcement Act (1997).<sup>295</sup>

In view of the many positive aspects relating to direct judicial communications, the abducting parents who are victims of domestic violence can benefit considerably if all judges involved in Hague abduction matters can utilise direct judicial communications. This will ensure that some of the hardships brought about by the interpretation of Article 13 of the Convention are averted. Direct judicial communications can also benefit internationally abducted children because the children's right to be heard can alleviate some of the challenges faced by international child abductions. Furthermore, direct judicial communications can also assist in preventing the child from having to repeatedly express his or her views to various judges in different jurisdictions.<sup>296</sup>

## **2. Judicial investigations of domestic violence in Article 13 cases**

Apparently, the Hague Conference on Private International Law (HCPIL) is in support of measures which will promote consistency in how domestic violence cases are dealt with in Hague abduction matters. The HCPIL also recognized that when deciding on a child abduction case, the requested judge should trust that the judicial authorities of the requesting State will take care of the due protection of the child, and where necessary the accompanying

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<sup>293</sup>INCADAT Reference: HC/E/UK 1197. Available at <http://www.incadat.com> (accessed on 22 January 2016).

<sup>294</sup>INCADAT Reference: HC/E/US 97. Available at <http://www.incadat.com> (accessed on 22 January 2016).

<sup>295</sup>See section 110. Available at <http://www.uniformlaws.org/shared/docs> (accessed on 22 January 2016).

<sup>296</sup>Martinson D (Q.C) 'The Canadian Approach to Direct Judicial Communication: Making Concurrent Proceedings Involving the Same Family Operate Effectively' page 13. Available at <http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-The-Canadian-Approach-to-Direct-Judicial-Communication.pdf> (accessed on 27 January 2016).

parent, once the child is returned.<sup>297</sup> The latter situation was considered in the Australian case of *Department of Community Services and Harris* [2010] FamCA 261, where the judge concluded (at paragraph 184) that:..."even with a well-structured legislative framework and social service agencies with responsibilities to assist victims of domestic violence and children who are exposed to it, such laws and systems may in individual cases be insufficient protection for the child....". The approach in the abovementioned case of *Department of Community Services and Harris* has been endorsed by the European Court of Human Rights in *Neulinger v Switzerland* which was discussed in paragraph 7 above. In the RSA, research has revealed that Government's efforts to effect changes in its approach to violence against women often fail on the level of implementation.<sup>298</sup> As already discussed in paragraph 7 above, it appears that the approach adopted in the *Neulinger* case can be of great assistance to victims of domestic violence in Hague abduction matters.

### **3. Article 13 cases and insufficient recognition of the harmful effects of domestic violence on children**

Previous and recent research indicates that a high proportion of the previously abducted children experienced some mental health problems and often do not get support.<sup>299</sup> However, the effects of such parental abductions on abducted children differ depending on, among other things, the length of the abduction, the age of the child and on whether siblings were also abducted.<sup>300</sup>

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<sup>297</sup>Hague Conference on Private International Law, Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 4-6 Judges' Newsletter On Child Protection, Vol. XVIII (2012).

<sup>298</sup>Artz L & Smythe D 'Case attrition in rape cases: a comparative analysis' (2007) 20 *SACJ* 158 -18.

<sup>299</sup>Report by Reunite International Research Unit, 'The Outcomes for Children Returned Following an Abduction' 2003, page 30. Available at [http://www.reunite.org/pages/outcomes\\_research.asp](http://www.reunite.org/pages/outcomes_research.asp) (accessed 22 January 2016); Edleson J L 'Children's Witnessing of Adult Domestic Violence' *Journal of Interpersonal Violence*, 14 (1999); Freeman M (2014) page 7.

