

**‘A COMPARATIVE ANALYSIS OF THE EXCEPTIONS/DEFENCES AVAILABLE UNDER
THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD
ABDUCTION, 1980 AND THEIR IMPLEMENTATION AND EFFECTIVENESS IN SOUTH
AFRICA AND AUSTRALIA.’**

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DECLARATION

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I declare that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references. It is submitted as the whole research dissertation which counts 100% of the requirement for the degree of Masters of Law in the Faculty of Law, University of KwaZulu Natal.

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Chapter One: Introduction

1. Introduction

‘Whatever the reasons for abducting a child, it causes great distress, anxiety, confusion, sadness and trauma. The left-behind parent suffers, as do other family members and relatives. The ultimate victim is, however, the child. He or she is ripped away from a familiar environment (including school or nursery school, friends and sports clubs), often without preparation and without explanation. While it is accepted that persons can assume individual freedom to live with their partners, separate from them, migrate and relocate to other countries, this should not violate the fundamental rights of the child to maintain contact with both parents. Children should be protected from family conflict that escalates to the extent where it jeopardises their natural development. For these reasons, the international abduction of children by one of their parents should be countered in all possible ways.’¹

[1] Due to the technological developments worldwide regarding international travel, an increasing number of people and families have become connected across international borders.² A result of the aforementioned has been an increasing number of intercultural and international marriages from which an increasing amount of multicultural and multinational children have been born, who are also able to cross international borders.³ A breakdown of these intercultural marriages may therefore give rise to instances where a parent may wish to return to their country of origin with the child, or who may decide to retain the child in their country of origin, without the permission of the left-behind parent.⁴ The result

¹ T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 1.

² Hague Conference on Private International Law (HCCH) ‘Hague Conference/International Centre for Judicial Studies and Technical Assistance’, available at http://www.hcch.net/index_en.php?act=text.display&tid=29, accessed on 12 June 2010; D Hodson *A Practical Guide to International Family Law* (2008) 223; M Kirby ‘Children caught in conflict – the Child Abduction Convention and Australia’ (Autumn 2010) 21(1) *Australian Family Lawyer* 13; PR Beaumont & PE McEleavy *The Hague Convention on International Child Abduction* (1999) 2; ‘Living in Limbo: The experience of International Child Abduction: The call for a national support service’ International Social Service Australian Branch (February 2005) 3, available at <http://www.missingpersons.gov.au/Assets/Files/9bb6de98-a9ab-436f-8c08-cb63c21ff155.pdf>, accessed on 19th April 2011; C Nicholson ‘Introduction to the Hague Convention on the Civil Aspects of International Child Abduction’ in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 232; C Woodrow and C Du Toit ‘Child abduction’ in CJ Davel and AM Skelton (Eds) *Commentary on the Children’s Act* (Loose leaf) Revision 1 (2007) [17-2]; C Chürr ‘The Hague Convention: consent issues and enforcement of “swift return orders”’ *Central Authority v H* 2008 (1) SA 49 (SCA) (2010) 136 *THRHR* 145; *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) at para [10], also cited as *LS v AT* 2001 (2) BCLR 152 (CC).

³ Hodson op cit (n2) 223; Beaumont & McEleavy op cit (n2) 2. Children born of multicultural or multinational relationships are more likely to be the victim of parental child abduction, see ‘Living in Limbo’ op cit (2) 5 and RL Hegar & RL Grief ‘Parental abduction of children from interracial and cross-cultural marriages’ (1994) 25 *Journal of Comparative Studies* 135-138. See generally Kruger op cit (n1) 48-49 who discusses the differences in nationalities and countries of origin of the abducting parents.

⁴ BM Bodenheimer ‘The Hague Draft Convention on International Child Abduction’ (1980) 2 *Family Law Quarterly* 100; B Clark ‘Division P: Child Abduction’ in B Clark (Ed) *Family Law Service* (Loose Leaf) (2010) (Issues 54 October) at para [1]. The converse problem arising from these international, multicultural and national relationships is the possible disintegration and breakdown of traditional family structures as well as the increased numbers of divorces, separations and extramarital

of the above is that of parental child abduction,⁵ which is a world-wide issue.⁶ However, little is known about the impact and extent this type of abduction has on both children and families.⁷

[2] The origins of international child abduction cannot be traced to one specific cause or event as each removal or retention turns on its own individual facts.⁸ The problem surrounding child abductions committed by parents, or members of the family, became prevalent from the late 1970s and early 1980s,⁹ and the interest shown in this area has been associated with major social changes.¹⁰ Child abduction is a result of the failure of adult relationships.¹¹ In the 1970s the rate of international child abductions increased as a result of the rise in the number of inter-cultural, inter-racial, inter-religious and ethnic backgrounds involved in marriages or relationships.¹² However this anomaly, referred to as ‘legal kidnapping’, was not given any specific recognition until the matter was formally adopted by the Hague

children: see Beaumont & McEleavy op cit (n2) 2. According to Living in Limbo op cit (n2) 1, abductions also occur as a result of the presence of domestic violence, feelings of unfairness regarding custody or access arrangements and the result of fear that the abducting parent may lose the child, or as a result of a disagreement regarding the other parent’s cultural beliefs in reference to the child’s rearing. Kruger also provides other reasons for a parent removing a child to another country e.g. fleeing from debt; to hurt the other parent or for the child’s future benefits: Kruger op cit (n1) 1.

⁵ Hodson op cit (n2) 223; Living in Limbo op cit (n2) 3.

⁶ Bodenheimer op cit (n4) 100.

⁷ Living in Limbo op cit (n2) 3.

⁸ Beaumont & McEleavy op cit (n2) 2.

⁹ D Finkelhor, G Hotaling & A Sedlak ‘Children abducted by family members: A national household survey of incidence and episode characteristics’ (August 1991) 53 (3) *Journal of Marriage and Family* 805; Clark op cit (n4) at para [1].

¹⁰ Finkelhor, Hotaling & Sedlak op cit (n9) 805-806: The first of the aforementioned social changes is the large increase in the number of divorce actions which involve children. Secondly, the rising divorce rates correlate with an increase in the amount of legal battles over care and contact rights (The terms ‘custody’ and ‘access’ are referred to as ‘care’ and ‘contact’ respectively as provided for in section 1(1) of the Children’s Act 38 of 2005, within South Africa). Thirdly there has been a change in the social attitudes and legal presumptions regarding care (custody) and how it should be allocated. A further social change is that the roles of men and women in the family arena have changed and are now shared or even reversed. These three situations are increasingly aggravated due to the increasing ability of individuals to move freely back and forth across international and national borders. JA Todd ‘The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s goals being achieved?’ Symposium: Law in place: Travel politics and the production of alternative legal imaginations (Spring 1995) 2 (2) *Indiana Journal of Global Legal Studies* 553: These increasing divorce rates and the level of international travel over the decades have contributed to the problem of international parental child abduction.

¹¹ Living in Limbo op cit (n2) 5.

¹² EA Schnitzer-Reese ‘International child abduction to non-Hague Convention countries: The need for an International Family court’ (Spring 2004) 2 *North Western Journal of International Human Rights* 4; KM Bowie ‘International application and interpretation of the Convention on the Civil Aspects of International Child Abduction’ (March 2001) [1980] *FamCA Federal Judicial Scholarship* 7-9, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/1980/1.html?stem=0&synonyms=0&query=International%20child%20abduction>, accessed on 3rd October 2011. Bowie suggests that a further reason for the increase in international parental child abductions is the consequences of domestic violence: (Bowie at 9-10).

Conference in the late 1970s.¹³ Prior to this many attempts were made to deal with the issue of child abduction, however most failed or faulted in the drafting stage.¹⁴

2. Purpose of the Study

[1] The aim of this study is to discuss the instances in which an abducted child must be ordered to return to their state of habitual residence in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (Hague Convention). The purpose of the research conducted herein will be to provide a comparative analysis of the application of the exceptions/defences available to the rule of peremptory return in terms of Article 12 of the Hague Convention as well as how these are applied and the criteria which need to be satisfied in order to determine when such exceptions/defences will be satisfied. This will be compared with the implementation and application of the same exceptions/defences in Australia in order to make recommendations for such application and interpretation within South Africa.

Australia was chosen as the comparative country because they have also adopted the Hague Convention principles in order to assist in dealing with the already existing problem of international child abduction as well as the fact that they also subscribe to the concept of the best interests of the child principle.¹⁵ According to Bates, the adoption of the Hague Convention by South Africa and the fact that South Africa and Australia have similar and appropriately comparative jurisdictions, the interpretation and law surrounding the Hague Convention is of special interest to South African readers.¹⁶ Bates further

¹³ Beaumont & McEleavy op cit (n2) 3.

¹⁴ Loc cit. For example: Article 6 of the 1961 'Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants' and the 1980 'European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children'; PR McEleavy *The Hague Convention on the Civil Aspects of International Child Abduction* (Ph.D Thesis, Aberdeen University, (1998) 33-36; 281-285.

¹⁵ Section 28(2) of the Constitution of the Republic of South Africa, 1996; Sections 7 and 9 of the Children's Act 38 of 2005; Section 60CA of the Family Law Act, 1975 (Cth) (Australia). The Hague Convention on the Civil Aspects of International Child Abduction, 1980 entered into force between South Africa and Australia on the 1st January 1998: The Department of Justice and Constitutional Development 'The Hague Convention of the Civil Aspects of International Abduction: Signatory Countries', available at www.justice.gov.za/hague/convention.html, accessed on 3rd October 2011. Chapter 3 incorporates a discussion of English and United States cases due to the fact that the Australian courts refer hereto.

¹⁶ F Bates 'Child abduction, the Hague Convention and Australian law – a specific overview' (1999) 32 *CILSA* 72. At this stage it is necessary to note that the Hague Convention and the Australian Family Law (Child Abduction Convention) Regulations, 1986 were both intended to effectively limit the discretion of the judicial authorities of the State to which the child was removed to or retained in. However, this has caused many difficulties for the Hague Convention's application in certain cases and has made judicial principles difficult to extract from the Australian case law. This has thus also meant that Australia is not a jurisdiction which other countries are able to interact with in matters of private international law: F Bates "'Escaping mothers" and the Hague Convention – the Australian experience' (2008) 41 (2) *CILSA* 246. See further F Bates

indicated that as the Australian law presents an interesting picture herein, it provides the basis for an interesting comparative study.¹⁷

[2] The historical background of the Hague Convention shall be discussed below as it provides an understanding of the implementation of the Hague Convention within both South Africa and Australia.

3. Historical background

[1] Children are a very important interest group in society generally¹⁸ and the legal rules which involve and relate to them are not stagnant, have been changed and are forever developing.¹⁹ These legal rules cannot therefore be classified in a traditional manner and thus the law surrounding children cannot be identified as either a subject of private or public law.²⁰ The legal rules which pertain specifically to children are no longer confined to private law issues (e.g. minority, parental responsibility, status or capacity)²¹ or to aspects of public law pertaining to children as criminal offenders, victims or their criminal and sentencing capacity.²² Child law dissects all traditional divides in law and its sources are diverse.²³ The aforementioned is relevant to the current discussion as the Hague Convention was formed specifically to protect children internationally from the effects of parental abductions.

[2] The area of family law is a specific area in which countries from around the world have shown the greatest international co-operation.²⁴ Prior to the formation and enactment of the Hague Convention²⁵ a patchwork of legal remedies existed²⁶ regarding the issue of international parental child abduction. This international convention was therefore designed and structured in order to counteract the global problem

‘Cave jurisdiction – recent cases on family law and conflicts in Australia’ (2006) 27 *Liverpool Law Review* 233. Chapter 2 also discusses English and United States case law as the South African courts make reference hereto.

¹⁷ Bates (1999) op cit (n16) 97.

¹⁸ T Boezaart ‘Child law, the child and South African private law’ in T Boezaart (Ed) *Child Law in South Africa* (2009) 3. The reason for this is also a result of the fact that children are a vulnerable yet voiceless group in society: T Davel ‘General principles’ in CJ Davel and AM Skelton (Eds) *Commentary on the Children’s Act* (Loose leaf) Revision Service 1 (2007) [2-2].

¹⁹ Boezaart op cit (n18) 3.

²⁰ Loc cit.

²¹ Loc cit.

²² Loc cit.

²³ Ibid at 3–4.

²⁴ Hodson op cit (n2) 247.

²⁵ Adopted at the 14th Session of the Hague Conference on Private International Law on the 24th October 1980, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

²⁶ Hodson op cit (n2) 223.

of parental child abduction which affected, and still affects, many children and families.²⁷ It has been considered as the primary international instrument designed to protect children from the effects of wrongful removal and retention across national and international borders.²⁸ It was also designed to ensure that issues surrounding a child's future are determined by the country which was, or is, the child's state (country) of habitual residence.²⁹ The Hague Convention thus provides the global community with a legal framework to protect the rights of children abducted to a foreign country by a parent or family member.³⁰ The Hague Convention is considered to be the most successful international family law instrument dealing with international co-operation and implementation in cases of parental abduction.³¹ However not all countries have signed or ratified the Hague Convention³² and the consequences of abductions to these countries are discussed in point [7] below.

3.1 The formation of the Hague Convention on the Civil Aspects of International Child Abduction, 1980

[1] The Hague Convention was adopted under the auspices of the 'Hague Conference on Private International Law' (Hague Conference) which was an inter-governmental organisation first convened in 1893,³³ whose main aim was to 'work for progressive unification of rules of private law.'³⁴ The Hague Conference is designed to draw up multilateral conventions on a number of private international law issues which include conflicting issues of law.³⁵ The Hague Conference is overseen by the 'Permanent

²⁷ HCCH: The International Child Abduction Database (INCADAT) 'Welcome to Incadat', available at <http://www.incadat.com/index.cfm?act=text.text&lng=1>, accessed on 12 June 2010.

²⁸ Incadat op cit (n27); Nicholson, in Davel op cit (n2) 232, who also indicates that it is potentially the most important modern influence on the recognition and enforcement of foreign custody orders and international parental kidnapping in South Africa and other Western countries, e.g. Australia (at 232 fn2).

²⁹ Manches 'International child abduction – Hague Convention' (2010), available at <http://www.manches.com/Practices/family/service.php?id=140>, accessed on 12 June 2010. See Chapter 2 point [6] for further information regarding this concept.

³⁰ EA Schnitzer-Reese op cit (n12) 5.

³¹ Hodson op cit (n2) 247; T Buck *International Child Law* (2005) 133.

³² E.g. Japan: M Otani 'Experiences with child abductions with non-member States of the Hague Convention: Situation of child abduction in Japan' International Symposium on Child Abductions: Berlin (4 December 2009) at 2, available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/383434/publicationFile/4324/RedeOtani.pdf>, accessed on 23rd August 2011. Another example is China: E Elis 'Please Return my son – PE mother's fight to get child back from China hits dead end' *The Herald* 30th June 2011 at 1–2; *Elize Lin v The Director: The Department of International Relations and Co-operation* Case No: 3207/2010, Judgment delivered on 30th November 2010. As at 5th October 2011, there were 86 member states to the Hague Convention on the Civil Aspects of International Child Abduction, 1980: Hague Conference on Private International Law 'Status table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction', available at http://www.hcch.net/index_en.php?act=conventions.status&cid=24#mem, accessed on 5th October 2011.

³³ Buck (2005) op cit (n31) 36 & 134; T Buck *International Child Law* (2010) 219; Living in Limbo op cit (n2) 15.

³⁴ Buck (2005) op cit (n31) 36; Living in Limbo op cit (n2) 15.

³⁵ Loc cit.

Bureau of the Hague Conference on Private International Law' (Permanent Bureau).³⁶ Draft conventions are discussed, modified and accepted at a Plenary Session of the Hague Conference which meets every four years.³⁷

[2] A sketch of the 'Preliminary Draft of a Convention on International Child Abduction by one Parent' was eventually presented to the second Special Commission held in November 1979³⁸ and was submitted to member governments for examination.³⁹ Once the final draft was ready, a report was prepared by Professor Pérez-Vera and member governments were invited to submit their comments on this draft.⁴⁰

[3] The Hague Convention was finally adopted by the 14th Session of the Hague Conference in Plenary Session on the 24th October 1980⁴¹ by a unanimous vote of twenty-three member states,⁴² including Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom (UK), the United States of America (USA), Venezuela and Yugoslavia,⁴³ after thirteen sittings thereof.⁴⁴ The Final Act of the 14th Session included the text of the Hague Convention and a recommendation containing the model form for use in applications was signed by the Delegates.⁴⁵ The Hague Conference, in contrast to their usual practice, made the Hague Convention immediately available for signature by states after the closing session.⁴⁶ France, Greece, Canada and Switzerland

³⁶ Hodson op cit (n2) 252.

³⁷ Buck (2005) op cit (n31) 36; The proposed topic of child abduction was submitted through a long process however for the purpose of this study shall not be discussed further.

³⁸ Beaumont & McEleavy op cit (n2) 20; AE Anton 'The Hague Convention on International Child Abduction' (July 1981) 30 *International and Comparative Law Quarterly* 539.

³⁹ Anton op cit (n38) 539; Beaumont & McEleavy op cit (n2) 21-22.

⁴⁰ Beaumont & McEleavy op cit (n2) 22. The Explanatory Report has persuasive value and status when interpreting the provisions of the Hague Convention: Buck (2010) op cit (n33) 220.

⁴¹ Beaumont & McEleavy op cit (n2) 23; L Silberman 'Hague International Child Abduction Convention: A progress report' (1994) 57 (3) *Law and Contemporary Problems* 210; E Pérez-Vera *Explanatory Report on the Hague Convention* (1982) at para [1], available at <http://hcch.e-vision.inl/upload/expl28.pdf>, accessed on 12 June 2010; Clark op cit (n4) at para [1]; Nicholson in Davel op cit (n2) 233.

⁴² Silberman op cit (n41) 210; Pérez-Vera op cit (41) at para [1]; Schnitzer-Reese op cit (n12) 5.

⁴³ Pérez-Vera op cit (n41) at para [1].

⁴⁴ Ibid at para [4].

⁴⁵ Beaumont & McEleavy op cit (n2) 23; Pérez-Vera op cit (n41) at para [1].

⁴⁶ Loc cit. The Hague Convention on the Civil Aspects of International Child Abduction, 1980 entered into force on the 1st December 1983: Kruger op cit (n1) 112 referring to the Hague Conference on Private International law Internet site www.hcch.net.

signed immediately and thus the Hague Convention bears the date 25th October 1980.⁴⁷ Through signing the Hague Convention, a signatory country indicated their intention to become a party to the Hague Convention, however despite this signature, without further ratification no legal obligation existed to force the signatory country to apply the principles of the Hague Convention any further.⁴⁸

[4] The Hague Convention is a multilateral treaty.⁴⁹ It is procedural and jurisdictional in nature⁵⁰ and it is a ground breaking instrument in the realm of private international law.⁵¹ It is also the most successful family law instrument which has been concluded under the auspices of the Hague Conference.⁵² The Hague Convention is only applicable between countries that have both signed and ratified the Convention;⁵³ however, it does not act as an extradition treaty.⁵⁴ Its implementation subsequently resulted in the return of many abducted children but has not completely eradicated the problem of international child abduction.⁵⁵

4. Parental abduction defined

[1] Initially, parental abduction was termed ‘parental kidnapping’ which was defined as the ‘taking, retention or concealment of a child by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member.’⁵⁶ Child abduction is most often carried out by a parent or family member and not usually by a stranger.⁵⁷ This concept is used when a parent or family member removes a child away from their home and familiar environment.⁵⁸ Child abduction is however merely a technical term for the illegal removal of a child

⁴⁷ Beaumont & McEleavy op cit (n2) 23; Pérez-Vera op cit (n41) at para [1]; Silberman op cit (n41) 210; Hodson op cit (n2) 251; Anton op cit (n38) 540.

⁴⁸ Living in Limbo op cit (n2) 15.

⁴⁹ Incadat op cit (n27).

⁵⁰ Silberman op cit (n41) 212.

⁵¹ Beaumont & McEleavy op cit (n2) ‘Preface’.

⁵² Hodson op cit (n2) 252.

⁵³ J Chiancone ‘Issues in resolving cases of International Child Abduction by parents’ (2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf>, accessed on 12 June 2010; A Skelton & M Carnelley (Eds) *Family Law in South Africa* (2010) 274.

⁵⁴ AS Smith ‘International parental child abductions’ (2 November 2009) *Congressional Research Service*, available at <http://www.hsdl.org/?view&doc=1153888coll=limited>, accessed on 20 June 2010; Bowie op cit (n12) 3.

⁵⁵ Nicholson in Davel op cit (n2) 233.

⁵⁶ PM Hoff ‘Parental kidnapping: Prevention and remedies’ (December 2000), American Bar Association, 1, available at <http://www.abanet.org/child/pkpreprevrem.pdf>, accessed on 20 June 2010; Chiancone op cit (n53) 1; Living in Limbo op cit (n2) 6.

⁵⁷ Hodson op cit (n2) 247.

⁵⁸ Loc cit.

from their home by a parent or family member.⁵⁹ The term is used as a result of the public's reaction to the words 'child abduction' as they usually regard this in extreme terms.⁶⁰

[2] It is usually understood that the crime of kidnapping or abduction has an element of force attached to it. However this element is usually absent in cases where a child is persuaded to leave with an abductor,⁶¹ especially if that abductor is the child's parent or family member. This form of abduction does not fall within the ambit of criminal law and carry a criminal sanction because when considering the motives of the abducting parent, they do not often perform the act for financial or material gain or to intentionally harm the child.⁶² The abducting parent usually removes the child in order to avoid losing custody during a divorce, or to hurt the other parent and exercise control over the child.⁶³ Thus parental child abduction does not fall into the same category as criminal kidnapping or bear the same sanctions as it lacks an element of violence and force. The phrase 'child abduction' does however possess a wide meaning and suggests a variety of possible acts, including those that are harmful and wrongful,⁶⁴ and thus it is necessary to determine exactly how the term is considered and viewed within international private law.

[3] Initially the Hague Convention was formed to deal with abductions carried out by the non-primary parent or care-giver that were usually frustrated by the lack of contact with their child.⁶⁵ This was initially thought to be the position. However, the reality today indicates that international child abductions may also occur (and usually do) via the primary care-giver or custodial parent.⁶⁶ Few studies exist which provide evidence as to the reasons why the above has changed.⁶⁷

⁵⁹ Manches op cit (n29) 1; Kruger op cit (n1) 25.