<sup>300</sup>Martinson D & Gregg M 'Cross Border Parental Child Abduction – Social Context Issues' Paper Prepared for Cross Border Child Custody Disputes – Judicial Networking and Direct

According to Professor Freeman,<sup>301</sup> the previously abducted children's mental health problems increase when they are returned home because of, among others, the following reasons: they struggle to find their place within their own family structure in their changed circumstances; the disturbance caused by the reunification triggers psychological problems for abducted children because they struggle with issues relating to their identity and a sense of belonging; previously abducted children often have conflicted loyalties for having spent some time with the abducting parent as their only support system, only to be returned to left a behind parent they barely remembered or a left behind parent who may be experiencing challenging feelings about the abduction; the new family composition which may include step parents or step-siblings, with which the previously abducted child should now form relationships with; and the previously abducted child may blame the left-behind parent for not finding them, and for deserting them.

A very low percentage of abducted children reported no real effects because their abductions were very short abductions or they supported the abduction or intention to abduct by the abducting parent.<sup>302</sup> The aforementioned research supports the World Health Organization's study on domestic violence in which it was stated, among others, that : “[v]iolence against women has a far deeper impact than the immediate harm caused[...] [i]t has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children”.<sup>303</sup>

Therefore, to ensure that the best interests of children are promoted without any compromise, it is essential that the judiciary and every person dealing with Hague abduction cases receives training on all aspects relating to the harmful effects of domestic violence on children because that will equip them to make informed decisions. Additionally, children can be protected from the harmful effects of abduction by providing them with appropriate support and care. Though the Preamble of the Hague Convention establishes “procedures to ensure

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Judicial Communication, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario, at page 14.

<sup>301</sup>Freeman M (2014) page 7.

<sup>302</sup>Freeman M (2014) page 35.

<sup>303</sup>WHO - Multi-country Study on Women's Health and Domestic Violence Against Women: summary report of initial results on prevalence, health outcomes and women's responses, Geneva, World Health Organization 2005, at pages viii and 8.

their prompt return to the State of their habitual residence”, the Convention does not in any way make provision for such support or aftercare. Practically, it is insufficient to simply return abducted children to their habitual place of residence because abducted children require protection from the harmful and negative effects of their abduction. The aforementioned protection can also be extended to abducted children who are not returned to their habitual place of residence.<sup>304</sup>

#### **4. Effectiveness or enforceability of undertakings and mirror orders**

There appear to be some challenges regarding the appropriate utilisation of protective measures ordered in conjunction with return orders in Hague Abduction cases, including the effectiveness or enforceability of undertakings and mirror orders. Undertakings are the voluntary promises or guarantees made by the left-behind parent promising not to endanger the safety of the child or the abducting parent and are usually attached to an order of return.<sup>305</sup> For example, the left behind parent may agree to an undertaking to pay for the return transport of the child and abducting parent to place of habitual residence, or agree to pay maintenance or rent for the children and/or the abducting parent.

In order to ensure that the undertakings are enforceable in the requested State, the left behind parent may be required to have the conditions in the undertakings registered in similar terms in the child's State of habitual residence.<sup>306</sup> These replica orders are referred to as mirror orders. Courts have, for example made return orders subject to the enactment of mirror orders in the UK cases of *Re W. (Abduction: Domestic Violence)*<sup>307</sup> and in *Re F. (Children) (Abduction: Removal Outside Jurisdiction)*<sup>308</sup> In the RSA undertakings and mirror orders were utilised in, among others, the cases of *Sonderup v Tondelli*<sup>309</sup> and in *Central Authority v*

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<sup>304</sup>Freeman M (2014) page 37.

<sup>305</sup>Edleson JL, Lindhorst T, Mehrotra G et al (2010) at page 254; Brown-Williams K (2011) 66.

<sup>306</sup>Edleson J L, Lindhorst T, Mehrotra G et al (2010) at page 254 - 259; Brown-Williams K (2011) 66.

<sup>307</sup>[2004] EWHC 1247, [2004] 2 FLR 499. INCADAT cite: HC/E/ UKe 599.

<sup>308</sup>[2008] EWCA Civ. 842, [2008] 2 F.L.R. 1649. INCADAT cite: HC/E/UKe 982.