⁶⁰ Manches op cit (n29) 2; Kruger op cit (n1) 25.

⁶¹ EG Ewaschuk 'Abduction of children by parents' (1978-9) 21 *The Criminal Law Quarterly* 176; Living in Limbo op cit (n2) 6.

⁶² GL Grief & RL Hegar 'Parents who abduct: A qualitative study with implications for practice' (1994) 43(3) *Family Relations* 286; Beaumont & McEleavy op cit (n2) 1. Kindly see the South African Law Commission (SALC) Discussion Paper 103 (Project 110) 'Review of the Child Care Act' (2002) 1087-1088, available at <http://www.justice.gov.za/salrc/dpapers/dp103.pdf>, accessed on 20th August 2011 for further information herein.

⁶³ Beaumont & McEleavy op cit (n2) 1.

⁶⁴ Loc cit.

⁶⁵ Hodson op cit (n2) 248.

⁶⁶ Loc cit.

⁶⁷ Loc cit. These reasons are not discussed within this Study.

Reasons provided for the abducting parent's actions are also based on the opinion that they acted to avoid the dangerous behaviour of the other parent⁶⁸ because they did not have a legal remedy available to them to assist in such situations.⁶⁹ A result of the aforementioned is that many return to their country of origin for family support and familiar surroundings.⁷⁰ The common perception was initially that fathers, who were unhappy with access awards or a divorce settlement, were the abductors.⁷¹ However, it seems more likely in this modern era that mothers are the likely abductors.⁷² The reasons for abduction do not however form a closed list.

Legally, the following scenarios are considered to be common instances of child abduction: taking any child abroad in breach of custody rights and without the permission of the other parent or an order of court (wrongful removal);⁷³ and retaining a child abroad beyond the period for which permission was given (wrongful retention).⁷⁴

[4] Within international private law, the phrase 'child abduction' is used synonymously with the unilateral removal or retention of children by a parent, guardian or family member.⁷⁵ The term 'abduction' appears in the title of the Hague Convention; conversely, the word is not used within the text of the Hague Convention itself. In the text, it is referred to as 'wrongful removal or retention'.⁷⁶ In light of the previous discussion, these terms are actually contradictory. It was considered desirable in the drafting stage of the Hague Convention to keep the term 'abduction' in the title, as it is was considered to be a product of the mass media and was, and is, habitually used by them as it has a resonance with the public as well as a powerful impact upon them.⁷⁷ The reason the terms 'retention' and 'removal' are preferred within the text is because they keep within the limited scope of the Hague Convention.⁷⁸ As a result of previous studies undertaken, as indicated by Professor Pérez-Vera, the relationship which

⁶⁸ Loc cit.

⁶⁹ Loc cit.

⁷⁰ Loc cit.

⁷¹ Beaumont and McEleavy op cit (n2) 3; Buck (2010) op cit (n33) 214.

⁷² Beaumont & McEleavy op cit (n2) 3–4; Buck (2010) op cit (n33) 214; Skelton & Carnelley op cit (n53) 273; *Central Authority v H* (2008) 1 SA 49 (SCA); *Central Authority (South Africa) v A* 2007 (5) SA 501 (W); J Sinclair & E Bonthuys 'Law of Persons and Family Law' *Annual Survey of South African Law* (2004) 145-146.

⁷³ Hodson op cit (n2) 224 & 247.

⁷⁴ Loc cit.

⁷⁵ Beaumont & McEleavy op cit (n2) 1.

⁷⁶ Pérez-Vera op cit (n41) at para [53]; Bodenheimer op cit (n4) 103; Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

⁷⁷ Pérez-Vera op cit (n41) at para [53]; Beaumont & McEleavy op cit (n2) 1; Anton op cit (n38) 537; Kruger op cit (n1) 25.

⁷⁸ Pérez-Vera op cit (n41) at para [53].

usually exists between the ‘abductor’ and the ‘child’, as well as the intentions of the ‘abductor’, indicate that we are not dealing with a criminal offence. Thus the subject of the Hague Convention is not based in the criminal law.⁷⁹

As a result of the aforementioned, the inconsistency that exists between the title and content of the Hague Convention’s text is avoided.⁸⁰ In order to avoid any further ambiguity, the title of the Hague Convention clearly indicates that it is only concerned with the regulation of the ‘civil aspects’ of the concept.⁸¹ The word ‘abduction’ would by itself, however, have a criminal connotation,⁸² but the Hague Convention does not cover any form of child kidnapping under criminal or extradition laws as the Hague Conference’s jurisdiction is limited to matters concerning private international law.⁸³ The term ‘abductor’ is therefore also avoided for the same reason.⁸⁴ Nonetheless, the terms ‘abduction’ and ‘abductor’ have been used as ‘short-cut’ expressions in academic writings.⁸⁵ In light of the aforementioned the aims and objectives of the Hague Convention shall be discussed below.

5. The purpose, aims and objectives of the Hague Convention

[1] The purpose of the Hague Convention was succinctly stated by Baroness Hale in the English case of *Re D (a child) (Abduction: rights of custody)*:⁸⁶

‘The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their “home”, but also so that any dispute about where they should live in the future can be decided in the Courts of their home country, and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed.’

The intention of the Hague Convention is thus to provide a simple and summary procedure⁸⁷ as well as to assist in cases where children are wrongfully removed or retained. This Convention has provided a solution to a situation which was previously problematic and it does this through the introduction of a

⁷⁹ Loc cit; Skelton and Carnelley op cit (n53) 274.

⁸⁰ Pérez-Vera op cit (n41) at para [53].

⁸¹ Loc cit; Bodenheimer op cit (n4) 103.

⁸² Bodenheimer op cit (n4) 103.

⁸³ Ibid at 99 fn4; Kruger op cit (n1) 25. Kruger also emphasises that the abductor can be a grandparent who had parental responsibility for the child, or a parent who had contact rights only. The person therefore does not have to be a parent to the child concerned.

⁸⁴ Bodenheimer op cit (n4) 103.

⁸⁵ Loc cit. For example see Chürr op cit (n2); Kruger op cit (n1); Bates op cit (n16) and most sources which consider the topic of the Hague Convention.

⁸⁶ *Re D (a child) (abduction: rights of custody)* [2007] 1 All ER 783 at para [48]; Hodson op cit (n2) 251.

⁸⁷ Hodson op cit (n2) 266.

mechanism for the summary return of wrongfully removed and retained children, and through the creation of communication and co-operation channels between contracting states in order to expedite return applications.⁸⁸ Its purpose is therefore to achieve a fair process⁸⁹ and to restore the *status quo ante* as fast as possible in order to prevent any further unnecessary harm being suffered by the child concerned, which is ensured through their return to the state of habitual residence.⁹⁰ The Hague Convention also aims at preventing the wrongful circumvention of the appropriate forum through the unilateral action of one parent. It also encourages interaction and co-operation between contracting states as well as ensures the appropriate jurisdiction is used in custody disputes.⁹¹ Delays herein can have adverse effects on the process and the child concerned.⁹² Due to the fact that the Hague Convention does not always consider child abduction as being within the child's short-term best interests, it attempts to ensure expeditiousness in returning the child to the status quo.

[2] In regards to the best interests of the child principle, this first appeared on an international level in principles 2 and 7 of the Declaration on the Rights of the Child of 1959.⁹³ Principle 2 states:

‘The Child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’⁹⁴

Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC)⁹⁵ which is binding on all ratifying states, including South Africa and Australia, states further that: ‘In all actions concerning

⁸⁸ Beaumont & McEleavy op cit (n2) ‘Preface’. The Hague Convention provides an official mechanism for taking action in regards to securing the child's return to their country of habitual residence and it also establishes a special legal regime to deal with abducted children independently of the domestic law of member countries for the ordinary enforcement of custody or access orders: L Curtis ‘The Hague Convention on the Civil Aspects of International Child Abduction: the Australian experience’ (April 1989) 15 *Commonwealth Law Bulletin* 628.

⁸⁹ Living in Limbo op cit (n2) 1.

⁹⁰ J Weideman & JA Robinson ‘The interpretation and application of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction’ (2011) 1 *Stellenbosch Law Review* 72; *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) at para [25]; C Du Toit ‘The Hague Convention on the Civil Aspects of International Child Abduction’ in T Boezaart *Child Law in South Africa* (2009) 370; Nicholson in Davel op cit (n2) 234.

⁹¹ Weideman & Robinson op cit (n90) 72; *Sonderup v Tondelli* supra (n2) at paras [31]-[32]; Du Toit at 354: The Hague Convention was designed to restore the pre-abduction or pre-retention status quo as well as to deter parents from crossing international borders in search of a more sympathetic forum.

⁹² Buck (2010) op cit (n33) 220.

⁹³ Buck (2005) op cit (n31) 59.

⁹⁴ Ibid at 218; Declaration of the Rights of the Child, 1959, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp (No. 16) at 19, U.N. Doc. A/4354, available at <http://www.cirp.org/library/ethics/UN-declaration/> under the United Nations Convention on the Rights of the Child, 1989 (UNCRC), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

⁹⁵ United Nations Convention on the Rights of the Child, 1989 (UNCRC), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ However the primary goal of the proceedings surrounding abductions is no longer a detailed investigation into the best interests of the child as discussed in the above, it is rather a peremptory examination into whether or not the child’s return should be ordered.⁹⁶

[3] In light of the above, the Hague Convention was designed in order to formulate managerial, organizational and judicial procedures to assist with the prompt return of an abducted child as well as to assist in preventing reliance upon self-help mechanisms and secondary abductions.⁹⁷ The Hague Convention is based on the principle that the interests of the child are of the highest importance.⁹⁸ Yet in the application of the Hague Convention it is considered that it is not in the best interests of the child for them to be abducted and the decisions which need to be made surrounding and concerning the child, specifically a custody order, are considered to be best left to the state in which the child was habitually resident before the abduction occurred⁹⁹ as the state of habitual residence is considered best equipped to handle such matters and to ultimately ensure that the child’s best interests are satisfied in the long term.

All states who have signed and ratified the Hague Convention have agreed that in matters where a child is abducted to their country, they will not enter into a full investigation of custody, contact or other parenting agreements regarding the specific child as this should be decided by a court in the state where the child was last habitually resident.¹⁰⁰ Therefore it has been agreed that their function will be merely to ensure the child’s quick and safe return.¹⁰¹ It has been suggested that instances of abduction should thus not be viewed in isolation but should be viewed in the light of the situation from which the child was removed, or retained, and that into which they would be returned.¹⁰²

⁹⁶ Beaumont & McEleavy op cit (n2) 29.

⁹⁷ Hodson op cit (n2) 251; Nicholson in Davel op cit (n2) 234, through requiring the child’s return to their country of habitual residence, the Hague Convention ensures that the custody and access rights under the law of the requesting State are respected.

⁹⁸ Hodson op cit (n2) 251.

⁹⁹ Loc cit; Du Toit op cit (n90) 354 & 370.

¹⁰⁰ Beaumont & McEleavy op cit (n2) 29-30 & 251; Du Toit op cit (n90) 354; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n90) at para [25] – This is important as the court in the country of the child’s habitual residence will have all the evidence required to decide custody issues on the merits of the case. This will include the recent evidence and not only the evidence surrounding the abduction: Nicholson in Davel op cit (n2) 234; Skelton & Carnelley op cit (n53) 274.

¹⁰¹ Loc cit.

¹⁰² Beaumont & McEleavy op cit (n2) 11.

The Hague Convention is not centred on the individual child and its process is not completely founded on the concept of the ‘best interest of the child’ which dominates family law in the western world.¹⁰³ The Hague Convention removes the focus from that of the individual child and focuses itself on the good of all children and as a result, elevates the importance of the rights of those adults who have legal responsibilities to care for a child and to determine where they should live, above those of the other parent or care-giver who does not have full legal responsibilities in regards to the child in question.¹⁰⁴ The interests of the child nevertheless remain paramount in custody matters and as indicated in the Preamble to the Hague Convention.¹⁰⁵

[4] In light of the above and in terms of the Hague Convention, courts are prohibited from considering the best interests of the child in regards to the individual child involved unless an abducting parent has raised an exception/defence to the peremptory rule of return.¹⁰⁶ These exceptions form an important part of the Hague Convention and they exist in order to allow the circumstances surrounding the child to be considered and taken into account in determining each individual situation.¹⁰⁷ These exceptions/defences are discussed in Chapters [2] and [3] at point [8].

[5] Furthermore, when a return order is made and the child is returned to the state of habitual residence, the child is not returned to the left-behind parent but into the care of the state unless other suitable arrangements can be made, pending the outcome of the investigations and court orders.¹⁰⁸ An application under the Hague Convention therefore may not be transformed into an application dealing with the merits of custody issues and or other related issues.¹⁰⁹ This remains an issue for the court of the child’s habitual residence to decide upon.¹¹⁰

[6] Cultural bias and one-sided applications may allow a more favourable custody order to be made in another jurisdiction.¹¹¹ However, the Hague Convention binds member states to the principle of

¹⁰³ Ibid at 13.

¹⁰⁴ Ibid at 11–13.

¹⁰⁵ Ibid at 29.

¹⁰⁶ Du Toit op cit (n90) 369; Beaumont and McElevay op cit (n2) 29.

¹⁰⁷ Du Toit op cit (n90) 369; *Senior Family Advocate, Capetown v Houtman* 2004 (6) SA 274 (C) at para [20].

¹⁰⁸ Du Toit op cit (n90) 354; Woodrow and Du Toit op cit (n2) at [17-3].

¹⁰⁹ Du Toit op cit (n90) 354-355.

¹¹⁰ Ibid at 355.

¹¹¹ Ibid at 354; BE Lubin ‘International parental child abduction: Conceptualizing new remedies through application of the Hague Convention’ (2005) 4 *Washington University Global Studies Law Review* 415.

peremptory return and prohibits the hearing of evidence on the merits of custody disputes or the best interests of the individual child involved.¹¹² Thus it prevents forum shopping.¹¹³ Article 16 of the Hague Convention provides that once notice of an abduction is given, states may not decide on the merits of custody issues or rights until it is determined that the child is not to be returned, or unless the application has not been lodged within the correct time frame.¹¹⁴ The Hague Convention deals with scenarios where the abducting parent or family member tries to forcefully establish an artificial juristic link on an international level so that they will obtain custody of the child.¹¹⁵

Due to the variety of circumstances surrounding abductions, it is impossible to arrive at a more precise definition of international child abduction than that provided above.¹¹⁶ The Hague Convention indicates a compromise which exists between two differing concepts regarding an end result which they try to achieve.¹¹⁷ As a result the Hague Convention has formulated a delicate balance between the potential conflict and desire to protect factual situations which have been altered by a wrongful removal or retention, with that of guaranteeing the respect for legal relationships which may underlie such situations.¹¹⁸

[7] The two objectives of the Hague Convention are set out in Article 1 and are the following:¹¹⁹

- ‘... a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States.’

The objective is thus to protect children from wrongful international removals or retentions from the parent in whose lawful custody the child should be.¹²⁰ Any development or changes in the characteristics

¹¹² Du Toit op cit (n90) 354; Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 provides for the rule of peremptory return.

¹¹³ Loc cit.

¹¹⁴ Du Toit op cit (n90) 354; *Smith v Smith* 2001 (3) SA 845 (SCA) at 850F; Articles 11 and 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980. Article 12 specifies the time frame as a year from the date on which the child was removed or retained.

¹¹⁵ Pérez-Vera op cit (n41) at para [11]; Curtis op cit (n88) 627: The importance of the Hague Convention arises from the possibility that people can establish legal and jurisdictional links which are artificial to the child’s welfare.

¹¹⁶ Pérez-Vera op cit (n41) at para [11].

¹¹⁷ Ibid at para [9].

¹¹⁸ Loc cit.

¹¹⁹ Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae) supra (n90) at para [25]; *Chief Family Advocate v G* 2003 (2) SA 599 (W) at 606C-D.

¹²⁰ Silberman op cit (n41) 210.

of wrongful removals or retentions should not solely be seen in terms of the individual child but should be seen in the context of the Hague Convention as a whole.¹²¹ The aforementioned generally aims to deter parents from unlawfully changing the child's habitual residence¹²² and also provides significant value to the protection of custodial rights of the parent responsible for the care of the child.¹²³ Article 1 of the Hague Convention does not seek to regulate the award of custody rights. However, it does rest on the implication that any debate surrounding the merits of a custody issue should take place before the competent authorities in the state where the child was habitually resident, prior to their removal.¹²⁴

A factor which is consistent in the situations under consideration is that the abductor will often claim that their actions are lawful due to the authorities in the state of refuge having made a decision regarding custody rights in the abductor's chosen forum.¹²⁵ However, these persons can be deterred from this through depriving their actions of any practical or legal consequences.¹²⁶ The aforementioned is obtained by placing at the head of the Hague Convention's objectives, the restoration of the status quo by means of 'the prompt return of children wrongfully removed to or retained in any contracting state.'¹²⁷

[8] Once it is proved that a child has been wrongfully removed or retained, the child must be returned immediately.¹²⁸ This is not in line with the aim of the instrument as a whole because the presence of exceptions/defences to the rule of peremptory return allows a calculated response to be made by the courts in abduction proceedings.¹²⁹ *Prima facie* wrongful removal or retention can occasionally be in a child's interests and may sometimes be recognized and justified.¹³⁰ This is not evident in the Preamble of the Hague Convention, however, which states that the signatory's desire to protect the children arises

¹²¹ Beaumont & McEleavy op cit (n2) 13.

¹²² Loc cit.

¹²³ Loc cit.

¹²⁴ Pérez-Vera op cit (n41) at para [19]. This will also apply to a situation where no determination on custody rights has been made.

¹²⁵ Ibid at para [16].

¹²⁶ Loc cit.

¹²⁷ Loc cit.

¹²⁸ Beaumont & McEleavy op cit (n2) 28.

¹²⁹ Loc cit.

¹³⁰ Ibid at 29.

not from the wrongful removal or retention but from the harmful effects of such actions, and therefore the Preamble counterbalances the effects of Article 1.¹³¹

[9] The co-operation and functioning together of contracting states has a bearing on the objectives stated in Article 1.¹³² The Hague Convention is centred upon the idea of co-operation amongst the Central Authorities of each state and it is therefore designed to regulate only those situations which fall within its scope and which involve two or more contracting states.¹³³ These objectives are only fully obtained amongst the contracting states who are guided by the Hague Convention's provisions.¹³⁴ The Hague Convention is autonomous in regards to other existing conventions which surround the protection of minors or custody rights.¹³⁵ It must, however, exist harmoniously with the laws of each contracting state as well as in regards to that state's recognition and enforcement of foreign orders.¹³⁶ Within its specific sphere of application, the Hague Convention does not claim to be applied in an exclusive way¹³⁷ and it is not retroactive in regards to countries who have become signatories after the abduction has occurred.¹³⁸ The provisions of Articles 1 and 2 are meant to set civil proceedings in motion, and not criminal proceedings.¹³⁹ The wider objectives of the Hague Convention are found in Articles 6 and 7 but these are subsidiary to the primary purposes evident in Article 1.¹⁴⁰

[10] The main objective stated in Article 1(a) is premised on the expeditious and prompt return of children and thus member states are required to act accordingly.¹⁴¹ The return of the child should be effected as expeditiously as possible so as to avoid any further litigation arising in the state where the child is removed to or retained in.¹⁴² This is also required to ensure that the merits of any custody dispute be decided by the courts in the state where the child was habitually resident prior to their removal.¹⁴³ Article 1(b) of the Hague Convention, however, does not provide any custody or access

¹³¹ Loc cit.

¹³² Pérez-Vera op cit (n41) at para [35].

¹³³ Ibid at para [37].

¹³⁴ Loc cit.

¹³⁵ Loc cit.

¹³⁶ Ibid at para [39].

¹³⁷ Loc cit.

¹³⁸ Nicholson in Davel op cit (n2) 242.

¹³⁹ Anton op cit (n38) 543.

¹⁴⁰ Loc cit.

¹⁴¹ Du Toit op cit (n90) 353.

¹⁴² Loc cit.

¹⁴³ Loc cit.

rights and neither does it investigate the merits of custody disputes.¹⁴⁴ It merely attempts to ensure the safe return of children to their state of habitual residence.¹⁴⁵ The Hague Convention also does not provide any uniform international standards for determining custody rights or for the enforcement of custody orders rendered in any foreign state.¹⁴⁶ Therefore from Article 1(b) it is determined that the Hague Convention is not essentially concerned with the merits of custody rights. The characterization of the removal or retention is only considered wrongful if a right of custody exists.¹⁴⁷ This objective is thus independent of Article 1(a) but has a connection with the return of the child.¹⁴⁸

[11] It is impossible to create a hierarchy between the above two objectives and thus in reality it is considered as a single object considered at two different points in time.¹⁴⁹ The prompt return of the child answers the desire to re-establish the status quo and respect for custody and access rights.¹⁵⁰ The Hague Convention also recognizes the possibility of a party invoking any other legal rule which may allow him/her to obtain the return of the wrongfully removed or retained child, or to assist in recognition being granted to their access rights.¹⁵¹

[12] The Hague Convention is a semi-open Convention which promotes and relies upon co-operation.¹⁵² Therefore any state can accede to it but the accession 'will have effect only as regards the relations between the acceding [s]tate and such contracting [s]tates as will have declared their acceptance of the accession.'¹⁵³ The contracting states thus sought to maintain a balance between a desire for universality and a belief that a system based on co-operation would work only if a mutual confidence and respect existed between the states.¹⁵⁴ The Hague Convention also does not provide any specification as to how and what means the state may employ in bringing about respect for the rights of custody existing in

¹⁴⁴ Silberman op cit (n41) 211.

¹⁴⁵ Ibid at 211-212. The approach followed in the proceedings is thus to deter wrongful removals and retentions by providing procedures ensuring that issues surrounding custody and access are litigated in the jurisdiction where the child is habitually resident.

¹⁴⁶ Silberman op cit (n41) 212.

¹⁴⁷ Pérez-Vera op cit (n41) at para [9].

¹⁴⁸ Ibid at para [17].

¹⁴⁹ Ibid at paras [17] & [18].

¹⁵⁰ Ibid at para [17].

¹⁵¹ Ibid at para [37]; Article 34 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Bodenheimer op cit (n4) 103. This may be done along with the implementation of the provisions of the Hague Convention.

¹⁵² Pérez-Vera op cit (n41) at para [41].

¹⁵³ Ibid at para [38].

¹⁵⁴ Loc cit.

another contracting state.¹⁵⁵ Professor Pérez-Vera concludes that with the exception of the indirect means of protecting custody rights, the respect for custody rights falls almost entirely outside the scope of the Hague Convention.¹⁵⁶ Access rights do however form part of an incomplete rule and thus there is an indication that an interest exists in ensuring that regular contact is maintained between both parents and their children, even if the custody is only awarded to one parent or a third party.¹⁵⁷

[13] Article 2 states the following:

‘Contracting [s]tates shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.’

The Hague Convention thus places contracting states under an obligation to take appropriate measures to implement the Hague Convention’s objectives¹⁵⁸ and therefore binds member states to assist left-behind parents or individuals in securing the child’s return.¹⁵⁹ Therefore in order for the Hague Convention to be successful, a consistent approach must be employed by all member states in their application of the Hague Convention.¹⁶⁰

6. The Hague Convention and its interaction with other Conventions

[1] As a result of the Hague Convention’s specific objectives, this Convention must occupy a place of precedence over other treaties and conventions concerning parental child abduction in order to fully and correctly function within a state.¹⁶¹ Otherwise, the Hague Convention should be implemented along side other treaties and conventions in order to ensure that its objectives and aims are observed and achieved.

Article 34 of the Hague Convention states the following:

‘The Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the [s]tate of origin and the [s]tate addressed or other law of the [s]tate addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.’

¹⁵⁵ Ibid at para [17].

¹⁵⁶ Loc cit.

¹⁵⁷ Loc cit.

¹⁵⁸ Buck (2005) op cit (n31) 134.

¹⁵⁹ Du Toit op cit (n90) 351.

¹⁶⁰ Loc cit.

¹⁶¹ Beaumont & McEleavy op cit (n2) 216.

In light of the above the Hague Convention promotes the concept and principle of non-exclusivity and does not restrict or limit any international instrument in its application and force between the state of origin and other states, especially in regards to a return order.¹⁶² The Hague Convention should always assume pre-eminence in order to ensure that a child is returned.¹⁶³ However other international instruments may also be of help in realizing the objectives of the Hague Convention.¹⁶⁴

As has already been discussed, the Hague Convention's design promotes its ability to achieve its objective of ensuring a prompt and speedy return of an abducted child in order to ensure that no consolidation occurs in any law regarding an initially unlawful factual situation concerning custody issues and the relevant area of jurisdiction.¹⁶⁵ The Hague Convention's compatibility with other conventions is thus achieved through ensuring that priority is given to its provisions which are likely to bring about a speedy and temporary solution to the situation.¹⁶⁶

[2] The first instrument to consider is the Universal Declaration of Human Rights, 1948.¹⁶⁷ Although the Declaration does not expressly consider the problem of child abduction, it provided in Article 25(2) that '[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same protection.' Therefore, it is submitted that this Declaration was a stepping stone towards the protection offered and afforded to children by the Hague Convention. The Preamble to the Declaration further indicates that it is 'essential to promote the development of friendly relations between nations' which it is submitted, assists with the aim and objective of international co-operation in the speedy and prompt return of parentally abducted children. Thus it is suggested that the Declaration of Human Rights was a building block relied upon by the Hague Convention which assisted in its formation.

¹⁶² Loc cit.

¹⁶³ Beaumont & McEleavy op cit (n2) 216; Pérez-Vera op cit (n41) at para [40].

¹⁶⁴ Loc cit.

¹⁶⁵ Pérez-Vera op cit (n41) at para [40].

¹⁶⁶ Loc cit; Article 34 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁶⁷ The Universal Declaration of Human Rights, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml>, accessed on 21 July 2010.

[3] A further convention which fortifies children's rights is the International Covenant on Civil and Political Rights, 1966.¹⁶⁸ This Covenant ensures that each individual enjoys their civil, political, social and cultural rights freely and without fear under the Charter of the United Nations.¹⁶⁹ Article 24(1) provides the following:

'Every child shall have without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.'

Thus it is evident that children belong to a vulnerable group and require protection and assistance in many areas. It is further submitted that the Covenant also provides a building block in regards to children's protection from parental child abduction. Thus the United Nations is a very important party involved in the development of children's rights.¹⁷⁰

[4] The 1989 UNCRC is an important convention to consider. The Geneva Declaration of the Rights of the Child, 1924,¹⁷¹ which was adopted by the League of Nations, preceded the UNCRC by being signed and entering into law at a very early stage, indicating an early need to afford protection to the rights of children as well as recognizing that 'mankind owes to the child the best that it has to give.'¹⁷² In 1959, the United Nations General Assembly adopted a second Declaration of the Rights of the Child which incorporated ten principles for working in a child's best interests¹⁷³ however this was not a legally binding document but merely a statement of intent.¹⁷⁴

The UNCRC was adopted into international law by signature of the United Nations General Assembly in November 1989.¹⁷⁵ It is considered to be the most widely ratified international human rights

¹⁶⁸ This Convention was adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966 and is available at <http://www2.ohchr.org/english/law/ccpr.htm>, accessed on 20 October 2010.

¹⁶⁹ Preamble to the International Covenant on Civil and Political Rights, 1966.

¹⁷⁰ Buck (2005) op cit (n31) 32.

¹⁷¹ Geneva Declaration of the Rights of the Child, 1924, available at <http://www.un-documents.net/gdrc1924.htm>, accessed on 21 July 2010.

¹⁷² Geneva Declaration of the Rights of the Child, 1924.

¹⁷³ UK Government 'Strategy and Working Practice: Every Child Matters' (updated 2009), available at <http://www.dcsf.gov.uk/everychildmatters/strategy/strategyandgovernance/uncrc/unitednationsbackground/uncrcbackground/>, accessed on the 20 October 2010.

¹⁷⁴ Loc cit.

¹⁷⁵ UNCRC was adopted and acceded to by the GA resolution 44/25 of 20 November 1989, ratified in December 1995 by South Africa; Buck (2005) op cit (n31) 48. The ratification of the UNCRC by Australia was a noteworthy development in the Australian family law: L Young & G Monahan *Family Law in Australia* (7th ed) (2009) 249. Australia ratified the UNCRC on the 17th December 1990 and it entered into force from the 16th January 1991. The UNCRC is therefore a comprehensive

instrument and is a unique international treaty.¹⁷⁶ It is the only international human rights treaty which includes civil, social and cultural rights, political and economic rights as well as sets out in detail what every child requires in order to have a happy and safe childhood.¹⁷⁷ It is a detailed and comprehensive instrument which provides and defines the universal norms for the status of children and also provides for their fundamental freedoms and rights.¹⁷⁸ The UNCRC further provides for a child's special assistance and protection due to their vulnerability and is also the most comprehensive and complete document concerning children's rights and is therefore the first internationally binding instrument which focuses specifically on the child.¹⁷⁹

The UNCRC is still a leader in its principles¹⁸⁰ and the Preamble states the following:

'Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding ... the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1989 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialised agencies and international organizations concerned with the welfare of the children.'

The development of children's rights is evident in the aforementioned quote. Children's rights, however, continue to be developed within many covenants and conventions.

Article 9 has particular importance and resonance with the Hague Convention.¹⁸¹ It provides:

'1. State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

accumulation of children's rights at international level. Through Australia's ratification, they committed themselves to undertaking 'all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention.' Young and Monahan (2009) at 250.

¹⁷⁶ Buck (2005) op cit (n31) 41 & 47; UK Government op cit (n173).

¹⁷⁷ UK Government op cit (n173); Buck (2005) op cit (n31) 41.

¹⁷⁸ UK Government op cit (n173); Buck (2005) op cit (n31) 47.

¹⁷⁹ UK Government op cit (n173); Buck (2005) op cit (n31) 41 & 47.

¹⁸⁰ P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its values in International and South African child law' in T Boezaart *Child Law in South Africa* (2009) 309.

¹⁸¹ Buck (2010) op cit (n33) 216.

3. State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. State Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.'

With specific reference to Article 9(3), it is evident how the UNCRC assists the Hague Convention's aims and is based on its principles of speedy return which may also assist in strengthening the Hague Convention. This however will not trump the Hague Convention's application in signatory countries, although in non-signatory countries it may provide some force and assistance in attempting to have a child safely returned to a left-behind parent or family member.

Article 10 is also of importance¹⁸² and provides the following:

'1. In accordance with the obligation of State Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner. State Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of State Parties under article 9, paragraph 1, State Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.'

Article 10(2) resonates with and is partly based upon the recognition which the Hague Convention gives to the maintenance of relations between children and both parents where they are of different nationalities.¹⁸³ Article 11 also supports the Hague Convention¹⁸⁴ and provides:

'1. State Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, State Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.'

¹⁸² Loc cit.

¹⁸³ Buck (2005) op cit (n31) 132; S Detrick *A Commentary on the UN Convention on the Rights of the Child* (1999) 185.

¹⁸⁴ Buck (2010) op cit (n33) 217.

Article 18 of the UNCRC further provides:

- ‘1. State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. State Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.’

This article supports the aims and objectives of the Hague Convention regarding the concept of parental rights and responsibilities. As is evident from the aforementioned, these articles assist the Hague Convention in ensuring the speedy return of parentally abducted children, despite the Hague Convention retaining its precedence over most other conventions.

[5] The African Charter on Human and People’s Rights came into effect in October 1986 with 53 states of the Organization of the African Union (OAU) ratifying it.¹⁸⁵ Although the aforementioned Convention is important, the African Charter on the Rights and Welfare of the Child,¹⁸⁶ which came into operation on the 29 November 1999,¹⁸⁷ also maintains importance. This Convention binds and affects only South Africa and not Australia. The three anchoring provisions of this Charter are the best interests of the child, non-discrimination and the primacy of the Charter over all harmful cultural practices and customs.¹⁸⁸ The Preamble indicates that the situation in most African states regarding children remains critical as a result of unique factors which surround their socio-economic, cultural, traditional and developmental circumstances and it also indicates that as a result of a child’s physical and mental immaturity, he/she needs to be provided with special safeguards and care. The Preamble further indicates that a child occupies a unique and privileged position in the African society and for the full and happy development of a child, they should grow up in a family environment in an atmosphere of love, happiness and understanding and this promotion and protection of rights and welfare of children also

¹⁸⁵ Buck (2005) op cit (n31) 43.

¹⁸⁶ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>, ratified on the 7th January 2000 by South Africa.

¹⁸⁷ F Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in T Boezaart *Child Law in South Africa* (2009) 331.

¹⁸⁸ Ibid at 336.

implies that the performance of these duties rests on the part of all concerned therein. Children are therefore viewed as the most vulnerable group in need of protection.¹⁸⁹

Article 19(1) provides:

‘Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his/her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child.’

Article 19(2) states:

‘Every child who is separated from one/both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.’

It is therefore submitted as evident that this Charter has recognized the problem of parental child abductions and thus as a result it is submitted that it can be used in support of the Hague Convention in non-convention African countries and perhaps as a support mechanism of its objectives, although the Hague Convention operates without the assistance of these other conventions. The Charter is the first comprehensible and regional treaty on the rights of the child¹⁹⁰ and is modeled on the UNCRC and shares its key underlying principles.¹⁹¹

[6] The Hague Convention no longer applies in the United Kingdom¹⁹² or the European Union. The law which now applies over these countries is that referred to as the Brussels II Convention.¹⁹³ The Brussels II and the Hague Convention are very important international conventions as well as key players in the international sphere.¹⁹⁴ The Hague Convention itself is very involved and is an important entity in the area of family law internationally and varies in its application across different countries.¹⁹⁵ Brussels II is specific to the area of family law and its harmonization across the European Union.¹⁹⁶ It is important to note that the Brussels II significantly strengthened the Hague Convention regarding matters of child

¹⁸⁹ Ibid at 338-339. This may be the result of the position which children occupy in society generally and which arises from their inherent vulnerability or from groups of children with pronounced needs.

¹⁹⁰ Buck (2005) op cit (n31) 44; A Lloyd ‘A theoretical analysis of the Reality of Children’s Rights in Africa: An intro to the African Charter on the Rights and Welfare of the Child’ (2002) 2(1) *African Human Rights Law Journal* 13.

¹⁹¹ Buck (2005) op cit (n31) 44.

¹⁹² Hodson op cit (n2) 248.

¹⁹³ Ibid at 268.

¹⁹⁴ Loc cit.

¹⁹⁵ Loc cit.

¹⁹⁶ Loc cit.

abduction, specifically in Europe.¹⁹⁷ Brussels II stems from the German proposal in 1992 to build on the 1968 Brussels Convention on Jurisdiction and Enforcement of the Judgments in Civil and Commercial Matters.¹⁹⁸ The revised Brussels II Regulation will apply to an abduction case where the same criteria as for the Hague Convention apply but in addition the abduction must be from a European Union country (excluding Denmark) and the application for return must have been made after 1 March 2005.¹⁹⁹

[7] The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children (1980) has as its primary objective the protection of the welfare of children through securing the recognition and enforcement of custody orders in order to respond to international child abductions more directly through the restoration of the interrupted custody of children.²⁰⁰ It however, was widely ratified but had no significant success.²⁰¹ Its broad approach, as well as its loose drafting, made it unsuitable as a tool for fighting unilateral removals and retentions.²⁰² Thus the Hague Convention prevails over this later Convention,²⁰³ as it is widely ratified and well drafted and has had success in return applications regarding wrongfully removed and retained children.

[8] In the USA the first major attempt to provide uniform rules over jurisdiction surrounding matters pertaining to custody issues began with the Uniform Child Custody Jurisdiction Act (UCCJA) revised in 1997 along with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) which was promulgated and adopted in approximately half of its states.²⁰⁴ The UCCJA allows authorized states jurisdiction in regards to custody if one of the following four possibilities exists:²⁰⁵

- 1) [T]he State of the child had been their home or was their home within 6 months commencement of custody proceedings, if a parent or person acting as one resided, continually resided in the State.
- 2) A Child or a child and one parent had substantial connections with the State, and in the State existed evidence (substantial) regarding the child's future.
- 3) It was an emergency situation.

¹⁹⁷ Hodson op cit (n2) 268 & 275: Nowhere else in the world is there anything as strengthening to the Hague Convention as that of the Brussels II Convention.

¹⁹⁸ Beaumont & McEleavy op cit (n2) 217.

¹⁹⁹ Buck (2010) op cit (n33) 219. This concept however shall not be discussed in any further detail within this study due to relevance.

²⁰⁰ Articles 8 & 9 of the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children, (e.g. Articles 1(c), 2, 4, & 7) & Beaumont & McEleavy op cit (n2) 221; Buck (2010) op cit (n33) 219.

²⁰¹ Beaumont & McEleavy op cit (n2) 221.

²⁰² Ibid at 224.

²⁰³ Loc cit; Buck (2010) op cit (n33) 219; Nicholson in Davel op cit (n2) 241.

²⁰⁴ N Lowe, M Everall & M Nicholls *International Movement of Children, Law Practice and Procedure* (2005) 79.

²⁰⁵ Ibid at 80.

4) No other States would have jurisdiction to make a custody determination.

The US International Child Abduction Remedies Act (ICARA) 42 U.S.C § 11601-10 *et seq* on the same day as the US signed the Hague Convention, Congress enacted § 11601(a) empowering the State and Federal Courts to hear cases under the Hague Convention and subsequently this became the law of the land in July 1988 as a result of the enactment of this Act.²⁰⁶ However, although the aforementioned legislation exists, the Hague Convention still maintains its precedence and assists with international abductions.

[9] Within South Africa, the Children's Act 38 of 2005, which entered in force on the 1st April 2010, is the leading precedent for the law regarding children in South Africa. This Act was drafted and implemented in order to give effect to certain rights of children as contained in the Constitution of the Republic of South Africa Act, 1996 and it also gives effect to the Hague Convention. The Preamble to the Act provides: 'The Constitution has created a society based on democratic values, social justice and fundamental human rights and it seeks to improve the quality of human life of all the citizens as well as free their potential.' Child specific rights are enshrined in section 28 of the Constitution and the state has a duty to protect as well as fulfill these rights, along with the other rights enshrined in the Bill of Rights in the Constitution e.g. Section 9 – the right to equality. The United Nations declared that children, in terms of the Universal Declaration of Human Rights, are entitled, as discussed, to special care and assistance. This care was extended in terms of the Geneva Declaration on the Rights of the Child in the Universal Declaration on the Rights of the Child, and is also provided for in the UNCRC. The African Charter on Rights of Welfare of the Child and the Universal Declaration on Human Rights also ensures special care and protection for a child along with other statutes and relevant instruments of specialized agencies and international organizations concerned with the child's welfare. The South African position is fully discussed in Chapter [2] of this Study.

[10] The above discussion places the Hague Convention in perspective amongst other international treaties, conventions and laws and indicates what an important and useful document it is and remains. The discussion also places the Hague Convention in perspective with regards to its background, aims and objectives.

²⁰⁶ Ibid at 80 fn60; Nicholson in Davel op cit (n2) 233; BJ Shirman 'International treatment of child abduction and the 1980 Hague Convention' (1991) 15 *Suffolk Transnational Law Journal* 205.

7. Non-convention countries

[1] One of the greatest problems which the Hague Convention faces is the continued existence of many non-convention countries.²⁰⁷ These countries can become safe havens for abductors.²⁰⁸ It is therefore necessary to briefly point out that in instances where an abduction occurs between countries which are not signatories (non-convention countries) to the Hague Convention, or the child is removed to a non-convention country, in terms of both the South African and Australian law, this should be dealt with via the normal principles of the domestic law of each state, therefore usually through the application of the best interests of the child principle.²⁰⁹

8. Framework of the Study

[1] This study shall take the following form: Chapter two will discuss the South African law regarding the general provisions of the Hague Convention with special attention to the exceptions/defences and their application, specifically in regards to case law. Chapter three will provide a discourse of the Australian law surrounding the general provisions of the Family Law (Child Abduction Convention) Regulations, 1986 which incorporates the Hague Convention's provisions within the domestic law of Australia; the implementation of the provisions in terms of Australian law, with specific emphasis on the exceptions/defences to the peremptory rule of return and their application and success within the case

²⁰⁷ Nicholson in Davel op cit (n2) 240. For further information regarding non-convention countries kindly refer to the 'Hague Conference on Private International Law (HCCH), available at <http://www.incadat.com/index.cfm?act=text.text&id=5&lng=1>. Examples of non-convention countries are: Japan, China, and most Islamic law governed countries: Schnitzer-Reese op cit (n12). Non-convention countries and abductions shall not be canvassed in any further detail within this Study as it is not the main focus herein.

²⁰⁸ Nicholson in Davel op cit (n2) 240.

²⁰⁹ The Australian case of *ZP v PS* (1994) 122 ALR 1 made cases involving children and non-convention countries impossible to litigate outside of Australia: Bates (1999 (32)) op cit (n16) 86. The best interests of the child are usually satisfied by ordering the child's return to the state of residence in such situations: Curtis op cit (n88) 633; Young and Monahan op cit (n175) 353-354; *K v K* 1999 (4) SA 691 (C) at 707G-H. For a South African example of an issue where the child was removed to a non-convention country, see Elis op cit (n32) 1-2 (this involved a child being removed to and retained in China). The unreported judgment is available in the case of *Elize Lin v The Director: The Department of International Relations and Co-operation* supra (n32); *K v K* supra at 702G-H; JMT Labuschagne 'Application of the Hague Convention on the Civil Aspects of International Child Abduction in South Africa' (2000) 25 *South African Yearbook of International Law* 257; CMA Nicholson 'The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980) *K. v K* 1999 (4) SA 691 (C)' (2001) 4 *THRHR* 334. For further information, the following article considered how a father was able to be reunited with his children without using the Hague Convention, but social networking: V Keppler 'Reunited Dad Finds His Missing Daughters on Facebook After 10 Years' *The Witness* 15th March 2011 at 1; Davel op cit (n18) 2-9. The Australian case of *In the Marriage Of: Hendrik Muller Janse Van Rensburg Appellant/Husband and Karin Susan Paquay Respondent/Wife* [1993] FamCA 25 is an example of a non-convention case involving South Africa and Australia prior to the Hague Convention on the Civil Aspects of International Child Abduction, 1980 entering into force between the two countries. The Hague Convention only entered into force between them on the 1 January 1998: The Department of Justice and Constitutional Development op cit (n15). This case also confirmed that in terms of the Australian approach to such matters, it is inappropriate to effectively apply the principles of the Hague Convention (at 80, 013): Bowie op cit (n12) 6.

law. Chapter four is a comparative study between the South African and Australian law with specific reference to the application of the exceptions/defences in each country and whether there are lessons which South Africa can learn from the Australia herein. Chapter five will conclude the Study.

9. Research method

[1] The research involved is not that of an empirical nature but will involve a literature study of legal textbooks, journal articles, case law and legislation. A full list of the relevant sources may be found in the 'List of works cited' which is attached at the end hereto.

In light of the above, the South African law shall now be discussed.

Chapter Two: South African Law

1. Introduction

[1] South Africa acceded to the Hague Convention on the 6 November 1996¹ and implemented and enforced it within its borders through the enactment of the now repealed Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 on the 1st October 1997.² South Africa acceded to the Hague Convention in order to prevent the country from becoming a 'safe haven' for parents who abduct their children.³ Since the 1st April 2010⁴ abduction of a child across South African borders has been covered by Chapter 17, schedule 2 of the Children's Act 38 of 2005.⁵ This governs the position of the Hague Convention and renders its principles a part of the national law.⁶ In terms of section 274(a) of the Children's Act, its purpose is 'to give effect to the Hague Convention on International Child Abduction'. Section 274(b) is included in order 'to combat parental child abduction.' Thus the Hague Convention is of force and effect in South Africa subject to the provisions of the Children's Act.⁷ The Children's Act however does not detract from the principles and objectives of the Hague Convention.⁸

¹ JMT Labuschagne 'International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law' (2000) 33 *CILSA* 334.