<sup>309</sup>2001(1) SA 1171 (CC), INCADAT cite: HC/E/ZA 309. The Constitutional Court demanded a lot of undertakings from the left behind parent. The undertakings related to,



H.<sup>310</sup> In the USA undertakings were considered in the Court of Appeals for the First Circuit case of *Danipour v McLarey*.<sup>311</sup>

In some cases where grave risk of harm was raised as a defence, the courts have tended not to reject the left behind parent's application, but addressed the issue of risk through the imposition of conditions and the giving of undertakings. For example in the RSA case of *Penello v Penello* the court found that the undertakings made by the child's father (left behind parent) would lessen the mother's (abducting parent's) concerns regarding potential hardship that their daughter might suffer if ordered to return to the USA.<sup>312</sup>

However, there are indications that such undertakings and mirror orders are in many instances unenforceable<sup>313</sup> or that the left behind parent failed to comply with undertakings. Furthermore, there are indications that undertakings contribute to the delays in the finalization of return cases and in some instances the undertakings can also create unreasonable conditions for the left behind parent.<sup>314</sup>

The fact that protective measures were issued by the court in the requesting State is not a sufficient guarantee that abducted children will be safe once they are returned to their habitual residence because: first, courts of the requesting State have no further opportunity to safeguard the interests of the abducted children once they leave their jurisdiction; and second, courts of the requesting State have no legal authority to follow up on the implementation of

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among others, the dropping of criminal charges against the abducting parent, maintenance and other ancillary expenses the abducting parent and her and child were likely to experience upon their return. The abducting parent also had to obtain an order from the Supreme Court of British Columbia in the same terms as the undertakings he had given in the RSA.

<sup>310</sup>2008 (1) SA 49 (SCA), .INCADAT cite: HC/E/ZA 900.

<sup>311</sup>286 F3d 1 (1st Cir 2002).

<sup>312</sup>See para 62.

<sup>313</sup>Nicholson CMA, page 276. See also the USA case of *Danipour v McLarey* 286 F3d 1 (1st Cir 2002) where the Court of Appeals for the First Circuit cautioned against reliance on undertakings for the protection of the child, because they are often unenforceable.

<sup>314</sup>Brown-Williams K (2011) 66 - 67. For example in the UK case of *Ro v. Ro* of 26 March 1997. INCADAT cite: HC/E/IL 832, the left behind parent failed to deposit the money required by the court.

undertakings made, but the requested State can assist with regard to the enforceability of the undertakings by issuing mirror orders.<sup>315</sup>

In view of the fact that undertakings in Hague abduction applications are temporary arrangements and not final decisions on custody and economic issues, it is crucial that courts should take into consideration the fact that there may be disparities in power between the abducting parents and left behind parents where domestic violence was the cause of the abduction. Therefore, there should be absolute certainty regarding the safety of the returning parents and/or the children following the return orders. Co-operation between the contracting States is a key element in ensuring that there's successful implementation of the terms of undertakings and mirror orders, particularly with regard to the safety of the abducting parents and their children. If such cooperation is not present, the issuing of undertakings will be useless and may even endanger the lives of the abducting parents and the children.

#### **5. Potential risks to the life or safety of the returning parent and / or the child following return orders**

There have been situations where courts handling Hague abduction matters have decided that the abducting parent's evidence of domestic violence does not support her case. Furthermore, there have been cases where the courts held that violence perpetrated against the abducting parent did not create any risk of harm to the child involved despite evidence of more than thirty years indicating the risks which domestic violence poses to children. In some cases courts minimized the violence because they failed to determine whether the "minimal" violence is part of a larger pattern of coercive power and control on the part of the left behind parent. Furthermore, courts in the requesting State would return the abducted child to the requested State's foster care system, believing that the requested State will resolve the problems. However, sending the abducted child to the requested State's foster care system is "intolerable" from the child's perspective. In some instances courts in the requesting State simply looked at the laws of the requested State without considering the