² CMA Nicholson 'The Hague Convention on the Civil Aspects of International Child Abduction, pill or placebo?' (1999) 32 *CILSA* 230; Labuschagne op cit (n1) 334-335; B Clark 'Division P: Child Abduction' in B Clark (Ed) *Family Law Service* (2010) (Issue 54 October 2010) (Loose Leaf) at para [2]; Section 313 of the Children's Act 38 of 2005 repealed Act 72 of 1996; C Nicholson 'Introduction to the Hague Convention on the Civil Aspects of International Child Abduction' in CJ Davel (Ed) *Introduction to Child Law in South Africa* (2000) 233; CS Human 'Child abduction' (2007) (1) *Juta's Quarterly Review* at 1.2. The Regulations to this Hague Convention can be found in the Regulations Relating to Children's Courts and International Child Abduction GNR 250 of 31 March 2010, GG 33067, specifically Chapter 4, 15-32 and in GGR 18322 of October 1997; The Department of Justice and Constitutional Development 'The Hague Convention of the Civil Aspects of International Child Abduction: Signatory countries', available at www.justice.gov.za/hague/convention.html, accessed on 3rd October 2011.

³ Nicholson op cit (n2) 230; Labuschagne op cit (n1) 334-335. Child abductions from South Africa and to South Africa have become a serious problem: C Woodrow and C Du Toit 'Child abduction' in CJ Davel and AM Skelton (Eds) *Commentary on the Children's Act* (Loose leaf) Revision 1 (2007) at [17-2].

⁴ J Heaton *South African Family Law* (2010) 311.

⁵ Section 275 of the Children's Act 38 of 2005 incorporated the Hague Convention in its entirety into South African law. J Weideman & JA Robinson 'The interpretation and application of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction' (2011) 1 *Stellenbosch Law Review* 72. South Africa follows a dualistic system which entails that an instrument becomes part of South African law once it has been incorporated into the domestic legislation. Accordingly the Hague Convention is binding both in South Africa, on its subjects, as well as on the international plane. See JM Hlophé 'The judicial approach to "summary applications for the child's return": A move away from "best interests" principles?' (1998) 115 *SALJ* 439; J Heaton 'Children' in the 'Law of Persons and Family Law' (2007) *Annual Survey of South African Law* 909.

⁶ Section 275 of the Children's Act 38 of 2005; Heaton (2010) op cit (n4) 311; J Heaton 'The Law of Persons and Family Law' (2008) in CJ Visser & JT Pretorius (Eds) *Annual Survey of South African Law* (2009).

⁷ Section 275 of the Children's Act 38 of 2005; Woodrow and Du Toit op cit (n3) at [17-2]-[17-3].

⁸ Woodrow and Du Toit op cit (n3) at [17-4].

[2] In order for the Hague Convention's operations to be fully understood in terms of the South African context, a brief discussion regarding the introductory articles shall take place in light of the South African law and its requirements. It is necessary to bear in mind while reading this chapter that the South African case law, in its interpretation of the Hague Convention, makes reference to foreign case authority which provide valuable resources in the effective interpretation and application of the Hague Convention in order to ensure uniformity within its application.⁹

2. A place for the Hague Convention in South African law: *K v K* 1999 (4) SA 691 (C)

[1] The case of *K v K*¹⁰ was the first reported case which concerned the Hague Convention and its application within South Africa.¹¹ The predominant issue which the Court had to decide upon was 'whether a wrongful removal of a child from one state to another before the [Hague] Convention came into operation in both states would fall within the ambit of the Convention.'¹² The Respondent and child herein left the United States of America (USA) in May 1996.¹³ In January 1999 the applicant located the minor child in Cape Town, South Africa.¹⁴

[2] Both Counsels prepared argument on 'whether the [Hague] Convention applied to an alleged wrongful removal from one [s]tate to another occurring *prior* to the entry into force of the Convention between those [s]tates,'¹⁵ as a result of the provisions of Article 35 of the Hague Convention which provides the following:

'This Convention shall apply as between [c]ontracting [s]tates only to wrongful removals or retentions occurring after its entry into force in those [s]tates. Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.'¹⁶

Some states have, through implementation of legislation, made the provisions of the Hague Convention retroactively applicable within their jurisdictions.¹⁷ In South Africa the Hague

⁹ Clark op cit (n2) at para [3].

¹⁰ *K v K* 1999 (4) SA 691 (C).

¹¹ JMT Labuschagne 'Application of the Hague Convention on the Civil Aspects of International Child Abduction in South Africa' (2000) 25 *South African Yearbook of International Law* 255.

¹² CMA Nicholson 'The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980) *K. v K* 1999 (4) SA 691 (C)' (2001) 4 *THRHR* 332.

¹³ *K v K* supra (n10) at 696H.

¹⁴ Ibid at 699C-D; Labuschagne op cit (n11) 256; Nicholson op cit (n12) 333.

¹⁵ *K v K* supra (n10) at 700H; Nicholson op cit (n12) 334; Labuschagne op cit (n11) 257.

¹⁶ Article 35 of the Hague Convention of the Civil Aspects of International Child Abduction, 1980.

¹⁷ Article 39 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; *K v K* supra (n10) at 701A-B; Labuschagne op cit (n11) 257; L Silberman 'Hague Convention on International Child Abduction: A brief overview and case law analysis' (1994) 28 *Family Law Quarterly* 24.

Convention only became applicable from the 1st October 1997.¹⁸ This was in accordance with Article 38 of the Hague Convention, which states the following:

‘Any other [s]tate may accede to the Convention ... The accession will have effect only as regards the relations between the acceding [s]tate and such [c]ontracting [s]tates as will have declared their acceptance of the accession ... The Convention will enter into force as between the acceding [s]tate and the [s]tate that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.’

Thus it is submitted that in order for the Hague Convention to be applicable between the states concerned, both states must be signatories to the Hague Convention, which must be in force and effect between them e.g. through state acceptance of accession.

[3] The court also discussed that the Hague Convention is not specifically based on the principle of the best interests of the child but is rather based on the understanding and belief that the best interests of the child would be served, not on the basis of each individual child, but by ordering the return of children generally to their place of habitual residence for custody decisions and other issues to be determined there.¹⁹ Thus the question the court had to answer in this case could not be answered through the use of the Hague Convention as it was not retroactively applicable between the USA and South Africa and thus the court determined it should be treated as a non-convention case.²⁰

[4] The Hague Convention is prevented from becoming retroactively applicable within South Africa but the ‘notions of justice and fairness it embodies conform, in a basic sense, to the general principles of our legal system.’²¹ Therefore the court in this case

‘effectively reconciled the Convention’s requirement for the summary return of abducted children with the requirements of the Constitution of the Republic of South Africa as regards the paramountcy of the best interests principle in cases dealing with children.’²²

It is therefore submitted that the need in South Africa for the application of the Hague Convention principles is confirmed by the decision in *K v K*²³ and it thus is necessary to discuss whether the Hague Convention is therefore constitutional in terms of the South African law.²⁴

¹⁸ This date is the date of effect of the repealed Act 72 of 1996; *K v K* supra (n10) at 701A–D; Labuschagne op cit (n11) 257; Nicholson op cit (n12) 334.

¹⁹ Nicholson op cit (n12) 334.

²⁰ *K v K* supra (n10) at 702G–H; Loc cit; Labuschagne op cit (n11) 257. The best interests of the child are of paramount consideration in all matters concerning the child (section 28(2)(a) of the Constitution of the Republic of South Africa, 1996) within South African law. This conforms with Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC), 1989, ratified by South Africa on 16 June 1995. For further information regarding non-convention cases kindly refer to Chapter One at point [7] of this Study.

²¹ Labuschagne op cit (n11) 259.

²² Nicholson op cit (n12) 337.

3. The constitutionality of the Hague Convention: *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC)

[1] The constitutionality of the Hague Convention was challenged in the case of *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC). This decision must be considered as the Hague Convention deals with decisions affecting children and the Constitution of the Republic of South Africa, 1996 (the Constitution) provides in section 28(2)(b) that the best interests of the child are of paramount consideration in all matters concerning the child.²⁵ This standard is also entrenched by the Children's Act.²⁶ However, the Hague Convention prohibits the court from considering the best interests of the individual child involved in international abduction, except for instances where an exception/defence has been raised.²⁷ In the case of *Sonderup v Tondelli*²⁸ it was argued by the abducting parent (the applicant) that Act 72 of 1996 (repealed since the judgment of this case) violated the principle of the best interests of the child provided for in the Constitution, because it did not recognise the paramountcy of this concept and was therefore inconsistent with the Constitution²⁹ thus making the Hague Convention's application unconstitutional in terms of the South African law.

[2] The important issue which the Constitutional Court had to decide upon was if the Hague Convention principles were applicable, whether the provisions, as incorporated by the repealed Act, were consistent with the Constitution and thus constitutional.³⁰ Therefore the court had to consider

‘whether the mother [was] acting in violation of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction ... If so, further questions arise, including the constitutionality of the statute incorporating the Convention into South African law.’³¹

In determining the aforementioned, the Constitutional Court held the following:³²

‘The Convention itself envisages two different processes – the evaluation of the best interests of the child in determining custody matters, which primarily concerns long-term and short-term best interests of children in

²³ Labuschagne op cit (n11) 259.

²⁴ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁵ C Du Toit ‘The Hague Convention on the Civil Aspects of International Child Abduction’ in T Boezaart *Child Law In South Africa* (2009) 369.

²⁶ Loc cit.

²⁷ Loc cit; Articles 12, 13 and 20 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 provide these exceptions/defences and are discussed at point [8] within this chapter.

²⁸ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC).

²⁹ Du Toit op cit (n25) 369; *Sonderup v Tondelli* supra (n28) at paras [16]-[17] & [26]-[37]; Heaton (2010) op cit (n4) 318; Section 28(2) of the Constitution of the Republic of South Africa, 1996; JMT Labuschagne ‘The constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction in terms of section 28(2) of South African Constitution’ (2001) 26 *South African Yearbook of International Law* 240; CMA Nicholson ‘The Constitutional Court deliberates on the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction *LS v AT* 2001 2 BCLR 152 (CC)’ (2002) 65 *THRHR* 483.

³⁰ *Sonderup v Tondelli* supra (n28) at para [19].

³¹ Ibid at paras [1]-[2].

³² Ibid at para [28]; Heaton (2010) op cit (n4) 318; Labuschagne op cit (n29) 243.

jurisdictional matters. The Convention clearly recognizes and safeguards the paramountcy of the best interests of children in resolving custody matters.’

The Constitutional Court thus proceeded from the assumption that the High Court limits the short-term interests of the child.³³ Like all rights, the best interests of the child may be limited in terms of section 36 of the Constitution.³⁴ The court considered what the short-term best interests of the children were in proceedings under the Hague Convention and decided that the limitation in the case was justifiable as the Hague Convention fulfils an important purpose and therefore the court, which was in the best position to determine these custody issues, should also determine the child’s short-term best interests in order for forum shopping to be discouraged.³⁵ This decision was further based on the consideration of encouraging comity between nations regarding co-operation in cases of cross-boarder abduction and that such a purpose was consistent with the values which are to be endorsed in an open and democratic society.³⁶

[3] The court also determined that a close relationship exists between the purpose of the Hague Convention and those means sought to achieve this purposes.³⁷ The Hague Convention recognizes and protects the paramountcy of the best interests of children in resolving custody matters as indicated in its Preamble which confirms ‘[that state parties to the Hague Convention are] firmly convinced that the interests of children are of paramount importance in matters relating to their custody.’³⁸ The Hague Convention may limit a child’s short-term best interests however; the extent is mitigated in order to protect the child’s long-term welfare.³⁹ The learned judge in this case accepted this argument as valid.⁴⁰

[4] The Court had to then consider whether the inconsistency, as indicated in the aforementioned, was justifiable in terms of section 36 of the Constitution which requires a proportionality analysis

³³ Du Toit op cit (n25) 369; *Sonderup v Tondelli* supra (n28) at 1173E-F (Headnote).

³⁴ Loc cit; see *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) for further support herein.

³⁵ Woodrow and Du Toit op cit (n3) at [17-3]; *Chief Family Advocate v G* 2003 (2) SA 599 (W) at 606E-F.

³⁶ Du Toit op cit (n25) 369; *Sonderup v Tondelli* supra (n28) at para [31]; Woodrow and Du Toit op cit (n3) at [17-24]; Heaton (2010) op cit (n4) 319.

³⁷ Du Toit op cit (n25) 369; *Sonderup v Tondelli* supra (n28) at para [23]; Labuschagne op cit (n29) 244.

³⁸ *Sonderup v Tondelli* supra (n28) at para [28]; Labuschagne op cit (n29) 243; Preamble to the Hague Convention on the Civil Aspects of International Child Abduction, 1980 as well as reference to the English case of *Re F (Minor: Abduction: Jurisdiction)* 1999 (3) All ER 97 (CA) at 99; Nicholson op cit (n29) 484.

³⁹ Du Toit op cit (n25) 369; *Sonderup v Tondelli* supra (n28) at para [29]; Labuschagne op cit (n29) 243; Nicholson op cit (n29) 484.

⁴⁰ *Sonderup v Tondelli* supra (n28) at para [29].

and the weighing up of all relevant factors.⁴¹ To conduct the aforementioned analysis the court must consider the importance of the purpose of the limitation as well as the relationship between the limitation and its purpose.⁴² Goldstone J subsequently held that:

‘There is a close relationship between the purpose of the Convention and the means sought to achieve that purpose. The Convention is carefully tailored, and the extent of the assumed limitation is substantially mitigated by the exemptions provided by [articles] 13 and 20. They cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child’s habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. Any person or body with an interest may oppose the return of the child on the specified grounds. The nature and extent of the limitation are also mitigated by taking into account s 28(2) of our Constitution when applying [article] 13. The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. The absence of a provision such as s 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying *dicta* of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion.’⁴³

Therefore the court concluded that the Hague Convention is consistent with the Constitution.⁴⁴

[5] The learned Judge held further that the approach to be adopted when dealing with applications in terms of the Hague Convention is the following:

‘A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court ... (T)he court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of [article] 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.’⁴⁵

As Act 72 of 1996 has been repealed by full incorporation within the Children’s Act without alteration, it is thus also constitutional. Therefore the decision of the Constitutional Court is reconcilable with international law as well as with section 28(2) of the Constitution.⁴⁶ The limitation

⁴¹ Loc cit; Labuschagne op cit (n29) 243; Nicholson op cit (n29) 484.

⁴² *Sonderup v Tondelli* supra (n28) at para [30]; Labuschagne op cit (n29) 243; *De Lange v Smuts* 1998 (3) SA 758 (CC) at paras [86]-[88].

⁴³ *Sonderup v Tondelli* supra (n28) at paras [32]-[33]; Labuschagne op cit (n29) 244.

⁴⁴ *Sonderup v Tondelli* supra (n28) at paras [26]-[37].

⁴⁵ *Sonderup v Tondelli* supra (n28) at paras [35]-[36].

⁴⁶ Labuschagne op cit (n29) 244.

of the child's best interests principle is mitigated by the exceptions contained in the Hague Convention and is also informed by section 28(2) of the Constitution.⁴⁷

[6] It is submitted however that the case of *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP) may provide a challenge to the decision of *Sonderup v Tondelli*. Although this 2011 case is not a Constitutional Court or Supreme Court of Appeal decision and thus does not have binding authority to change the law nationally within South Africa, it is necessary to consider its decision. This case held that in terms of the objects of the Children's Act in terms of section 2, the best interests of a child are of paramount importance in every matter concerning a child.⁴⁸ Further the objects of the Children's Act are to 'give effect to the Republic's obligations concerning the wellbeing of children in terms of international instruments binding on the Republic, such as the [Hague] Convention.'⁴⁹ Section 6 of the Children's Act further states:

'[A]ll proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfill the child's rights set out in the Bill of Rights; the "best interests of the child" standard set out in s 7; and the rights and principles set out in the Act, subject to any lawful limitation.'⁵⁰

Section 7 of the Act also sets out the 'best interests of the child' standard and indicates what the court must consider in determining this principle.⁵¹ The court therefore held that it was evident from Article 13 of the Hague Convention, section 278 of the Children's Act and section 28(2) of the Constitution, that the court is legally required to take these considerations into account, over and above the relevant Hague Convention articles because the Hague Convention itself is actually subservient to these provisions as a result of section 275 of the Children's Act which specifically makes the Hague Convention subject to the provisions of the Children's Act and thus to the Constitution.⁵² This however has not been confirmed as yet by the Constitutional Court and therefore the decision of *Sonderup v Tondelli* remains as law within South Africa.

⁴⁷ *Sonderup v Tondelli* supra (n28) at para [33]; Nicholson op cit (n29) 484. Nicholson indicates further that this judgment is welcome as it is a valuable contribution towards the development and clarification of the South African law which relates to and governs parental child abductions and it also indicates how courts are not allowing the application proceedings in terms of the Hague Convention to be turned into a custody hearing.

⁴⁸ *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP) at para [26.1]; Section 2(b)(iv) of the Children's Act 38 of 2005 supported by section 28(2) of the Constitution of the Republic of South Africa, 1996.

⁴⁹ *Central Authority v MV* supra (n48) at para [26.1]; Section 2(b)(iv) of the Children's Act 38 of 2005.

⁵⁰ *Central Authority v MV* supra (n48) at para [26.2]; Section 6(2)(a) of the Children's Act 38 of 2005.

⁵¹ *Central Authority v MV* supra (n48) at para [26.3]; Section 7 of the Children's Act 38 of 2005.

⁵² *Central Authority v MV* supra (n48) at paras [26.3] & [27]; *Central Authority of the Republic of South Africa and Another v LG* 2011 (2) SA 386 (GNP) at 392C-F where the court referred to the decision in *Senior Family Advocate, Cape Town, And Another v Houtman* 2004 (6) SA 274 (C) at para [23], which supports the view expressed above.

[7] In light of the above the interpretations and applications of some of the requirements of the Hague Convention in terms of the South African law shall now be briefly discussed. It must be noted that the onus of proof in all matters regarding the Hague Convention is the following:

‘... [A] party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal or retention and that the removal or retention was otherwise wrongful in terms of [article] 3. Once this has been established the *onus* is upon a party resisting the order to establish one or other of the defences referred to in [article] 13 (a) and (b) or that the circumstances are such that the refusal would be justified having regard to the provisions of [article] 20.’⁵³

Therefore in layman’s terms the onus of proof is: ‘he who alleges must prove’ and this must be considered on a balance of probabilities as in all South African civil matters.⁵⁴ However, the proof need not be equated with the customary civil law requirements to discharge an onus as the courts, due to the urgent nature and objective of the Hague Convention, must decide the case on affidavit evidence without the option of a referral to trial or oral evidence.⁵⁵ The best interests’ standard in this regard further relates to children generally, not individually.⁵⁶

The requirement of wrongful removal or retention, which is the basis for the Hague Convention’s applicability, shall now be briefly discussed below.

4. Wrongful removal and retention: Article 3 of the Hague Convention

[1] Wrongful removal or retention is defined in Article 3 of the Hague Convention as:

‘The removal or the retention of a child is to be considered wrongful where -

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the [s]tate in which the child was habitually resident immediately before the removal or retention;⁵⁷ and

⁵³ *Smith v Smith* 2001 (1) SA 845 (SCA) at para [11]; *Senior Family Advocate, Cape Town, And Another v Houtman* supra (n52) at para [7].

⁵⁴ Woodrow and Du Toit op cit (n3) at [17-7]; *Smith v Smith* supra (n53) at para [11].

⁵⁵ *Pennello v Pennello* 2004 (3) SA 100 (N) at 103B-C; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [15]. It is evident from the SCA case of *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) at para [38] that no reason exists as to why the person who is opposing a court order in this regard did not bear ‘the usual civil *onus* of proof as it is understood in our law.’

⁵⁶ Nicholson in Davel op cit (n2) 242; Hlophe op cit (n5) 439.

⁵⁷ Heaton (2010) op cit (n4) 312-313 at fn280 ‘[I]t is important to note that it is the law of the contracting state in which the child was habitually resident immediately before the removal or retention (ie, the law of the requesting state) that determines whether a person, institution or body has rights of custody: [article] 3(a). In ascertaining whether there has been a wrongful removal or retention, the judicial or administrative authorities of the requested state may take notice of the law and judicial or administrative decisions of the state of the habitual residence of the child, without the need to adhere to the specific procedures for the proof of foreign law or the recognition of foreign decisions which would otherwise apply: [Article] 14. The High Court may request the Chief Family Advocate to provide a report on the domestic circumstances of the child prior to the alleged abduction in order to ascertain whether there has been a wrongful

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that [s]tate.⁵⁸

Along with Article 3, section 278(1) of the Children's Act assists in determining whether or not a wrongful removal or retention has occurred.⁵⁹

[2] As indicated, one of the main objectives of the Hague Convention is to secure and ensure the prompt return of children who have been wrongfully removed or retained within a contracting state.⁶⁰ The purpose of Article 3 is thus to ensure that applications for return orders are not initiated by an individual whose custody rights are 'stale'.⁶¹ Therefore the mere existence of automatic parental rights, parental agreements or court orders do not suffice as proof of such custody rights required for satisfaction of this Article as there must also be some evidence that custody rights have in fact been exercised in order to satisfy the wrongful removal or retention.⁶² Thus in order for the Hague Convention to be applicable, the applicant must show that the specific child has been wrongfully removed or retained⁶³ by providing evidence that the requirements stipulated in Articles 3, 4 and 5 of the Hague Convention have been satisfied, because only if they are satisfied will the court order the child's return.⁶⁴

[3] The following are considered instances of wrongful removal:

- 'the parties were married at the date of the child's removal and domestic law vested joint custody in the parties;
- the parties were divorced and there was a custody order in favour of the plaintiff;
- the parties were unmarried and the father had a custody order in his favour ...
- the child had been made a ward of the court and is removed by the parent who has been granted interim care and control ...'⁶⁵

removal or retention': section 278(1) of the Children's Act 38 of 2005; Article 15 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

⁵⁸ Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Du Toit op cit (n25) 355; Nicholson op cit (n2) 234.

⁵⁹ Woodrow and Du Toit op cit (n3) at [17-6]; *Senior Family Advocate, Cape Town v Houtman* supra (n52) at para [7].

⁶⁰ Articles 1 and 2 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Heaton (2007) op cit (n5) 909; Heaton (2010) op cit (n4) 312.

⁶¹ T Buck *International Child Law* (2005) 138; T Buck *International Child Law* (2010) 224.

⁶² Buck (2005) op cit (n61) 138; Buck (2010) op cit (n61) 221; AE Anton 'The Hague Convention on International Child Abduction' (July 1981) 30 *International and Comparative Law Quarterly* 546.

⁶³ Du Toit op cit (n25) 355.

⁶⁴ Loc cit.

⁶⁵ S Davis, J Rosenblatt & T Galbraith *International child abduction* (1993) 12; Nicholson op cit (n2) 232.