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<sup>315</sup>Nicholson CMA, page 276. See also for example the RSA case of *Penello v Penello* where the left behind parent had to obtain a mirror order in which he undertook to withdraw the arrest warrant for his wife in the USA and that he would not institute legal proceedings against his wife relating to her abduction of their child (see paragraphs 149 C-E).

implementation/application of those laws and trusted that the requested State would protect the victims.<sup>316</sup>

In terms of Article 20 of the Convention the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. The novel approach to the provisions of Article 20 is that it can be interpreted to include abducting parents (who are primary care-givers) fleeing from domestic violence because domestic violence is a human rights issue. According to the Perez Vera Report, the fundamental principles of human rights referred to in Article 20 "...must not be invoked any more frequently in international cases...than they would be in their application to purely internal matters...Otherwise the provision would be discriminatory in itself, and opposed to one of the most widely recognised fundamental principles in internal law."<sup>317</sup> I submit that the Perez Vera Report did not explain Article 20 extensively.

In instances where the abducting parent is a primary care-giver, I submit that it is a violation of the fundamental principles of human rights to send a domestic violence victim's child back to a place where his/her parent's life might be in danger because that parent might, because of safety concerns, be impeded from or will not be able to exercise some of his/her parental rights, for example visitation rights. Furthermore, it is a violation of Article 20 of the Hague Abduction Convention to make a domestic violence victim litigate custody in a place where her safety is at risk. Nevertheless, research indicates that no court has yet found that returning a child to a place where his/her mother's life is endangered violates the mother's fundamental human rights.<sup>318</sup>

## **6. Lack of adequate support for victims of domestic violence in the requesting or requested jurisdiction**

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<sup>316</sup>Weiner M H & Knight P H - Office for the Prevention of Domestic Violence Child Abduction: Domestic Violence or a Flight to Safety?' Bulletins - Summer 2013. Available at [http://www.opdv.ny.gov/public\\_awareness/bulletins/summer2013/childabduction.html](http://www.opdv.ny.gov/public_awareness/bulletins/summer2013/childabduction.html) (accessed 6 November 2015).

<sup>317</sup> Perez-Vera Report, 462.

<sup>318</sup>Weiner M H & Knight P H (2013).

There are indications that abducting parents and their children often experience a lack of support in general, including lack of support from the government. According to Professor Taryn Lindhorst (Professor of Social Work, USA) who is currently assisting to develop new legislation to protect abused women, there are several barriers that prevent abducting parents (mothers) from getting help. She indicated that “Many women in abusive situations abroad don’t speak or read the country’s primary language, and may not have access to legal protections, like a restraining order, that they would in the USA.” The Professor also indicated that “Once a woman is in the United States, expenses associated with mounting a legal defence and getting evidence from another country, along with lawyers who are unfamiliar with transnational domestic violence, can add complications.”<sup>319</sup>

In some contracting States, for example in the USA, abducting parents who lose their cases against the left behind parents are compelled to pay the left behind parent’s exorbitant legal costs even if the abducting parent fled in good faith and can prove the abuse on a preponderance of evidence. In this way, many of the abusive left behind parents turn the Hague Abduction Convention into a powerful tool against the abducting parents (intimidatory litigation).<sup>320</sup> In South Africa studies show that Government’s attempts to effect changes in its approach to violence against women regularly fail at the level of implementation.<sup>321</sup>

To ensure that the human rights of abducting parents and their children are protected in both the requesting and requested States, abduction support services must be widely publicised and made available to them. To ensure accessibility, the aforementioned services should be available in various forms including remote access through the internet. Most contracting States would argue about the funding of the aforementioned proposal, but some international co-ordinated effort in this regard should be possible, even on a modest scale, and should be immediately investigated.<sup>322</sup>

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<sup>319</sup>Princing M ‘Professor help craft US Bill to aid women fleeing abuse’. Available at [www.hsnewsbeat.uw.edu/story/professor-helps-craft-us-bill-aid-women](http://www.hsnewsbeat.uw.edu/story/professor-helps-craft-us-bill-aid-women) (accessed 6 November 2015).