[4] Retention is considered to be wrongful in the following situations:

- ‘the parties agreed to a temporary separation and one removed the children abroad without any intention of returning ...; and
- the plaintiff agreed to the removal of the child from the jurisdiction for a set period of time and the child is not returned after the elapse of this period.’⁶⁶

[5] The Hague Convention is only applicable to those wrongful removals or retentions which occur between contracting states who have both ratified the Hague Convention and implemented and effected it between themselves because a wrongful removal or retention is considered to be a specific event and not a continuing state of affairs.⁶⁷ The Hague Convention is also only applicable in those cases where an abducted child was habitually resident in a contracting state immediately before the breach in the custody or access rights.⁶⁸

[6] A further requirement for the Hague Convention’s applicability pertains to the age limit provided in Article 4. The age of majority in South Africa is 18-years-of-age according to the Children’s Act.⁶⁹ This Act aligns the South African law with the international notion of childhood being that below eighteen-years-of-age.⁷⁰ However, the Hague Convention, in accordance with Article 4, is only applicable to children below the age of 16-years-of-old⁷¹ who are habitually resident in a contracting state immediately before the breach of custody or access rights.⁷² Therefore the Hague

⁶⁶ Davis, Rosenblatt & Galbraith op cit (n65) 12-13; Nicholson op cit (n2) 232-233.

⁶⁷ Silberman op cit (n17) 24; Nicholson op cit (n2) 233; *K v K* supra (n10) at 700I-J.

⁶⁸ Nicholson op cit (n2) 233; Anton op cit (n62) 545; JMT Labuschagne “‘Human rights’ status of a court order, in terms of the Hague Convention, that a child, abducted by a parent and taken from one country to another, has to be returned.’ (1998) 23 *South African Yearbook of International Law* 281.

⁶⁹ Section 313 of the Children’s Act 38 of 2005, read with Schedule 4 of the Children’s Act which repeals the Age of Majority Act 57 of 1972; Section 28(3) of the Constitution of the Republic of South Africa, 1996; T Boezaart ‘Child law, the child and South African Private Law’ in T Boezaart (ed) *Child Law in South Africa* (2009) 3; Human op cit (n2) at 1.2; T Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 16 considers the definition of a minor child as this varies from country to country e.g. 18 years in South Africa but 21 years in other African countries: Kruger referring generally to A Bergmann, M Ferid and D Heinrich (Eds) *Internationales Ehe- und Kindschaftsrecht* (Loose leaf (1980-present).

⁷⁰ Boezaart op cit (n69) 3; Article 1 of the UNCRC, 1989; Article 2 of the African Charter on the Rights and Welfare of the Child, 1999.

⁷¹ Article 4 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Labuschagne op cit (n1) 335; Heaton (2010) op cit (n4) 313; Hlophe op cit (n5) 442; Anton op cit (n61) 544; HAUGE ‘The Central Authority – The Hague Convention of the Civil Aspects of International Abduction’ (2009) available at <http://www.justice.gov.za/hague/application.html>, accessed on 12 June 2010.

⁷² Labuschagne op cit (n1) 313; Heaton (2010) op cit (n4) 313; E. Pérez-Vera ‘Explanatory Report on the Hague Child Abduction Convention’ (1982) at para [76], available at <http://hcch.e-vision.nl/upload/exp128.pdf>, accessed on 12 June 2010.

Convention ceases to apply once the specific child attains the age of 16 and this therefore includes applications where the child turns 16 while the application is pending.⁷³

Thus the age limit provided in the Hague Convention is important for the functioning of the Hague Convention because a child over the age of 16 is generally considered to have an independent mind which is not considered easily ignored by either a parent, administrative or judicial authority.⁷⁴ Nicholson however has indicated that a short fall of the Hague Convention in this regard is that the Hague Convention should continue to apply in cases where an application was launched prior to a child turning 16 but ceases to apply when the child turns 16 while the decision is pending.⁷⁵ Nicholson states this should be followed in order to prevent the abducting parent from benefiting from judicial delays.⁷⁶ However, this has not been attended to either by the South African Legislature or Hague Conference.

[7] Article 5 provides a further requirement for a valid Hague Convention application:

‘For the purposes of this Convention-

- (a) “rights of custody” shall 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;
- (b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.’⁷⁷

Therefore in all applications brought in terms of the Hague Convention the applicant must show the following:

- ‘1) that the child was habitually residing in the requesting [s]tate immediately before the removal or retention [article 3(a)];
- 2) that the removal or retention was wrongful in that it constituted a breach of custody rights by operation of law of the requesting [s]tate [article 3]; and

⁷³ D Hodson *A Practical Guide to International Family Law* (2008) 253. It must be noted that in countries where in terms of the law the child is able, before reaching the age of 16, to choose and determine their own residence then there will be no breach of custody or access rights in terms of the Hague Convention and therefore it will not be applicable. A problem only arises if he/she is removed against their own wishes: Anton op cit (n62) 544-545.

⁷⁴ Pérez-Vera op cit (n72) at para [77]; Woodrow and Du Toit op cit (n3) at [17-7]; Kruger op cit (n69) 16. Kruger also indicates that one cannot treat a 16-year-old the same as that of a 2-year-old. A 16-year-old has a larger comprehension and understanding of their ability to make their own choices. Therefore (at 17) it is not considered appropriate to set the judicial process into motion in order to have the child returned without having due regard to the child’s independent will (Pérez-Vera op cit (n72) at paras [75]-[78]). This is discussed fully in terms of the child’s objections to being returned at point [8.2(d)] herein.

⁷⁵ Nicholson op cit (n2) 242.

⁷⁶ Loc cit. It is possible that an argument could be raised against the constitutionality of the Hague Convention and therefore the relevant sections of the Children’s Act as the age limit in terms of the Hague Convention does not accord with the age of majority in terms of the Constitution, however this argument shall not be discussed herein.

⁷⁷ Article 5 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Du Toit op cit (n25) 355.

3) that the Applicant was *actually exercising those rights* at the time of the wrongful removal or retention, or would have so exercised such rights but for the removal or retention [article 3(b)].⁷⁸

[8] Whether a removal or retention is wrongful depends on two key legal concepts, ‘habitual residence’ and ‘rights of custody’.⁷⁹ Article 3 of the Hague Convention constitutes one of the key provisions of the Hague Convention as it sets into motion the machinery in order to affect the child’s return.⁸⁰ The aforementioned is true as the duty to return the child rests entirely on whether the child’s removal or retention was in fact wrongful.⁸¹ The Hague Convention seeks to protect the following relationships which are both based on the existence of facts: firstly, the existence of custody rights attributed by the state of the child’s habitual residence and secondly, the actual exercise of these custody rights prior to the child’s removal or retention.⁸² Article 3 states that custody ‘may arise ... by operation of law’.⁸³ Therefore it is clear that one of the main characteristics of the Hague Convention is its application in regards to the protection of custody rights exercised prior to a decision having been made in this regard.⁸⁴ Most abductions occur before a final custody decision has actually been rendered⁸⁵ and therefore the requirement of wrongful removal or retention is important in this regard. This is due to the fact that it prevents applications from proceeding, thus from incurring unnecessary expenditure if rights of custody do not exist or are found to be stale.

A second source of custody rights arises from judicial or administrative decisions.⁸⁶ The Hague Convention does not expand on the concept of the aforementioned however the term ‘decision’ is interpreted in its widest sense and embraces any decision, or part of a decision regarding a child’s custody, and these decisions may have been made by the courts in the child’s habitual residence or

⁷⁸ Du Toit op cit (n25) 355; *S v H* 2007 (3) SA 330 (C) at para [43].

⁷⁹ Buck (2005) op cit (n61) 136; Buck (2010) op cit (n61) 223-224 & 227. The unreported South African case of *Steadman and Landman* (22994/2010) [2010] ZAWCHC 618 (10 December 2010) found that the child had not been habitually resident in South Africa, based on the decision of the *Houtman* (supra (n52) case, and that in terms of Article 15 of the Hague Convention, the declaration for whether a child was habitually resident in a country depended on whether or not the child was habitually resident in that country and therefore the South African court was unable to make such a declaration as the child was not considered habitually resident there. This case also considered, for general information purposes, the concept of parental rights and responsibilities in terms of the Children’s Act for unmarried fathers.

⁸⁰ Pérez-Vera op cit (n72) at para [64].

⁸¹ Loc cit.

⁸² Loc cit.

⁸³ Ibid at para [68].

⁸⁴ Loc cit.

⁸⁵ Loc cit.

⁸⁶ Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Pérez-Vera op cit (n72) at para [69].

by those courts of another country.⁸⁷ This means that when custody rights are exercised on the basis of a foreign decree, the Hague Convention does not require that the decree be formally recognised.⁸⁸

Custody rights may also arise ‘by reason of an agreement having legal effect under the law of that [s]tate.’⁸⁹ The agreement made may not be of a prohibited nature and it must provide a basis for bringing a legal claim to the relevant authorities.⁹⁰ However, it is important to note that the Hague Convention does not state what these agreements should include and therefore this is determined according to the law of the state of concerned.⁹¹

The intention of the Hague Convention is therefore to protect all manners in which the custody of children are, and would be, exercised.⁹² The Hague Convention thus takes the stand point that the removal of a child by one joint holder of custody rights without the consent of the other, is equally wrongful and this wrongfulness arises not from a particular law but from the fact that the action disregards the rights of the other parent whose rights are also protected by law and this thus results in an interference with the normal exercise of custody rights.⁹³

[9] In light of Article 3, in order for an abduction to be wrongful, custody rights must actually have been exercised by the holder of these rights in order for them to be breached. To prove that these rights were actually exercised, the applicant must provide some preliminary evidence that he/she took physical care of the child.⁹⁴ The Hague Convention however also applies in situations in which custody could not be exercised due to the removal or retention of the child as provided for in Article 3(b).⁹⁵

⁸⁷ Pérez-Vera op cit (n72) at para [69].

⁸⁸ Loc cit. Article 14 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 confirms this wide interpretation and states: ‘In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.’

⁸⁹ Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Pérez-Vera op cit (n72) at para [70].

⁹⁰ Pérez-Vera op cit (n72) at para [70].

⁹¹ Loc cit.

⁹² Ibid at para [71].

⁹³ Loc cit.

⁹⁴ Ibid at para [73]; Article 8 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

⁹⁵ Pérez-Vera op cit (n72) at para [74].

[10] Thus it is submitted that South Africa must ensure that the rights of custody and access under the law of another contracting state are effectively respected within its borders.⁹⁶ The Hague Convention also specifically provides that the right to decide a child's place of residence is also a right of custody.⁹⁷ This approach is in line with that adopted by foreign jurisdictions, which our courts have upheld to encompass a parent's rights to withhold consent to the child's removal from the contracting state in which the child is habitually resident.⁹⁸ This is true despite the fact that rights of access include the right to take a child to another place other than their place of habitual residence for a limited period of time.⁹⁹

Therefore it is submitted that the Hague Convention defines exactly what is meant by the concepts of wrongful removal and retention.¹⁰⁰ Secondly, if the facts of the individual abduction fit the definition as provided for in Article 3, then an immediate duty to make a return order rests on the courts and the child must be returned to the country from which they were removed in order to uphold the *status quo ante* prior to the abduction.¹⁰¹ The time frame of the duty to order the peremptory return lasts for 12 months from the date of the child's removal or retention.¹⁰² Thirdly, after the period of 12 months has elapsed, there is a proviso which permits a court faced with such proceedings to refuse to grant a return order if they consider the child to be 'sufficiently settled in its new environment.'¹⁰³ Fourthly, the duty to return the child may also be refused if one of the exceptions/defences applies.¹⁰⁴ However, if one of the exceptions is proven, the court still maintains a discretion to order or refuse to order the child's return.¹⁰⁵

As a result of the above requirements, the concept of custody rights will be briefly discussed in terms of the South African law due to the fact that for a valid application to be launched, the authorities

⁹⁶ Heaton (2010) op cit (n4) 312.

⁹⁷ Loc cit; Article 5(a): 'Rights of Custody are not limited to the care of the child's person and the right to determine the child's place of residence. Nor is it required that the person, institution or body must have both the care of the child's person and the right to determine the child's place of residence.' See further *Chief Family Advocate v G* supra (n35) which considered the concept of rights of custody in detail.

⁹⁸ Heaton (2010) op cit (n4) 312; *K v K* supra (n10) at 702A-C; *Chief Family Advocate v G* supra (n35) at 608B-E; *Sonderup v Tondelli* supra (n28) at para [21].

⁹⁹ Heaton (2010) op cit (n4) 312; Article 5(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁰⁰ Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁰¹ Buck (2010) op cit (n61) 229.

¹⁰² Loc cit; Buck (2005) op cit (n61) 135.

¹⁰³ Buck (2010) op cit (n61) 229.

¹⁰⁴ Loc cit.

¹⁰⁵ Buck (2005) op cit (n61) 135-136; Heaton (2007) op cit (n5) 909; Article 18 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

must consider the law of the child's state of habitual residence in determining whether custody rights exist and have in fact been breached.¹⁰⁶

5. Rights of custody: Article 5 of the Hague Convention

5.1 The concept of parental rights and responsibilities in terms of the South African law

[1] The Children's Act is a comprehensive statute which incorporates the concept of parental rights and responsibilities within its scope.¹⁰⁷ This Act emphasises the importance of parental responsibilities towards children as well as the validity of parental rights.¹⁰⁸ Parental rights are important in affording protection to children from arbitrary interferences by the state and third parties.¹⁰⁹ In South Africa, protection for the child is also provided for in the Constitution in terms of section 28(1)(b) where it is stated that children have a right to family or parental care.

[2] The concept of 'parental authority' referred to all the rights and duties that a parent had in regards to a child born within a particular marriage.¹¹⁰ Parental authority however has now been replaced with the concepts of parental rights and responsibilities which include all the rights and duties parents have in respect of children born within a marriage.¹¹¹ Parental authority includes the concepts of guardianship, custody and access, and all have been codified within the Children's Act.¹¹² Parental rights and responsibilities are capable of being shared¹¹³ whether the parents are married or not.¹¹⁴ Such rights and responsibilities also apply to co-holders of rights, even if the co-holders of these rights are not the biological parents of the child.¹¹⁵ Further, if a child's parents do not live together, parental rights and responsibilities can still be enjoyed in the making of decisions regarding the child.¹¹⁶ The parent with whom the child resides will usually make the most decisions regarding the

¹⁰⁶ The full details of such rights shall not be considered in great detail as this is not the focus of this study. The fact that brief content is discussed is merely used to lay out the position of the Hague Convention in terms of the South African law as well as to adequately interpret its functioning herein for further understanding of the main emphasis of this Study.

¹⁰⁷ A Skelton 'Parental responsibilities and rights' in T Boezaart *Child Law in South Africa* (2009) 63. For further information see generally J Heaton 'Parental responsibilities and rights' in CJ Davel and AM Skelton (Eds) *Commentary on the Children's Act* (Loose leaf) Revision Service 1 (2007) at Chapter 3.

¹⁰⁸ Skelton op cit (n107) 63.

¹⁰⁹ Loc cit.

¹¹⁰ Loc cit; Heaton (2010) op cit (n4) 283; Kruger op cit (n69) 22.

¹¹¹ Skelton op cit (n107) 63; Du Toit op cit (n25) 358. The specific rights of both parents, whether married or unmarried, are provided for in sections 19–24 of the Children's Act 38 of 2005.

¹¹² Skelton op cit (n107) 63-64.

¹¹³ Section 30 of the Children's Act 38 of 2005; Ibid at 64.

¹¹⁴ Skelton op cit (n107) 64; Kruger op cit (n69) 22.

¹¹⁵ Skelton op cit (n107) 64; Section 30 of the Children's Act 38 of 2005.

¹¹⁶ Loc cit; Section 31(2)(a) of the Children's Act 38 of 2005.

child although there may be a duty on this parent to consult with the other parent in regard to certain decisions.¹¹⁷

[3] Section 18(1) of the Children's Act provides that '[a] person may have both full or specific parental responsibilities and rights in respect of a child.' Section 18(2) defines parental responsibilities and rights as the following in regards to a child: '(a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child.'¹¹⁸

In light of the aforementioned it is thus necessary to define the concepts of 'custody' and 'access'. Previously the word 'custody' was used to indicate who the child was to live with and which parent would mostly make the day-to-day decisions regarding the child, whereas the term 'access' refers to whether the non-custodial parent has visitation or contact rights with his/her child.¹¹⁹ The word 'custody' however no longer features in the Children's Act¹²⁰ as it has been replaced with the word 'care' - a more broadly defined concept.¹²¹ Although the definition of 'care' is broader than that of 'custody', it still includes the previous concept of 'custody'.¹²² 'Custody' refers to all concepts of the word 'care', excluding that of maintenance and contact.¹²³ In most instances, it is likely that as parental rights and responsibilities should be shared, both parents would play a role in promoting these concepts.¹²⁴ The Children's Act refers to access as 'contact'.¹²⁵ This concept is centred around the child as it is the child's right to have contact with his/her parents and therefore it is evidenced that there is a change from the concept of the parental right of access to a child, to that of a child's right to 'contact' with their parent/s.¹²⁶

¹¹⁷ Skelton op cit (n107) 64-65; Kruger op cit (n69) 23, specifically in regards to where a child is to reside if both parents possess parental authority.

¹¹⁸ Section 18(2)(a)-(d) of the Children's Act 38 of 2005.

¹¹⁹ Skelton op cit (n107) 66; Heaton (2010) op cit (n4) 169; Kruger op cit (n69) 18-19. Kruger also indicates that the term 'custody' is most often used in combination with that of access.

¹²⁰ Skelton op cit (n107) 65.

¹²¹ Section 1 of the Children's Act 38 of 2005; Loc cit.

¹²² Section 1 of the Children's Act 38 of 2005; Skelton op cit (n107) 66; Kruger op cit (n69) 19: The terms 'care' and 'contact' have been preferred in some other legal systems as they are more child-centered.

¹²³ Heaton (2010) op cit (n4) 169; Section 1 of the Children's Act 38 of 2005; Kruger op cit (n69) 19.

¹²⁴ Skelton op cit (n107) 66.

¹²⁵ Section 1 of the Children's Act 38 of 2005; Heaton (2010) op cit (n4) 175.

¹²⁶ Skelton op cit (n107) 67. For decisions surrounding 'contact' as the right of a child, see generally: *B v S* 1995 (3) SA 571 (A) at 582A-B, *T v M* 1997 (1) SA 54 (A) at 57H-J & *Wicks v Fisher* 1999 (2) SA 504 (N) at 509F-G.

[4] In South Africa, guardianship is also considered as an element of parental rights and responsibilities.¹²⁷ Section 18(3) of the Children's Act provides the following:

‘Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must - ...

(c) give or refuse any consent required by law in respect of the child, including - ...

(iii) consent to the child's departure or removal from the Republic;

(iv) consent to the child's application for a passport ...’

And section 18(5) provides the following:

‘Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).’¹²⁸

The aforementioned is important for the purposes of the Hague Convention as it indicates which parent, if not both, has to consent in order to allow a child to leave South Africa. This assists in determining whether the removal or retention of a child is in fact wrongful.

5.2 Custody rights

[1] The Children's Act has impacted upon the determination of custody rights of parents in regards to their children when they have been removed from South Africa to another Hague Convention country.¹²⁹ The Hague Convention however interprets custody and access rights according to their conventional meaning.¹³⁰ The case of *Chief Family Advocate and Another v G* sets out the content and meaning of parental responsibilities and rights and subsequently determined that the Hague Convention is considered flexible enough to accommodate the relatively new concept of parental rights and responsibilities in South Africa.¹³¹ The concept of the rights of custody in the context of the Hague Convention is however not an easy concept to understand despite it being fundamental to its operation.¹³² The concept of ‘rights of custody’ within the Hague Convention is considered to be broader than an order of the court and subsequently parents do have rights in respect of their children without the need for them to be declared by the court or defined by a court order.¹³³

[2] Article 5 of the Hague Convention provides:

‘For the purposes of this Convention –

a) “rights of custody” shall 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;

¹²⁷ Section 18(2)(c) of the Children's Act 38 of 2005.

¹²⁸ Heaton (2010) op cit (n4) 171.

¹²⁹ Du Toit op cit (n25) 357.

¹³⁰ Loc cit.

¹³¹ *Chief Family Advocate and Another v G* supra (n35) at 606I-608B; Du Toit op cit (n25) 357.

¹³² *S v H* supra (n78) at para [31].

¹³³ Loc cit.

b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.’

The Hague Convention however does not define the legal concepts which it makes reference to.¹³⁴ In terms of Article 5, the manner in which the terms ‘custody’ and ‘access’ are used is made clear because an incorrect interpretation of these terms would risk compromising the Hague Convention’s objectives.¹³⁵ The Hague Convention in regards to custody rights emphasizes the fact that it also includes the term ‘rights relating to the care of the person of the child’ and therefore excludes the possible ways in which a child’s property may be protected and thus provides a more limited scope than that which merely refers to a minor’s protection.¹³⁶ This Convention also recognises that custody rights may be established through a court order, by operation of law or through an agreement between the parents which has legal effect under the law of the specific country concerned.¹³⁷

The failure of the courts to recognise foreign custody orders in the past, however, created a possibility for non-custodial parents to remove the child from the jurisdiction where a custody order was present, to a new jurisdiction where they would seek a new custody order better suited to their needs.¹³⁸ In light of this, the courts in such matters are now able to acknowledge foreign custody orders when making any decisions.¹³⁹

[3] In determining whether a person, body or institution has rights of custody in relation to a specific child, this should be determined according to the law of the country of the child’s habitual residence.¹⁴⁰ When reading Article 3 with Article 5 it is evident that the Hague Convention has its own independent definition of custody rights and that the existence of custody rights must therefore be determined on two levels.¹⁴¹ The court therefore has to decide whether the person who requests that the child be returned had custody rights in terms of the law of the child’s country of habitual residence as well as in regards to custody rights in terms of the Hague Convention at the time of the abduction.¹⁴²

¹³⁴ Pérez-Vera op cit (n72) at para [83].

¹³⁵ Loc cit; Kruger op cit (n69) 18-19.

¹³⁶ Pérez-Vera op cit (n72) at para [84].

¹³⁷ Woodrow and Du Toit op cit (n3) at [17-10]; Articles 14 & 15 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 allow for the above and provide that evidence of a custody order can be obtained from the court in the requesting country, which allows the court to come to a different conclusion regarding the existence of custody rights for purposes of the Hague Convention: Du Toit op cit (n25) 358.

¹³⁸ Nicholson op cit (n2) 228.

¹³⁹ Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁴⁰ *Sonderup v Tondelli* supra (n28) at para [11]; Du Toit op cit (n25) 357; HAUGE op cit (n71).

¹⁴¹ Du Toit op cit (n25) 357-358.

¹⁴² Loc cit; *Sonderup v Tondelli* supra (n28) at para [11].

If a parent possesses both access rights and a right to consent to the child's removal, this parent is considered as possessing custody rights in terms of the Hague Convention, even if no custody rights exist in terms of the domestic law.¹⁴³ The aforementioned is due to the fact that the parent maintains a right to determine the child's place of residence as provided for in terms of Article 5 of the Hague Convention.¹⁴⁴ This right can also arise through the operation of law, e.g. guardianship in South Africa¹⁴⁵ or it may arise through a court order and can be called non-removal rights or *ne exeat* rights.¹⁴⁶

[4] The recognition and establishment of rights of custody within the Hague Convention's meaning has also been recognised in the case of *Sonderup v Tondelli*.¹⁴⁷ The reason for the consistent global interpretation of rights of custody is due to the fact that when a parent acts in contravention of their rights, this effectively nullifies the rights of the requesting parent as well as evades the jurisdiction of the court in charge of custody issues, which the Hague Convention aims to prevent.¹⁴⁸ This was succinctly stated in the case of *Chief Family Advocate v G* in the following quote:

‘The Convention is an international accord that seeks to find common ground amongst the municipal laws of all signatory nations. It must be purposively interpreted in accordance with the contents of [article] 1, namely to secure the prompt return of children wrongfully abducted from a contracting [s]tate, to ensure that rights of custody and access under the laws of that [s]tate are effectively respected by other contracting [s]tates and to give effect to the underlying premise that the child's interests are paramount.’¹⁴⁹

The above further accords with Article 9(3) of the UNCRC, in terms of which the state must respect a child's right to have and maintain personal and direct contact with both parents on a regular

¹⁴³ Du Toit op cit (n25) 358.

¹⁴⁴ Loc cit.

¹⁴⁵ Ibid at 359; *Chief Family Advocate and Another v G* supra (n35) at para 606I-610H; *Sonderup v Tondelli* supra (n28) at para [21]. If a parent remains the co-guardian of the child after divorce or separation, they maintain custody rights through the operation of law for the purposes of the Hague Convention because such non-custodial parents would have the right to determine the child's place of residence through consenting or refusing to a child's removal from South Africa.

¹⁴⁶ Du Toit op cit (n25) 358; A Skelton & M Carnelley (Eds) *Family Law in South Africa* (2010) 275.

¹⁴⁷ Loc cit; *Sonderup v Tondelli* supra (n28) at paras [21]–[25]. The interpretation of the custody rights regarding non-removal rights has however been applied consistently in other jurisdictions around the globe, see generally: *C v C (minors: abduction: custody rights abroad)* [1989] 2 ALL ER 465 at 468d-j; *Sonderup v Tondelli* supra (n28) at para [21] & [25]; *David S v Zamira* 574 NYS 2d 429 (FamCt 1991); *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; *G v B* [1995] NZFLR 49 & D Kelly ‘Rights of custody under the Hague Convention’ (2007) *Scots Law Times: News & Sheriff* 229 & M Bailey ‘The right of a non-custodial parent to an order for return of a child under the Hague Convention’ 1996 *Canadian Journal of Family Law* 287.

¹⁴⁸ Du Toit op cit (n25) 358-359; *Sonderup v Tondelli* supra (n28) at para [11]; Bailey op cit (n147) 297-298. It was subsequently held, after extensive argument in the case of *Chief Family Advocate v G*, that the Hague Convention has accepted that the terms ‘rights of custody’ convey a general meaning within each of the jurisdictions of the signatory States but that each signatory State has agreed, through the insertion of these principles, that however restrictive their own application of these rights may be, these must be expanded at least to the extent provided in Article 5: *Chief Family Advocate and Another v G* supra (n35) at 609E-F.

¹⁴⁹ *Chief Family Advocate v G* supra (n35) at 609B-D.

basis.¹⁵⁰ Thus Article 5 does not seek to restrict the meaning of custody rights but illustrates what it encompasses and provides it with a more expansive meaning.¹⁵¹

[5] In order for the application of return, the applicant needs only *prima facie* prove that rights of custody were exercised, jointly or alone, at the relevant time as indicated in Article 3(b).¹⁵² These rights are *prima facie* exercised where the abducted child's parent's consent is required before the child can be removed due to a court order or a law of general effect.¹⁵³ Thus it is evident as to what is considered to be rights of custody in terms of Articles 3 and 5 of the Hague Convention.

[6] The case of *S v H*¹⁵⁴ considered the issue of whether and when a South African court acquires rights of custody for the purposes of the Hague Convention.¹⁵⁵ *In casu* it was held that if proceedings are pending in a court within South Africa at the time of a child's removal from South Africa, that court qualifies as an institution or body to which rights of custody are ascribed.¹⁵⁶ A court may be the holder of custody rights as in Article 5 of the Hague Convention because the terminology is wide enough to include the right to determine a child's place of habitual residence.¹⁵⁷ However, in order for a court to be vested with such rights of custody, the application made must raise matters of custody within the meaning of the Hague Convention.¹⁵⁸

[7] Access and custody rights are dealt with separately under the Hague Convention and it must be remembered that a breach of access does not trigger a remedy of return in terms of the Hague Convention.¹⁵⁹ This is because it does not seek to regulate access rights exhaustively as this would go beyond the scope of its objectives.¹⁶⁰ Article 5(b) emphasises however that the Hague Convention does not intend to exclude all other ways of exercising access rights.¹⁶¹ The objective of the Hague

¹⁵⁰ Du Toit op cit (n25) 359.

¹⁵¹ *Chief Family Advocate and Another v G* supra (n35) at 609F-G. This submission was confirmed by the Constitutional Court in *Sonderup v Tondelli* supra (n28) at para [21].

¹⁵² *Chief Family Advocate and Another v G* supra (n35) at 610C-E.

¹⁵³ Loc cit.

¹⁵⁴ *S v H* supra (n78).

¹⁵⁵ Heaton (2007) op cit (n5) 909.

¹⁵⁶ Heaton (2010) op cit (n4) 313. Judge Griesel held that a court in South Africa can be the holder of custody rights for purposes of the Hague Convention as a result of the foreign English House of Lords decision in *In re H (Abduction: Rights of Custody)* [2002] 2 AC 291 (HL) ([2000] 1 FLR 374); *S v H* supra (n78) at para [46].

¹⁵⁷ *S v H* supra (n78) at para [45].

¹⁵⁸ Loc cit.

¹⁵⁹ Silberman op cit (n17) 215.

¹⁶⁰ Pérez-Vera op cit (n72) at para [125].

¹⁶¹ *Ibid* at para [85].

Convention is therefore to ensure that the rights of access are respected under the law of the contracting states involved in such situations.¹⁶²

In light of the above discussion, the concept of habitual residence shall be discussed below in terms of the South African law.

6. Habitual residence: Articles 3 and 5 of the Hague Convention

[1] A complex question regarding the interpretation of the Hague Convention revolves around the meaning of the term ‘habitual residence’.¹⁶³ The term ‘habitual residence’ is not defined in the Hague Convention¹⁶⁴ or the Children’s Act.¹⁶⁵ The lack of definition is however useful in that it allows some flexibility for the courts and central authorities to arrive at practical solutions when considering cases.¹⁶⁶ Habitual residence is considered to be the ‘international connecting factor in Hague matters and may determine the outcome of the matter.’¹⁶⁷ It is also a central concept to the Hague Convention.¹⁶⁸ The reason for not defining the term was to prevent the concept from becoming too rigid and technical and so that it could be applied by Judges of all legal systems as a factual test.¹⁶⁹ Thus it should not be treated as a term of art and not complicated by technical legal requirements, such as those included for establishing domicile.¹⁷⁰

If the court in the requested state determines that the child was not habitually resident in the requesting state, the Hague Convention does not apply and the application for the child’s return ends.¹⁷¹ Therefore in every case the court must determine what the habitual residence of the child is because this is pursuant to the purpose and aims of the Hague Convention.¹⁷² Habitual residence of the child must also be decided at the beginning of a return application as the law of the state of

¹⁶² Du Toit op cit (n25) 368: The Central Authority is obliged and bound to promote the peaceful enjoyment of access rights and fulfilment of any conditions to which these rights may be subject after a child’s return is ordered and effected and they must take steps to remove the obstacles to the exercise of access rights: Articles 7 and 21 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁶³ Labuschagne op cit (n11) 282, referring to ST McMurty ‘Defences under the Hague Child Abduction Convention’ (1996) *Kentucky Bench and Bar* 12; Kruger, op cit (n69) 20, provides that there is not global agreement regarding a common definition for habitual residence.

¹⁶⁴ Du Toit op cit (n25) 355; Buck (2005) op cit (n61) 139; Buck (2010) op cit (n61) 227; Hodson op cit (n73) 257.

¹⁶⁵ Du Toit op cit (n25) 355.

¹⁶⁶ Buck (2010) op cit (n61) 227; *Central Authority (South Africa) v A* 2007 (5) SA 501 (W) at para [17]; Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁶⁷ Du Toit op cit (n25) 355; Buck (2005) op cit (n61) 139; Woodrow and Du Toit op cit (n3) at [17-8].

¹⁶⁸ Nicholson in Davel op cit (n2) 237.

¹⁶⁹ *Central Authority (South Africa) v A* supra (n166) at para [19].

¹⁷⁰ Loc cit; Buck (2010) op cit (n61) 227.

¹⁷¹ Du Toit op cit (n25) 356; Woodrow and Du Toit op cit (n3) at [17-8].

¹⁷² Du Toit op cit (n25) 356.

habitual residence determines whether a person has custody rights at the time of the removal or retention.¹⁷³ If an applicant does not in fact have custody rights at the time of the removal or retention, the Hague Convention will also not apply.¹⁷⁴

[2] In South Africa the term ‘habitual residence’ should be given its ordinary and natural meaning with reference to all the facts of the particular case as the term ‘habitual’ implies a steady and stable territorial link.¹⁷⁵ This link may be achieved through a length of stay or through evidence that there is a very close tie between the child and that particular place.¹⁷⁶ The intention of the above is to avoid the creation and development of restrictive rules regarding habitual residence ‘so that the facts and circumstances of each case can be assessed free of presuppositions and presumptions.’¹⁷⁷ As habitual residence is a question of fact it must be determined on the facts and circumstances of each individual case.¹⁷⁸

[3] In South Africa it is also difficult to determine a very young child’s habitual residence because referring to the habitual residence of the child can be artificial because all the available evidence depends on the parent’s circumstances.¹⁷⁹ If the parents agree on the habitual residence, this usually becomes that of the child.¹⁸⁰ As the child grows up, they develop and form their own bonds and links with their surroundings e.g. through school, friends and other activities.¹⁸¹ In the case of *Senior Chief Family Advocate v Houtman* the court stated that ‘one has to look at whether the child has a factual link with the requesting state, culturally, socially and linguistically [in order] to determine whether it was the child’s country of habitual residence.’¹⁸² When a child is very young the court should

¹⁷³ Loc cit; *Sonderup v Tondelli* supra (n28) at para [11]; Silberman op cit (n17) 225.

¹⁷⁴ Du Toit op cit (n25) 356; Woodrow and Du Toit op cit (n3) at [17-8]; C Chürr ‘The Hague Convention: Consent issues and enforcement of “swift return orders” *Central Authority v H* 2008 (1) SA 49 (SCA)’ (2010) *THRHR* 146; Silberman op cit (n17) 225.

¹⁷⁵ Du Toit op cit (n25) 356; Heaton (2010) op cit (n4) 313; Silberman op cit (n17) 225; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [8]. The case of *Central Authority v MV* supra (n48) at paras [20]-[23] supports the views regarding habitual residence evidenced in the case of *Houtman*. Nicholson in Davel op cit (n2) 237; Woodrow and Du Toit op cit (n3) at [17-8]; Chürr op cit (n174) 146.

¹⁷⁶ Du Toit op cit (n25) 356; *Senior Family Advocate, Cape Town v Houtman* supra (n52) at paras [9]-[10]; Heaton (2010) op cit (n4) 313.

¹⁷⁷ *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at paras [8] & [9].

¹⁷⁸ Du Toit op cit (n25) 356; *Central Authority v A* supra (n166) at 508D & 508H-I; Hodson op cit (n73) 105; Nicholson in Davel op cit (n2) 237.

¹⁷⁹ Du Toit op cit (n25) 356. Kruger indicates that the residence of the parent can be either primary or secondary depending on who has care and contact of the child. The primary residence refers to the place the child resides most of the time and the secondary residence refers to the place where the child resides for shorter periods of time: Kruger op cit (n68) 20-21.

¹⁸⁰ Heaton (2010) op cit (n4) 313.

¹⁸¹ Du Toit op cit (n25) 356; Kruger op cit (n69) 20.

¹⁸² *Senior Family Advocate, Cape Town v Houtman* supra (n52) at para [10]; Du Toit op cit (n25) 356.

consider the parents last shared intention regarding the child's residence,¹⁸³ especially if there is no agreement indicating otherwise.¹⁸⁴ There, however, have been many guidelines derived from case law which assist in determining whether the parents intended to change the child's habitual residence.¹⁸⁵

[4] Habitual residence is established through the following: firstly, the family must voluntarily have adopted the new place of residence and also have a settled purpose to make the new residence a part of their life, despite the time period they intend to stay.¹⁸⁶ Secondly, the determination of the parent's intention is a question of fact determined in light of all the circumstances.¹⁸⁷ Thirdly, there is no fixed period of time required to establish a new habitual residence however the duration of the relocation must have occurred for an appreciable period of time in order to indicate that the previous habitual residence has been departed from.¹⁸⁸ It must be noted however that it only takes a moment to lose one's habitual residence¹⁸⁹ although mere temporary absence does not satisfy this.¹⁹⁰

[5] Habitual residence is similar to that of domicile, yet simpler.¹⁹¹ Domicile is the 'legal and factual relationship between a person and a jurisdiction'.¹⁹² Every person has to have a domicile and this cannot be lost without replacing it with another.¹⁹³ A person however does not have to have a habitual residence because they may have more than one residence at a time, however only one will

¹⁸³ Du Toit op cit (n25) 356; *Senior Family Advocate, Cape Town v Houtman* supra (n52) at para [10]; Heaton (2010) op cit (n4) 313.

¹⁸⁴ Heaton (2010) op cit (n4) 313. 'Habitual residence is meant to refer to the center [*sic*] of the child's life, and in most cases this can be easily determined. A geographical emphasis in interpreting the term "habitual residence" also runs into difficulty when a very young child has been moved from one jurisdiction to another. An infant's life center is with the parent and not in any geographical location, so should the court look to the center of the parent's life?' McMurty op cit (n163) 12, referred to by Labuschagne op cit (n68) 283.

¹⁸⁵ Du Toit op cit (n25) 356; JMT Labuschagne 'The concept *habitual residence* in the Hague Convention on the Civil Aspects of International Child Abduction' (1999) 24 *South African Yearbook of International Law* 306.

¹⁸⁶ Du Toit op cit (n25) 356-357; Woodrow and Du Toit op cit (n3) at [17-8].

¹⁸⁷ Du Toit op cit (n25) 357; Nicholson op cit (n2) 233; Pérez-Vera op cit (n72) at para [66]; Woodrow and Du Toit op cit (n3) at [17-8]-[17-9].

¹⁸⁸ Du Toit op cit (n25) 357; Woodrow and Du Toit op cit (n3) at [17-9].

¹⁸⁹ Nicholson op cit (n2) 233; Hodson op cit (n73) 257.

¹⁹⁰ Nicholson op cit (n2) 233; Pérez-Vera op cit (n72) at para [66].

¹⁹¹ Nicholson op cit (n2) 233; EB Crawford 'Habitual Residence of the child as the connecting factor in child abduction cases: a consideration of recent cases' (June 1992) *The Juridical Review* 177; Nicholson in Davel op cit (n2) 237; J Sinclair & E Bonthuys 'Law of Persons and Family Law' *Annual Survey of South African Law* (2004) 145; B Clarke 'Domicile' in B van Heerden et al *Boberg's Law of Persons and the Family* (2ed) (1999) 90. Habitual residence is however not included in the interpretation of the concept of domicile: Labuschagne op cit (n68) 283; Pérez-Vera op cit (n72) at para [66]; Silberman op cit (n17) 225. Kruger op cit (n69) 21: The habitual residence of a person or child also need not be the legal residence of that individual.

¹⁹² Hodson op cit (n73) 101.

¹⁹³ Loc cit.

become their habitual residence.¹⁹⁴ The habitual residence pertains to the customary residence at the time prior to the removal having occurred and thus the court must look at the facts of the situation at the time of the child's removal.¹⁹⁵

[6] The case of *Senior Family Advocate, Cape Town v Houtman* holds that there are three requirements that an applicant has to establish in order to secure a child's return in terms of the Hague Convention¹⁹⁶ and these are to be adhered to in all matters determining habitual residence. The requirements are:

- '(i) that the child had been habitually resident in the requesting state [footnote omitted] immediately before the removal or retention;
- (ii) that the removal or retention had been wrongful in that it constitutes a breach of custody rights which exist by operation of law of the requesting state; and
- (iii) that the applicant had actually been exercising those rights at the time of the wrongful removal or retention, or would have been so exercising such rights but for the removal or retention.'¹⁹⁷

[7] It is submitted that in light of the above courts should avoid taking an intricate and microscopic look into what constitutes habitual residence within South Africa and should merely generally consider the factors in order to make a decision regarding habitual residence.¹⁹⁸ If there is no agreement present between the parents, and where the length of time does not convincingly indicate habitual residence, then it is accepted that the court may then look to the person's intentions in this regard.¹⁹⁹

This brief discussion of wrongful removal, custody rights and habitual residence, sets the backdrop for the discussion to proceed. The aforementioned evidences what is required for a successful Hague Convention application within South Africa in order that the courts, in considering such applications, avoid backlogs and irrelevancies in determining whether a return order should be granted.

¹⁹⁴ Ibid at 104 & 257.

¹⁹⁵ *Central Authority (South Africa) v A* supra (n166) at para [22].

¹⁹⁶ Weideman & Robinson op cit (n5) 73.

¹⁹⁷ *Senior Family Advocate, Cape Town v Houtman* supra (n52) at paras [6]-[11]: All three of these are provided for in Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and these will also establish wrongful removal and retention.

¹⁹⁸ Hodson op cit (n73) 258.

¹⁹⁹ *Senior Family Advocate, Cape Town v Houtman* supra (n52) at para [10].

7. Process in terms of the Hague Convention

[1] Article 6 of the Hague Convention requires each contracting state to designate a Central Authority to attend to the duties imposed by the Hague Convention. Article 7 provides the objectives the obligations of the Central Authority.²⁰⁰ Article 7(1) sets out the duty of co-operation and Article 7(2) lays out all the principle functions which the Central Authority must discharge.²⁰¹ Both of these sections assist in securing the child's prompt return and in achieving the Hague Convention's objectives.²⁰² The creation of the system of Central Authorities also allows for a system of co-operation between contracting states in order to assist in resolving international child abductions.²⁰³

[2] In South Africa the Chief Family Advocate is the designated Central Authority.²⁰⁴ Regionally the Family Advocate appointed for each High Court fulfils the duties of the Central Authority when appointed by the Chief Family Advocate.²⁰⁵ They assist in cases where a child is wrongfully removed from or retained in South Africa.²⁰⁶

[3] There is no obligation which requires an applicant to seek assistance from the Central Authority in order to secure an abducted child's return.²⁰⁷ Thus an individual can launch an application

²⁰⁰ Section 277 of the Children's Act 38 of 2005 provides for the delegation of powers and duties of the Central Authority as provided for in Article 6 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980: Woodrow and Du Toit op cit (n3) at [17-5]. It was stated by Van Oosten J that the Family Advocate must adopt an adversarial rather than neutral role in relation to one of the parents but above all remain objective and not assume the role of an advocate for either of the child's parents: *Sonderup v Tondelli* supra (n28) at para [14]; *Central Authority v B* 2009 (1) SA 624 (W) at paras [14]-[15]. The duties and obligations of the Central Authorities however shall not be dealt with in detail within this study.

²⁰¹ Pérez-Vera op cit (n72) at para [88]. The wording of Article 7(1) provides that the role of and the manner in which the Central Authority performs its duties varies from state to state as it is left to their discretion: Anton op cit (n62) 547. CMA Nicholson 'The Hague Abduction Convention as rewritten by the South African Courts: The changing role of the Family Advocate as Central Authority' (2004) 1 *De Jure* 130 and this occurs in order to allow for the creation of a diversity of internal laws and structures; Pérez-Vera op cit (n72) at paras [45] & [88].

²⁰² Anton op cit (n62) 543.

²⁰³ Loc cit; Pérez-Vera op cit (n72) at para [42].

²⁰⁴ HAUGE op cit (n71); Heaton (2010) op cit (n4) 313; Sections 276(1)(a) & (2) and section 279 of the Children's Act 38 of 2005. Section 276 of the Children's Act 38 of 2005 refers to the Central Authority and states that the Chief Family Advocate, who is appointed by the Minister of Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, is the Central Authority for South Africa: *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at 122B (Headnote); Skelton & Carnelley op cit (n146) 275. According to Section 18(1) of Regulations Relating to Children's Courts and International Child Abduction GNR 250 of 31 March 2010, GG 33067 also provides this requirement. The Chief Family Advocate can, if they need assistance, appoint any person to assist them or the Family Advocate, to exercise their powers to fulfill their obligations under the Hague Convention: Human op cit (n2) 1.2; South African Law Commission (SALC) Discussion Paper 103 (Project 110) 'Review of the Child Care Act 2002 at 1066, available at <http://www.justice.gov.za/salrc/dpapers/dp103.pdf>, accessed on 20th August 2011.

²⁰⁵ Heaton (2010) op cit (n4) 313; Section 279 of the Children's Act 38 of 2005.

²⁰⁶ HAUGE op cit (n71).