<sup>320</sup>Weiner M H & Knight P H (2013).

<sup>321</sup>Artz L & D Smythe ‘Case attrition in rape cases: a comparative analysis’ (2007) 20 *SACJ* 158-181.

<sup>322</sup>Freeman M (2014) page 38.

## 7. Conclusions

The global prevention of domestic violence should entail, among others, women's empowerment and their enjoyment of human rights.<sup>323</sup> In this chapter it is clear that judicial communications, undertakings and mirror orders are tools used by Convention courts to address allegations of domestic violence falling below the grave risk standard. It appears that undertakings are time-consuming and complicated, and they often involve conflicting expert testimony which may lead to courts falling prey to cultural stereotyping. The acceptance of undertakings should not be viewed as a panacea since without mirror orders in the state of habitual residence they may not be effectively enforceable, and even when they are enforceable, they are routinely broken.

The inability of some abducting parents to find and afford legal assistance can result in widely varying results and disparities where appropriate evidence of alleged abuse perpetrated by the left behind parent is critical and time is critical. Therefore, there should be provision for adequate time in cases where domestic violence is alleged, for example to allow the abducting parent to gather evidence.

In view of the conclusions set out above, I submit that Article 13 and the legal concepts in the Hague Abduction Convention need overhauling because in the context of domestic violence they violate the rights of the abducting parents and their children. This view is shared by most private international law experts and other stakeholders, hence the recent meeting (from 21-23 January 2016) convened by the Hague Conference on Private International Law, to develop a Guide to Good Practice on the interpretation and application of Article 13(b) of the Hague Convention, including the relationship between domestic violence and Article 13.

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<sup>323</sup>UN WOMEN 'Focusing on Prevention to Stop the Violence'. Available at <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/prevention> (last accessed on 22 January 2016).

## **CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS**

### **1. Introduction**

This chapter will highlight the most pertinent conclusions reached in the preceding chapters of this thesis. Furthermore, this chapter will propose certain recommendations which may assist in ensuring that the scourge of domestic violence is not perpetuated through Hague Abduction cases. Additionally, recommendations will propose measures to improve the manner in which victims of domestic violence are treated in Hague Convention cases.

### **2. Summation**

In chapter 2 the aim was to explore the key legal concepts which govern international child abductions. The concepts discussed included: elements of a prima facie case in Hague convention cases; wrongful removal or retention of child; habitual residence; prompt return principle; rights of custody and the role of the best interests of the child. This chapter established and concluded that some of the provisions of the Hague Convention are antiquated and may require some revision because in many instances they operate against the victims of domestic violence. Furthermore, in many cases the provisions of the Hague Convention give the left behind parents the benefit of the doubt over the abducting parents and their children. For example, it was explained as to how the prompt return principle and considerations relating to the determination of habitual residence disadvantage the victims in Hague Abduction applications. Additionally, it was explained how the strict application of the Convention may in some instances compromise children's rights.

The main objective of chapter 3 was to explore the definition and dynamics of domestic violence, the international and regional legal framework governing domestic violence and Article 13 of the Convention. This chapter highlighted domestic violence legislation in the RSA, USA, Switzerland and UK. Furthermore, this chapter dealt with the due diligence principle which has risen to prominence in domestic violence jurisprudence. It was concluded in this chapter that in view of the international treaties discussed and the aforementioned States' legislation on domestic violence, those States are compelled to ensure that there is full implementation of the law governing domestic violence, without any

compromise. Domestic violence, it was argued, is now rightly considered a core human rights concern.

The aim of chapter 4 was to explore the following aspects vis- a- vis Article 13(b) of the Hague Convention: direct judicial communications; judicial investigations regarding domestic violence; insufficient recognition of the harmful effects of domestic violence on children; lack of awareness of social science evidence of the links between spousal and child abuse; potential risks to the life or safety of the returning parent and / or the child following return orders; appropriate use of protective measures (e.g undertakings); lack of adequate social or governmental support for victims of domestic violence in the requesting or requested jurisdiction; and a lack of family, social and economic support (including legal aid or access to justice ) for the returning parent in the requesting jurisdiction when she or he has been a victim of domestic violence.