²⁰⁷ Anton op cit (n62) 547; Nicholson op cit (n201) 131; Article 29 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

themselves as long as it contains the specified requirements. An application launched either by the Central Authority or individual must contain the information and grounds of the applicant's claim in accordance with Article 8(2) of the Hague Convention.²⁰⁸

[4] It is also required that the Central Authority take all practical measures in order 'to secure the voluntary return of the child or to bring about an amicable resolution of the issues.'²⁰⁹ If the voluntary return of the child is not successful then various duties are imposed on the Central Authorities with a view to assisting the applicants in court proceedings to secure the child's return.²¹⁰

[5] Article 10 should be read with Article 11 which requires the judicial or administrative authorities of the contracting states to act expeditiously in application proceedings²¹¹ and if there has been no decision within six weeks from the commencement date of the proceedings, the applicant has the right to request a statement detailing the reasons for the delay.²¹² The case of *Central Authority v H* confirms that 'expeditiousness is essential at all stages of the Convention process, including appeals.'²¹³ In South Africa the matter may be expedited by giving it preference on the court roll, making a special court available for such applications or through treating it as an urgent matter.²¹⁴ As a result of the requirement for expeditiousness, oral evidence is only heard in exceptional circumstances.²¹⁵

²⁰⁸ Anton op cit (n62) 548; Section 15 of Regulations Relating to Children's Courts and International Child Abduction GNR 250 of 31 March 2010, GG 33067 also provides these requirements.

²⁰⁹ Article 7(2)(c) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Anton op cit (n62) 548; Nicholson op cit (n201) 131; Article 7(2)(c) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 imposes a general duty of attempting to effect voluntary return of the child and this is reinforced by Article 10 of the Hague Convention.

²¹⁰ Anton op cit (n62) 549; Heaton (2010) op cit (n4) 314 & 314 fn290. Prior to 1st April 2010, the High Court was the only court which had jurisdiction to determine an application concerning international child abduction, however section 45(3)(d) and (e) of the Children's Act 38 of 2005 has extended the jurisdiction to the Divorce Court.

²¹¹ Hlophe op cit (n5) 444; Heaton (2010) op cit (n4) 314; Hodson op cit (n73) 253.

²¹² Hlophe op cit (n5) 444; Du Toit op cit (n25) 353; Silberman op cit (n17) 215; BM Bodenheimer 'The Hague Draft Convention on International Child Abduction' (1980) 2 *Family Law Quarterly* 106; Hodson op cit (n73) 253 & 265.

²¹³ *Central Authority v H* 2008 (1) SA 49 (SCA) at 60J, see also Weideman & Robinson op cit (n5) 72fn11. Speed is of cardinal importance and Article 11 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 places a duty on the judicial and administrative authorities to act expeditiously in order to lessen the harm possibly suffered by the child in question and in order that the issues of custody are adequately determined by the habitual residence administrative authorities: Chürr op cit (n174) 148-149.

²¹⁴ Heaton (2010) op cit (n4) 314; *Chief Family Advocate v G* supra (n35) at 606C-D.

²¹⁵ Heaton (2010) op cit (n4) 314; *Chief Family Advocate v G* supra (n35) 615J-616A; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [40].

[6] The court where the application for return is heard is required to order the child's immediate return;²¹⁶ however it is the return of the child, not the abducting parent which must be ordered.²¹⁷ If a child is safely returned, then the provisions of the Hague Convention will cease to apply and the domestic law of the relevant country will determine whether and what steps are to be taken in respect of subsequent issues (e.g. guardianship and custody rights) regarding the child.²¹⁸

[7] When a return order is made, the child is ordered to return to the contracting state from which they were abducted from, they are not ordered to return into the care of the left-behind parent.²¹⁹ The child is returned to the jurisdiction of their habitual residence and it is not generally necessary or likely that they would be returned to the same situation,²²⁰ from which they were removed.

[8] In light of the above the main focus of this study shall now proceed. This is an examination into the exceptions/defences available to the abducting parent in order to oppose the court ordering the child's return. This will involve a full discussion of Articles 12, 13 and 20. In considering the South African position it is necessary to consider section 39 of the Constitution which allows a court, when considering an interpretation of the Bill of Rights, to consider international law and foreign case law and thus the consideration of international cases.²²¹ This is necessary in instances where there is a gap in the South African law or where uncertainty exists as to how a requirement is to be implemented. The above provides that the South Africa courts are able to consider foreign decisions in assisting them in determining a matter before them.

8. Exceptions to the rule of peremptory return in terms of the Hague Convention

[1] There are five exceptions to the rule of peremptory return²²² and most are unique to the Hague Convention and have many judicial interpretations in regards to their meanings.²²³ The meanings attributed to the interpretations of these exceptions should be consistent with the Hague Convention as otherwise this would undermine the Hague Convention's value as a mechanism for ensuring that a

²¹⁶ Heaton (2010) op cit (n4) 314.

²¹⁷ Loc cit.

²¹⁸ Loc cit.

²¹⁹ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [53].

²²⁰ Loc cit. This return therefore prevents the child from being placed in the perhaps difficult or risky situation in which they were previously removed from. Therefore it is submitted that this assists in protecting the child from any harm until such matters can be determined by the relevant authorities.

²²¹ Section 39(b) and (c) of the Constitution of the Republic of South Africa, 1996.

²²² Hodson op cit (n73) 259.

²²³ Silberman op cit (n17) 213.

child, who has been wrongfully removed or retained, is returned.²²⁴ These exceptions are found in Articles 12, 13 and 20.²²⁵

[2] As has been previously discussed, it is necessary for the requesting party/applicant to satisfy the requirements of Articles 3, 4 and 5 of the Hague Convention initially in order for the return of an abducted child to be ordered by the court.²²⁶ After proving wrongful retention or removal, Article 12 requires proof that the application was launched within one year of the date on which the wrongful removal or retention occurred in order for a return order to be granted.²²⁷ This is referred to as the rule of peremptory return. In light of this, the first exception/defence shall be discussed.

8.1 Exception one: Article 12

[1] Article 12 of the Hague Convention provides the following:

‘Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the [c]ontracting [s]tate where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The Judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested [s]tate has reason to believe that the child has been taken to another [s]tate, it may stay the proceedings or dismiss the application for the return of the child.’

The rule of peremptory return is evident in the above and indicates that if an application is launched within a year from the date of the child’s abduction, the court must order the child’s return unless another exception/defence is successfully proven. If however the application is launched after a year has expired from the date of the child’s removal, then the court, when exercising their discretion in terms of Article 18, must consider whether or not the child is settled in their new environment prior to ordering their return.

In South Africa, Article 12 has been considered to be mandatory as well as inflexible in its requirements as it does not allow the presiding officer any discretion in determining whether an order

²²⁴ Loc cit.

²²⁵ Du Toit op cit (n25) 360.

²²⁶ Loc cit.

²²⁷ Du Toit op cit (n25) 360; N Lowe, M Everall, M Nicholls *International Movement of Children Law Practice and Procedure* (2004) 287.

of return should or should not be made.²²⁸ The court, in terms of Article 12 and within a period of one year, is obliged to order the return of the abducted child to the country of habitual residence.²²⁹ The case of *Central Authority v H* confirms that if no exceptions are raised however, or if they are raised but not successfully proven, the court in terms of Article 12 is bound to order the child's return.²³⁰ This however has been met with some controversy regarding issues of whether any family tie to the country of habitual residence remains since the start of proceedings.²³¹ It was decided that Article 12 is flexible enough to depart from this consideration in the adequate circumstances.²³²

[2] The abducting parent is responsible for raising any of the exceptions/defences to the application for return and they also bear the onus of proof of each exception on a *prima facie* basis.²³³ If exceptions are raised, this allows the courts to conduct a limited investigation into the best interests of the child in order to determine whether the child's return should be ordered or not.²³⁴ The court in *Central Authority of the Republic of South Africa and Another v LG* agreed with the position in *Sonderup v Tondelli* which held that the best interests of the child test is applicable in such Hague Convention matters where an exception is raised.²³⁵ In terms of Article 16 of the Hague Convention however, they are unable to decide upon the merits of any custody dispute.²³⁶ The reason for this exception is that it needs to be recognized that circumstances exist in which a court should be allowed to consider and examine the best interests of the child, as well as the child's welfare, instead of having to strictly adhere to the rule of preemptory return.²³⁷ The nature of this enquiry therefore

²²⁸ Du Toit op cit (n25) 360.

²²⁹ *Sonderup v Tondelli* supra (n28) at para [12]; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [26]; *Chief Family Advocate and Another v G* supra (n35) at 611B-E; Du Toit op cit (n25) 360; Pérez-Vera op cit (n72) at para [106].

²³⁰ *Central Authority v H* supra (n213) at para [26]; Lowe, Everall & Nicholls op cit (n227) 288.

²³¹ Lowe, Everall & Nicholls op cit (n227) 288–289. Article 18 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 provides a discretion to the courts to determine, despite the evidence, whether or not to order the child's return.

²³² Loc cit.

²³³ Du Toit op cit (n25) 360; *Smith v Smith* supra (n53) at para [11]; *Pennello v Pennello* supra (n55) at para [38]; Pérez-Vera op cit (n72) at para [114]; Clark op cit (n2) at para [23].

²³⁴ Du Toit op cit (n25) 360.

²³⁵ *Central Authority of the Republic of South Africa and Another v LG* supra (n52) at 'Flynote' & 392C-F where the court referred to the case of *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n51) at para [23] where it was held that the South African courts are compelled to place particular emphasis on the best interests of the child, not only because of their role as upper guardian of all minors but also because of the provisions of the Constitution of the republic of South Africa, 1996. Section 28(2) of the Constitution states that: "A child's best interests are of *paramount importance in every matter* concerning the child ..." The drafters of the Convention have made provision for the reference to the law of independent states with the insertion of art 20, which states that: 'The return of the child under the provisions of art 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.'

²³⁶ Du Toit op cit (n25) 360; Article 16 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

²³⁷ Pérez-Vera op cit (n72) at paras [23] & [25]; Du Toit op cit (n25) 362.

should shift and become one in which the best interests of a particular child are considered²³⁸ and not those interests of abducted children generally. This should be considered because the peremptory return of a settled child may not be in their long-term best interests, and therefore it is possible that the best interests of the child may override policy considerations provided in the context of Article 12.²³⁹ Article 12, however, remains constitutional:

[D]espite its proscriptive nature and although that it had the potential of not serving the best interests of the child as required by s28 of the Constitution of the Republic of South Africa Act 108 of 1996, it was nonetheless a law of general application (through its adoption into our domestic law) and that the limitation on the child's rights was reasonable and justifiable in an open and democratic society in the manner contemplated by s 36(1) of the Constitution.²⁴⁰

[3] Article 12 further provides that if the application is launched after a period of one year since the child's wrongful removal and retention, the abducting parent can raise the exception that the application was brought outside of the specified time period, that the child is now settled in their new environment and thus it would not be in their best interests to be returned to their habitual residence. Du Toit however considers it unfortunate that as Hague Convention cases are decided under time constraints, lengthy judgments have been avoided and thus although it seems that this exception is very straightforward, South Africa has not embarked on a thorough analysis of the law or made reference to many foreign decisions, despite the wealth of foreign decisions available.²⁴¹ The result of foreign decisions is that this exception is a difficult defence for judicial or administrative officials to tackle.²⁴²

²³⁸ Du Toit op cit (n25) 362; C Du Toit 'The article 12(2) defence of the Hague Abduction Convention' in 'Children' (2009) (1) *Juta's Quarterly Review* 2.2, referring to *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* [2006] NZSC 97 at para [53].

²³⁹ Du Toit op cit (n25) 362; Section 28(2) of the Constitution of the Republic of South Africa Act, 1996.

²⁴⁰ *Chief Family Advocate and Another v G* supra (n35) at 611C-D.

²⁴¹ Du Toit (2009) op cit (n238) 2.2.

²⁴² The reasons for this are that most abduction cases brought before a court have surpassed the time frame of one year due to the conduct of one of the parties e.g. hiding the child or living under a false name, making it difficult for the left-behind parent or Central Authority to locate the child, despite the parent's knowledge of their remedies: Du Toit (2009) op cit (n238) 2.2. Foreign jurisdictions have taken into consideration that when a Judge is to make a decision, they must consider policy considerations e.g. the *mala fide* behavior of the abducting parent e.g. *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* op cit (n238). It was further considered that the court must use a weighing exercise to determine whether there are policy considerations in favour of returning the child which will override the child's best interests who has settled in their new environment: Du Toit (2009) at 2.2. It can thus be argued that South African courts have a greater obligation to protect the best interests of the child because the Constitution of the Republic of South Africa, 1996 provides in terms of section 28(2) that the best interests of the child are a paramount consideration and thus the courts should also consider using the above weighing exercise: *Weighing the policy considerations against the child's best interests. S v M (Centre for Child Law as Amicus Curiae)* 2008 (1) SA 232 (CC) at para [15]: 'The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner

The case of *Central Authority v B* was the first South African case to consider this exception.²⁴³ This case held that the period of one year runs from the date on which the child was removed.²⁴⁴ The case of *Family Advocate, Cape Town, and Another v EM* 2009 (5) SA 420 (C) also provides that the rule of peremptory return applies even if the application was launched within a few days of the period of a year being completed and unless an exception/defence to the aforementioned is raised and proven, the peremptory rule would still apply.²⁴⁵

[4] If the exception is proven, the court still maintains a discretion whether or not to order the child's return.²⁴⁶ The aforementioned is reinforced by Article 18 of the Hague Convention which explicitly states that the exceptions/defences do not limit the powers of a court to order the child's return.²⁴⁷ *B v S* 2006 (5) SA 540 (SCA) held that the judicial and administrative bodies in the contracting state where the child was removed to can order the child's return, however, they are also able to order the conditions under which the return should occur.²⁴⁸ This allows for the court to order a return even if the exception is satisfied, but it also allows them to provide for the child's protection.

[5] In South Africa, in order to establish this exception, a two-step enquiry is used.²⁴⁹ The first step is to determine whether or not more than one year has passed prior to the application being launched, and secondly, if a year has passed, they must determine whether or not the child is settled in their new environment²⁵⁰ prior to making an order of return. It is only once both steps have been proven that the court has the discretion of whether or not to order the child's return.²⁵¹ Nevertheless, the

which at all times shows due respect for children's rights.' According to Du Toit, the New Zealand case of *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* (supra (n238)) provides a very useful analysis of international case law as well as the guidelines which have been developed regarding the defence in terms of Article 12: Du Toit op cit (n25) 361.

²⁴³ Du Toit (2009) op cit (n238) 2.2.

²⁴⁴ *Central Authority v B* supra (n200) at 632A-C.

²⁴⁵ *Family Advocate, Cape Town, and Another v EM* 2009 (5) SA 420 (C) at para [45].

²⁴⁶ Du Toit op cit (n25) 360; *Chief Family Advocate and Another v G* supra (n35) at 618D-E; *Smith v Smith* supra (n53) at para [11]; Nicholson op cit (n2) 242.

²⁴⁷ Du Toit op cit (n25) 360; Pérez-Vera op cit (n72) at para [112].

²⁴⁸ *B v S* 2006 (5) SA 540 (SCA) at para [19]; Nicholson in Davel op cit (n2) 240.

²⁴⁹ *Central Authority v B* supra (n200) at 632A-C. This case ensures that the South African courts follow the aforementioned two-step enquiry in order to apply Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

²⁵⁰ Nicholson op cit (n2) 234 & 242; Silberman op cit (n17) 246-247; Labuschagne op cit (n68) 281; CMA Nicholson 'Can South Africa follow England's example and apply a strict interpretation of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction?' (1999) 32(2) *De Jure* 250.

²⁵¹ Du Toit op cit (n25) 361.

courts still maintain an unregulated discretion to order the child's return even if it is demonstrated that the child is settled.²⁵²

[6] The enquiry regarding whether the child has in fact settled in their new environment is a factual enquiry and it is very similar to that of the enquiry into the child's habitual residence.²⁵³ The court must exercise its discretion in each case in light of the Hague Convention's objectives in determining whether or not the child is settled.²⁵⁴ The court is required to consider and to take into account whether the child is physically and emotionally settled (i.e. established in the community as well as in their emotional environment which constitutes security and stability in a permanent manner for the child)²⁵⁵ as well as whether the child has been socially integrated.²⁵⁶ It was held in the case of *Re N (Minors)(Abduction)* that the degree of the child's settlement must be 'more than [a] mere adjustment to surroundings.'²⁵⁷ The term 'new' pertains to the moment at which the court considers the application and does not refer to the date of the abduction, it also refers to the child's home, friends, school, activities, people and it does not refer to the relationship which the child and abducting parent have.²⁵⁸

However if a child appears settled in their new environment, this does not provide an automatic defence to the rule of mandatory return as there may be other mitigating factors which result in the order of return subsequently being granted.²⁵⁹ Even if a year has passed, it is still necessary for the abducting parent to prove that the child is settled in their new environment.²⁶⁰ In foreign countries a child who has been kept in hiding and is always on the run with the abducting parent in order to avoid detection, is not considered to be settled in their new environment and the one year period does not then apply.²⁶¹

²⁵² Article 18 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Du Toit op cit (n25) 361; *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* supra (n238) at para [37]; *Re N (Minors)(Abduction)* [1991] FLR 413; Pérez-Vera op cit (n72) at para [109].

²⁵³ Du Toit op cit (n25) 361; *Cannon v Cannon* [2004] EWCA Civ 1330 at para [55].

²⁵⁴ Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Clark op cit (n2) at para [19].

²⁵⁵ Hodson op cit (n73) 264.

²⁵⁶ Du Toit op cit (n25) 361; *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* supra (n238) at para [55]; Section 39 of the Constitution of the Republic of South Africa, 1996 allows, when interpreting South African law, the consideration of foreign decisions to assist herein.

²⁵⁷ *Re N (Minors)(Abduction)* supra (n252); Section 39 of the Constitution of the Republic of South Africa, 1996 allows, when interpreting South African law, the consideration of foreign decisions to assist herein.

²⁵⁸ Hodson op cit (n73) 264-265.

²⁵⁹ *Ibid* at 264.

²⁶⁰ *Loc cit*; Buck (2005) op cit (n61) 141.

²⁶¹ *Loc cit*; Buck (2010) op cit (n61) 229.

[7] In the case of *Central Authority v B* it was argued by Counsel for the applicant that the applicant should not be prejudiced by a delay resulting from his ignorance concerning his rights in terms of the Hague Convention, which were exacerbated through the lack of proper advice from attorneys consulted as well as the seven months it took for the requesting state to forward the request to the South African authorities.²⁶² These delays, if made allowance for, would place the commencement of the proceedings within the one year time period.²⁶³ However, it was held in South Africa that this is not acceptable argument because Article 12 clearly makes no allowances for a discretionary determination of the time period.²⁶⁴ If it is determined that the application was launched after the expiration of one year, then the court has to consider whether the child is settled in the new environment²⁶⁵ in order to allow the court to exercise the discretion of whether or not to order the child's return.

In casu the evidence of the child's settlement included the information that the applicant and minor child were settled in a townhouse which adequately provided for the child's needs, the minor child attended a nursery school and was involved in extramural activities, had made friends and spent time with her family and a report by a forensic social worker, with many years of experience, concluded that the minor child was 'settled and secure and should continue to be afforded the permanence that the respondent affords her.'²⁶⁶ It was held that the child was settled in the new environment in light of the above and thus the return order was refused.²⁶⁷ Therefore it is clear that the aforementioned are factors which should be considered in determining whether a child is settled in their new environment.

The unreported case of *Rovetto v Walter-Rovetto*²⁶⁸ involved an appeal of an order refusing the children's return as they had been residing with their mother in South Africa for a period of 30 months prior to the decision being finalized and this delay was only due to multiple negotiations and discussions between the parents and their separate attorneys.²⁶⁹ The reason the appeal was dismissed was that the court held that the children had now become settled in their new environment as a result of the amount of time spent in South Africa and subsequently it was the only environment known to

²⁶² *Central Authority v B* supra (n200) at para [8].

²⁶³ Loc cit.

²⁶⁴ Loc cit.

²⁶⁵ Loc cit.

²⁶⁶ Ibid at para [9].

²⁶⁷ Loc cit.

²⁶⁸ *Rovetto v Walter-Rovetto* [2005] JOL 15303 (T).

²⁶⁹ Ibid at 1-3.

them.²⁷⁰ Therefore it is clear that the element of time is important in determining whether a child is settled in their new environment.

[8] In light of the above, a possible shortcoming in terms of the South African law is that this exception should, in the implementing legislation, include definitive parameters in order to ascertain when the child actually becomes settled in their new environment, and the factors which are used to determine the aforementioned should also adequately be provided for so as to ensure that they are strictly interpreted in order to provide certainty herein.²⁷¹ Nicholson has also suggested that the time limit of one year is also possibly too short in those instances where the child cannot be located despite every effort of the left-behind parent.²⁷² It is also possible that an abducting parent is able to hide the child for more than a year and then request the court to refuse a return order as the application would have been made out of time and that the child would now be settled in the new environment²⁷³ thus taking advantage of the time period unjustly. Nicholson suggests that in this instance, the period of one year should run from the date on which the child is located, subject to the provision that the steps were taken to locate the child's whereabouts within three months from the date on which the child was actually abducted.²⁷⁴ It is clear that no form of judicial delay should benefit the abducting parent²⁷⁵ due to the fact that this may allow these parents to obtain a more favourable decision as a result of their own devious actions.

[9] The above evidences how the first exception/defence is applied within South Africa and that the exception in Article 12 is easily applied to the facts of each individual case and it is evident that the courts in South Africa have had very few issues with the interpretation and application of this exception.²⁷⁶ Therefore the further exceptions/defences available to the abducting party in terms of Article 13 of the Hague Convention shall now be discussed.

²⁷⁰ Ibid at 7.

²⁷¹ Nicholson op cit (n2) 242.

²⁷² Loc cit; Bodenheimer op cit (n212) 109.

²⁷³ Nicholson op cit (n2) 242.

²⁷⁴ Loc cit.

²⁷⁵ Loc cit.

²⁷⁶ Woodrow & Du Toit however submit that in regards to the limited context of Article 12(2) of the Hague Convention, the paramount principle in section 28(2) of the Constitution of the Republic of South Africa, 1996 may possibly have the effect that a particular child's best interests may override the policy considerations herein: Woodrow and Du Toit op cit (n3) at [17-16]. The criticism regarding the issue discussed is however provided for by Du Toit, op cit (n238) 2.2, and is discussed at fn238 hereof and at point [3] above.