It was contended in chapter 4 that the practical application of judicial communications and judicial investigations are not operating in favour of all domestic violence victims in Hague Abduction cases. Furthermore, in many instances there is lack of governmental, social, economic and legal support to victims of domestic violence in Hague Abduction matters, not only in the requested States, but also in the requesting States.

Chapter 4 concludes that that judicial communication in Hague Abduction matters can go a long way in alleviating the challenges faced by domestic violence victims. Furthermore, it was argued that the use of undertakings if utilised effectively, can assist the victims of domestic violence and affected children to live normal lives after finalisation of the Hague Abduction case.

### **3. GENERAL RECOMMENDATIONS**

In view of the conclusions reached in the chapters 1 to 4 above, it is clear that domestic violence in Hague abduction matters requires further attention. The provisions of Article 13 of the Convention are lacking and require augmentation by an additional Protocol and the addition of new mechanisms to the protective measures. Apparently the Convention is not construed uniformly throughout the 90 ratifying States and in many instances it operates against the rights and interests of domestic violence victims. It was not contemplated more than 35 years ago, when the Convention was drafted, that abducting parents will include

domestic violence victims. Hence there is tension between the interest in discouraging international child abduction and that of protecting victims of domestic violence.

Considering that the Hague Convention was enacted before awareness of the scourge of domestic violence became rife and prior to the advanced scientific psychological research on the effects of domestic violence on human beings, the provisions of the Convention need augmentation by closing the loopholes that may give abusive left behind parents the benefit of the doubt over the abducting parents and their children. This can be achieved by inserting a domestic violence defence in the Convention by means of a Protocol. However, any proposed change to the Convention must work within three limitations. First, a proposal should not change the nature of the Convention such that a court where a Hague application is brought must resolve issues relating to a final custody determination. Second, to avoid forum shopping, any proposed solution should try to maintain uniformity in the enforcement of the Convention. Third, any proposed change should refrain from infringing on the rights of the left-behind parents.

The inclusion of an explicit domestic violence defence in the Convention will ensure a consistent and predictable body of international law and will send a strong message that the international community will not tolerate domestic violence. Furthermore, judges would be compelled to give full effect to the Convention's intent and would be forced to be consistent. Furthermore, the best interests of children will be clearly covered because an explicit domestic violence defence would alleviate the fundamental problem of recognizing domestic violence perpetrated upon an adult care-giver as a harm to children.

Though an explicit domestic violence defence might lengthen court proceedings, the interests of the abducted children and the abducting parent's safety are more important than procedural efficiency. Member States can in turn revise implementing legislation; educate mothers about transnational issues; ensure mother and children's safety if returned; provide support and resources to mothers and educate lawyers and judges.

A domestic violence defence may be criticized on the basis that theoretically it justifies the abduction. Nevertheless, it is argued here that this is in practice not the case, because under a domestic violence defence, victims would still have to litigate the custody issues; they would not be able to take a child away from the other parent without having to go to court. It will increase fair and just outcomes. Both parents will still have their day in court. What will be at



stake is which party chooses the custody forum. A domestic violence defence acknowledges that victims who have first proven the existence of domestic violence should have the right to choose the forum where they feel safest. By increasing the victims' security, courts can bargain away custody rights for physical safety. Batterers will know that they cannot easily manipulate the courts and the judges will be in better positions to come to fair and just custody decisions.

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## 11. **Case Law**

### 11.1 **RSA**

- *Central Authority for the Republic of South Africa v ER* [2014] JOL 31502 (GNP).
- *Central Authority v. H.* 2008 (1) SA 49 (SCA).
- *Central Authority v Houwerts* 2008 (1) SA 49 (SCA).

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- *Penello v Penello* 2004(3) SA 117 (SCA).
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- *Smith v Smith* 2001 (3) SA 485(SCA) [2001] 3 All SA 146 at 850.
- *Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.
- *WL v LS* 2000 (4) SA 104 (C) 112I.

## 11.2 UK

- *Bridgend County Borough Council v GM and Another* [2013] 1 FLR 987 (FD).
- *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465.
- *Purrucker v Valles Perez (no 1)* [2012] 1 FLR 903; [2011] Fam 254; [2011] 3 WLR 982.
- *Purrucker v Valles Perez (no 2)* [2012] 1 FLR 925; [2011] Fam 312; [2011] 3 WLR 1040.



- *RA v DA* [2012] NIFam9.
- *Re A (A Minor) (Abduction)* [1988] 1 FLR 365.
- *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27.
- *Re F (Children) (Abduction: Removal Outside Jurisdiction)* [2008] EWCA Civ. 842, [2008] 2 F.L.R. 1649.
- *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899.
- *Re O (Child Abduction: Habitual Residence)* [2015] EWFC 16.
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- *Re S (A Child)* [2002] EWCA Civ 908.
- *Re S (A Child)* [2012] UKSC 10.
- *Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam) 505.
- *Ro v. Ro*, 26 March 1997. INCADAT cite: HC/E/IL 832.

### 11.3 USA

- *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001).
- *Dallemagne v Dallemagne* 44-0 F Supp 2<sup>nd</sup> 1283 (MD Fla (2006)299.
- *Danaipour v. McLarey*, 286 F.3d 1, 4 (1st Cir. 2002).
- *Feder v. Evans-Feder* INCADAT Reference HC/E/USf 879.

- *Friedrich v Friedrich* 78 F.3d 1080 8 (6th Cir. 1996).
- *Karpenko v. Leendert*, No. 09-03207, 2010 WL 831269.
- *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL.
- *Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).
- *Nicolson v Pappalardo*, 605 F.3d 100, 106 (2010).
- *Nunez-Escudero v Tice-Menley* 58 F.3d 374, 377-378 (8th Cir.1995).
- *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997)
- *Rydder v Rydder* 49 f.3d 369, 372 (8th Cir. 1995).
- *Simcox v. Simcox* 511 Supp 3d 594(6<sup>th</sup> Cir 2007).
- *Van de Sande v Van de Sande* 431 F.3d 567 (7th Cir. 2005) 10.
- *Walsh v Walsh* 221 F.3d 204 (1st Cir. 2000).

#### 11.4 Switzerland

(Note: The available Swiss case reports do not include party names or initials)

- 5P.1/1999, Bundesgericht (Tribunal fédéral), [INCADAT cite: HC/E/CH 427.
- Obergericht des Kantons Zürich (Appellate Court of the Canton Zurich), 28/01/1997, U/NL960145/II.ZK.
- 5A\_285/2007/frs, IICour de droit civil, arrêt du TF du 16 août 2007 [INCADAT Reference: HC/E/CH 955].

- 5A\_479/2012, IleCour de droit civil, arrêt du TF du 13 juillet 2012 [INCADAT Reference: HC/E/CH 1179].

## 11.5 Other Jurisdictions and Courts

### European Court of Human Rights

- European Court of Human Rights case of *Neulinger v Switzerland*, App no. 41615/07 (ECtHR, 6 July 2010).
- European Court of Human Rights case of *Maumousseau and Washington v France* , App no 39388/05 (ECtHR, 6 December 2007).
- European Court of Human Rights case of *Raban v Romania*, App no 25437/08 (ECtHR, 26 October 2010).

### Inter-American Court of Human Rights

- *Velásquez Rodríguez v Honduras* (Judgment dated 29 July 1988) Series C: Decisions and Judgments, No. 04.

### Other jurisdictions

- Canadian Supreme Court: *W.(V.) v. S.(D.)*, (1996) 2 SCR 108, (1996) 134 DLR 4th 481.
- Australian case of *Department of Community Services and Harris* [2010] FamCA 261