8.2 Exception two: Article 13(a)

[1] Article 13 of the Hague Convention states:

‘Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested [s]tate 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.’

[2] Therefore three exceptions/defences are available in terms of Article 13. Justice Hlophe indicates that the defences available in terms of the Hague Convention should be strictly interpreted by judges and should favour the child’s return to the state of habitual residence in order to prevent custody disputes from being determined in the state of refuge, as this would otherwise undermine the objectives of the Hague Convention.²⁷⁷ Article 13 also provides the court with a discretion and opportunity to consider the particular child’s best interests.²⁷⁸

[3] The case of *Chief Family Advocate and Another v G*²⁷⁹ quoted *Sonderup v Tondelli* where it was considered ‘that a child’s long-term interests are likely to be better protected by the procedures in the

²⁷⁷ Hlophe op cit (n5) 445; Buck (2005) op cit (n61) 141; Buck (2010) op cit (n61) 229; Pérez-Vera op cit (n72) at para [34].

²⁷⁸ Woodrow and Du Toit op cit (n3) at [17-16]; *Sonderup v Tondelli* supra (n28) at para [32]; Pérez-Vera op cit (n72) at para [29].

²⁷⁹ *Chief Family Advocate and Another v G* supra (n35): The facts are briefly that the applicant brought an application against the respondent (the father of the minor child) in terms of the Hague Convention (at 604I) and the applicant wished the child to be returned to the UK (at 605A). The parents of the minor child had married in South Africa in 1995, the minor child was born in January 1996 and the parents immigrated with the child to Britain in 1997 (at 605A-B). In March 2001 the mother left the marital home and the minor child continued to reside with the respondent (at 605B). Without the mother’s knowledge, the respondent left Britain with the minor child in September 2001 and came to South Africa where he placed the child in school immediately (at 605C). On discovering the aforementioned, the mother obtained an order from the High Court of Justice, Family Division in England, during October 2001, that the child remained a ward of that Court (at 605C-D). The respondent raised the defence that the mother, at the time of the child’s removal, was not actually exercising her custody rights and that she had consented or subsequently acquiesced to the child’s retention (at 612B-C).

country of that child's habitual residence whilst the child's short-term interests may not be met by their immediate return.²⁸⁰ The Constitutional Court in *Sonderup v Tondelli* stated that the purpose of including Articles 13 and 20 in the Hague Convention was that they were 'intended to provide exceptions, in extreme circumstances, to protect the welfare of children.'²⁸¹ It further held that in applying Article 13, the paramountcy of the child's best interests must inform the court's understanding of the exemptions without undermining the Hague Conventions integrity.²⁸² Therefore it has been established that in determining whether or not to order the child's return, the court is required to balance the desirability of the state of habitual residence retaining their jurisdiction and the possibility of undermining the child's best interests through granting the order.²⁸³

In light of the above, each exception in terms of Article 13 shall be separately discussed below.

a) Article 13(a): Exercise of custody rights

[1] Within Article 13(a) a further three possible exceptions/defences exist. These include: 1) a person, institution or body who had care of the child, who was not actually exercising the custody rights at the time of the child's removal or retention; 2) that they had consented to the child's removal or retention, or 3) that they acquiesced to the child's removal or retention.²⁸⁴ If one of the aforementioned is successfully proven, the court may then use its discretion in determining whether or not the child's return should be ordered.²⁸⁵

[2] The first available exception/defence herein relates to the failure of a parent to exercise their custody rights in terms of the Hague Convention. Article 13 does not provide a definition of the 'actual exercise' of custody rights and therefore the provision must be compared to Article 5 of the Hague Convention which contains such a definition.²⁸⁶ The Judge in each case must factually

²⁸⁰ *Chief Family Advocate and Another v G* supra (n35) at 611F.

²⁸¹ *Sonderup v Tondelli* supra (n28) at para [32].

²⁸² Loc cit.

²⁸³ *Sonderup v Tondelli* supra (n28) at para [35]; *Chief Family Advocate and Another v G* supra (n35) at 612A-B.

²⁸⁴ Article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Heaton (2010) op cit (n4) 315; Pérez-Vera op cit (n72) at para [28]; Hlophe op cit (n5) 445; Nicholson op cit (n2) 234; Lowe, Everall & Nicholls op cit (n227) 305.

²⁸⁵ Article 18 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Lowe, Everall & Nicholls op cit (n227) 293; Hague Convention Chapter Advisory Committee 'The Hague Convention International Child Abduction: A child's return and the presence of domestic violence' (September 2005) 12, available at <http://www.haguedv.org/articles/Washington%20State%20Bench%20Guide%20dvAndTheHagueConvention.pdf>, accessed on 24 February 2011.

²⁸⁶ Pérez-Vera op cit (n72) at para [115]. Custody rights in terms of the South African law were briefly discussed at point [5] of this Chapter.

determine whether the custody rights were actually exercised.²⁸⁷ However, proof that custody rights were not actually exercised does not individually form an exception to the duty of return and nor does the fact that the left-behind parent was unable to exercise his/her rights due to the abducting parent's actions alone.²⁸⁸ If the custody rights of the left-behind parent have become redundant, stale or are no longer effective, the court would be incorrect in ordering the child's return.²⁸⁹ Thus this defence is only relied upon if exceptional circumstances exist.²⁹⁰ The purpose of this exception is therefore to prevent a person from being granted a favourable order on the grounds that they technically have custody rights but on the evidence produced they have not taken any active or meaningful role in the child's life.²⁹¹

Few cases however consider this aspect of Article 13(a) because without the existence of custody rights wrongful removal or retention is not satisfied.²⁹² A subsequent ramification of this is that an application would not have been successfully launched initially. Thus it appears necessary to subsequently prove whether or not the left-behind parent consented or acquiesced to the child's removal or retention in order to fully prove the exception in terms of Article 13(a).²⁹³

[3] The unreported case of *Family Advocate, Cape Town & another v Chirume aka Munyuki*²⁹⁴ considered this exception based on the facts that the respondent had removed the child to Zimbabwe in January 2005 and the second applicant had not exercised his custody rights since October 2004 when he had left the matrimonial home.²⁹⁵ The second applicant contended that in terms of the law of England and Wales that he had custody rights and since the separation in 2004, he had attempted

²⁸⁷ Loc cit.

²⁸⁸ Loc cit.

²⁸⁹ Hodson op cit (n73) 260-261; Buck (2005) op cit (n61) 141. This situation does not include a parent who does not have day-to-day care of the child but who is involved in some form of care and control and exercises these as a parent.

²⁹⁰ Hodson op cit (n73) 261.

²⁹¹ Buck (2005) op cit (n61) 141.

²⁹² Loc cit.

²⁹³ It can be seen from case law that clear and unequivocal evidence is required in order to provide evidence of the failure to exercise custody rights. An example where custody rights have not been nullified is perhaps where, due to a parent's disability or incapacity as a result of an accident, illness or demanding job, there is a low level of input into the child's routine care; Ibid at 141-142. Article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is a consequence of Article 3(b) of the same Convention: Woodrow & Du Toit op cit (n3) at [17-17].

²⁹⁴ *Family Advocate, Cape Town & another v Chirume aka Munyuki* [2006] JOL 17112 (C) involved a request for an order of return of a minor child, who was removed by the respondent (mother), from the UK without the second applicant's (father's) consent to South Africa (at paras [1]-[2]). The parents were both Zimbabwean citizens and were married there in September 2001. They moved to the UK however after many back and forth trips by the respondent, between Zimbabwe and the UK, in attempts to reconcile the failing marriage, finally in January 2005 the respondent moved with the minor child (who was born in June 2002) to Zimbabwe and subsequently to South Africa later that year (at paras [3]-[9]).

²⁹⁵ Ibid at para [22].

to exercise these rights via his attorney's. The respondent confirmed the aforementioned as she received an email from his attorneys indicating that the husband wanted to pay maintenance for and have access to the child.²⁹⁶ The court held however that the second applicant would have exercised the rights of custody but for the child's removal.²⁹⁷ This case is thus an example of an unsuccessful attempt at raising the exception in Article 13(a).

In light therefore it is submitted that this exception is difficult to prove due to the fact that in order for the application to be litigated, the left-behind parent would have to have had custody rights which were not stagnant in terms of Article 5 in order for the application to be considered in the first instance. Thus this exception in terms of the South African law has not been of great assistance in preventing a child's return. Perhaps the Australian approach may be of more assistance here. The second defence/exception in terms of Article 13(a) shall now be discussed.

b) Article 13(a): Consent or acquiescence

[1] When this exception is raised, the court must consider whether in fact in terms of all the circumstances of the specific case, the left-behind parent had acquiesced or consented to the child's wrongful removal or retention.²⁹⁸ The concept of 'consent' precedes that of 'acquiescence' as consent normally occurs prior to the child's removal or retention, whereas acquiescence occurs after the child has been removed and is being retained.²⁹⁹ The consent must also relate either to the child's permanent removal or permanent retention³⁰⁰ and must be determined according to the facts of each case.³⁰¹ Consent and acquiescence are also able to be inferred from the conduct of the parties and can be either active or passive.³⁰² The evidence provided must therefore suggest positive consent as

²⁹⁶ Loc cit.

²⁹⁷ Loc cit.

²⁹⁸ Du Toit op cit (n25) 362; *Smith v Smith* supra (n53) at paras [18]-[20]. See also *Re H (Minors) (Abduction)* [1997] All ER 225 at 232-237D-G; *Re A (A Minor) (Abduction)* [1998] 1 FLR 365; *Thomson v Thomson* (1994) 119 DLR (4th) 253 ((1995) 34 ILM 1159). Section 39 of the Constitution of the Republic of South Africa, 1996 also allows consideration of foreign decisions in the interpretation of concepts and case law.

²⁹⁹ Hodson op cit (n73) 259; Hague Convention Chapter Advisory Committee op cit (n285) 13; Lowe, Everall & Nicholls op cit (n227) 315; *Family Advocate, Cape Town & another v Chirume aka Munyuki* supra (n294) at para [29].

³⁰⁰ Lowe, Everall & Nicholls op cit (n227) 309.

³⁰¹ Loc cit.

³⁰² Clark op cit (n2) at para [18]; *Central Authority (South Africa) v A* supra (n166) at para [26], referring to *Re AZ (A Minor) (CA)* [1993] 1 FLR 682 at 685, which stated: 'Acquiescence means acceptance, and it may be either active or passive. If it is active, it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights and consistent only with an acceptance of the *status quo*. If it is passive, it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act.'

having been given and ‘must be clear and unqualified.’³⁰³ The conduct of the consenting parent may also be inferred.³⁰⁴ In *Central Authority v H*³⁰⁵ the court referred to the judgment of the English case of *Re K (Abduction: Consent)* [1997] 2 FLR 212 (FD) which approved the view of *Re C (Abduction: Consent)* [1996] 1 FLR 414 (FD) where the court indicates that it was not necessary that the exact words ‘I consent’ be employed because it is possible to infer such consent from the left-behind parent’s conduct.³⁰⁶

Where consent has been given for the purposes of a holiday and the child’s departure is consented to, it has been held that if the child is then retained in that state or removed to another, this does not extinguish the earlier limited consent.³⁰⁷ The consent may however end for other reasons, e.g. where the abducting parent indicates that they will no longer be returning³⁰⁸ or where the left-behind parent is under the misguided impression that the child would be returning and thus gives consent based on this understanding. If consent is obtained in a fraudulent manner, there is a misunderstanding or the abducting parent deceives the left-behind parent or fails to disclose important information regarding the child’s departure, this will rarely result in valid consent having been obtained.³⁰⁹ In the South African case of *Family Advocate, Cape Town and Another v EM* the court referred to the English case of *In Re H and Others (Minors) (Abduction: Acquiescence)* [1997] 2 All ER 225 (HL) where it

³⁰³ *Family Advocate, Cape Town and Another v EM* supra (n245) at para [36]; *Central Authority v H* supra (n213) at para [20] referring to UK law; *Central Authority v B* supra (n200) at para [5]; Du Toit op cit (n25) 363; Heaton (2010) op cit (n4) 315; Hodson op cit (n73) 260; Buck (2005) op cit (n61) 142; Buck (2010) op cit (n61) 232.

³⁰⁴ Hodson op cit (n73) 260; Lowe, Everall & Nicholls op cit (n227) 310.

³⁰⁵ *Central Authority v H* supra (n213) concerns an appeal surrounding a child born in 2002, who had been brought by the respondent (his mother) to South Africa from the Netherlands in September 2003 (at para [1]). In June 2004 the applicant applied for the return of the minor child to the Netherlands (at para [2]). The *court a quo* made an order in June 2005 for an order of return of the child to the Netherlands (at para [3]). The parties were married in South Africa in 2000 and resided in the Netherlands and the minor child was born in the Netherlands in May 2002 (at para [5]). In September 2003 the mother and the child, with the father’s consent, went to South Africa for an extended holiday (at para [6]). However the respondent indicated that it was their joint intention to immigrate to South Africa and that it was agreed that she and the minor child would travel first to South Africa in 2003 and the father would follow later after winding up the family’s affairs in the Netherlands (at para [6]). However in January 2004, after the father stated he would only be in South Africa in March 2004, the respondent informed the father that she and the minor child would not be returning to the Netherlands but would remain permanently in South Africa. According to her, after discussions with the father, they had agreed that they would divorce and that the respondent and minor child would stay in South Africa (at para [7]). The father however argues that in December 2003 he asked the respondent when they would be returning and she stated she wanted to stay longer, however he realized then that she had no intention of returning and in February 2004 he approached the Dutch Central Authority (at para [8]). It was considered to be common cause that at the time the minor was wrongfully removed from the Netherlands, that he was habitually resident there and that both parents were exercising equal custody rights regarding the child at the time of the removal and retention (at para [9]). During April 2004 the Central Authority attempted to ensure the voluntary return of the minor child and the respondent initially was open to this (at para [10]).

³⁰⁶ *Central Authority v H* supra (n213) at para [20]; *Re C (Abduction: Consent)* [1996] 1 FLR 414 (FD) at 419.

³⁰⁷ *K v K (Abduction (No 1))* [2010] 1 FLR 1295 (FD) at para [69]; Section 39 of the Constitution of the Republic of South Africa, 1996 allows consideration of foreign cases; Clark op cit (n2) at para [18].

³⁰⁸ Clark op cit (n2) at para [18]; *K v K (Abduction (No 1))* supra (n307) at para [69]; Section 39 of the Constitution of the Republic of South Africa, 1996.

³⁰⁹ Hodson op cit (n73) 260; Lowe, Everall & Nicholls op cit (n227) 309.

was held that in considering Article 13, the true inquiry is simply whether the left-behind parent ‘had in fact consented to the continued presence of the child in the jurisdiction to which the child had been removed or had been retained.’³¹⁰ This case further held that consent is an important matter which is to be determined on a balance of probabilities with positive, clear and compelling evidence³¹¹ within South Africa.

[2] In determining acquiescence within South Africa, the case of *Senior Family Advocate, Cape Town v Houtman* determined that the court must examine the ‘outward conduct’ of the wronged parent and consequently, the ‘subjective intention of the wronged parent is a question of fact for the trial Judge to determine in all the circumstances of the case.’³¹² Acquiescence is concerned with the subjective state of mind of the left-behind parent and whether or not any positive action had been taken by that parent.³¹³

The case of *Smith v Smith* provides the following in regards to the proof of acquiescence:

‘There can be little doubt that the acquiescence referred to in article 13(a) involves an informed acceptance of the infringement of the wronged party’s rights. But that is not to say that acquiescence requires full knowledge of the precise nature of those rights and every detail of the guilty party’s conduct. What he or she should know is at least that the removal or retention of the child is unlawful under the Convention and that he or she is afforded a remedy against such unlawful conduct.’³¹⁴

Thus the left-behind parent should at least be aware of the fact that the child’s removal or retention is unlawful in terms of the Hague Convention and thus that they are provided with a remedy to this.³¹⁵ Article 13(a) also only requires that the person, who is seeking the relief, should have acquiesced.³¹⁶ If this is satisfied, the fact that at a subsequent point in time, the person/party changes their mind, this

³¹⁰ *Smith v Smith* supra (n53) at para [18]; *Family Advocate, Cape Town and Another v EM* supra (n245) at para [38].

³¹¹ *Family Advocate, Cape Town and Another v EM* supra (n245) at para [39] referring to *In Re H and Others (Minors) (Abduction: Acquiescence)* supra (n298).

³¹² *Senior Family Advocate, Cape Town v Houtman* supra (n52) at paras [17]-[18]; Du Toit op cit (n25) 362-363; Hodson op cit (n73) 259; Buck (2005) op cit (n61) 142; Clark op cit (n2) at para [18].

³¹³ *Family Advocate, Cape Town and Another v EM* supra (n245) at paras [36] & [38], in which the court followed the dicta in *In Re H (Minors) (Abduction: Acquiescence)* supra (n298); *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir, 1996) at 1070 and is also quoted in *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [17]. *Houtman* agrees with *Smith v Smith* supra (n53), at paras [18]-[19], which supports the view of *In Re H and Others (Minors) (Abduction: Acquiescence)* supra (n298) at 235e.

³¹⁴ *Smith v Smith* supra (n53) at paras [15]-[17]; Du Toit op cit (n25) 363; Heaton (2010) op cit (n4) 315; Clark op cit (n2) at para [18], referring to *Re A and Another (Minors) (Abduction: Acquiescence)* [1992] 1 All ER 929 (CA) at 940b; Hodson op cit (n73) 259.

³¹⁵ *Smith v Smith* supra (n53) at para [16].

³¹⁶ *Ibid* at para [17].

will not alter the situation.³¹⁷ The conduct or words of the left-behind parent must also lead the abducting parent unequivocally to believe that the left-behind parent was not going to demand the child's return through any assertion of their rights.³¹⁸

[3] The left-behind parent must also have full knowledge of the abducting parent's intention in choosing a new habitual residence in regards to the concepts of consent and acquiescence.³¹⁹ Consent or acquiescence may also not be assumed where the left-behind parent was in a state of emotional chaos, confusion and was thus unaware of any remedies available to them.³²⁰ There is an indication that the fact that the left-behind parent failed to look for the child expeditiously, could suggest acquiescence.³²¹ However, the case of *Family Advocate Port Elizabeth v Hide* is an example of immediate action dispelling the possibility of acquiescence.³²² It is therefore submitted that the South African courts should consider that a failure to act, as a result of being given the incorrect legal advice, which is then followed by immediate action on receiving the correct advice, should not be seen as acquiescence.³²³ Further, the courts should be careful in attaching too much weight to acquiescence which was given and then speedily withdrawn.³²⁴ This case further held that there is no justification for importing into Article 13(a) a distinction which is not evident within its words.³²⁵

[4] The case of *Chief Family Advocate and Another v G* rejected the exception of consent raised on the grounds that the respondent deceived the child's mother into believing that he and the child were going on holiday and would return.³²⁶ In considering whether the mother had acquiesced, the respondent told the court that the mother contacted him in South Africa and said that she felt it was

³¹⁷ Loc cit; Clark op cit (n2) at para [18]; Heaton (2010) op cit (n4) 315; Clark also refers to the fact that the USA have adopted a more stringent approach to the concept of acquiescence in terms of the Hague Convention in that they require 'an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.' (*Friedrich v Friedrich* supra (n313)); Du Toit op cit (n25) 363. In Australia it was stated that there must be 'clear and equivocal words or conduct' which will indicate acquiescence and there cannot be acquiescence if the parties are in a state of chaos or confusion: *Department of Health and Community Services, State Central Authority v Casse* (1995) FLC 92-629; F Bates 'Child Abduction: The Hague Convention and Australian Law – A specific overview' (1999) 32 *CILSA* 72.

³¹⁸ *Smith v Smith* supra (n53) at paras [18]-[19] referring to *Re H and Others (Minors)(Abduction: Acquiescence)* supra (n298) at 236f; *Family Advocate, Cape Town, and Another v EM* supra (n245) at para [38] referring to UK law; Clark op cit (n2) at para [18].

³¹⁹ Du Toit op cit (n25) 363.

³²⁰ Loc cit; *Chief Family Advocate and Another v G* supra (n35) at 614H-J.

³²¹ *Senior Family Advocate, Cape Town v Houtman* supra (n52) at paras [18]-[20]; Heaton (2010) op cit (n4) 315; *Chief Family Advocate and Another v G* supra (n35) at 614H-J.

³²² *Family Advocate Port Elizabeth v Hide* [2007] 3 All SA 248 (SE) at para [10].

³²³ Hodson op cit (n73) 259.

³²⁴ Loc cit.

³²⁵ *Smith v Smith* supra (n53) at para [18].

³²⁶ *Chief Family Advocate and Another v G* supra (n35) at 612C-D & H.

in the child's best interests for the child to stay there with father.³²⁷ In light of the objective evidence submitted, it was evident that the mother had not acquiesced and had taken steps to pursue abduction proceedings immediately.³²⁸ The court was thus of the opinion that the mother's emotional state and her timeous approach of attorneys indicated that she had fully applied her mind to the matter and thus the defence of acquiescence could not succeed.³²⁹ This case further indicates the following as to how acquiescence is determined: 'It is tested ... by whether a parent still retains the right to object should the other parent wish to affect rights relating to the care of the person of the child.'³³⁰

[5] Further the case of *Central Authority (South Africa) v A*³³¹ involved an unsuccessful acquiescence exception,³³² and this decision further makes the point that if the left-behind parent immediately seeks a remedy to prevent the child leaving the country, this indicates an awareness of their rights and probable remedies as well as the fact that they were not willing to give consent for the child to be removed.³³³ The case of *Central Authority v B*³³⁴ also involved an applicant who sought legal advice for the return of the child, from varying attorneys, of which none referred him to the Hague Convention³³⁵ as a remedy. Sometime after the abduction, and after having visited South Africa and having gained access to the child, the applicant reported the removal to the relevant Central Authority who much later sent a request to the Central Authority of South Africa to launch a return application.³³⁶

In regards to the above, it has been authoritatively provided that consent and acquiescence cannot be 'lightly inferred from a party's conduct. It concerns the state of mind of the person involved and only

³²⁷ Ibid at 613F-G.

³²⁸ Ibid at 614A-G.

³²⁹ Ibid at 614H-J.

³³⁰ Ibid at 610E-G. This is supported by *Family Advocate, Cape Town & another v Chirume aka Munyuki* supra (n294).

³³¹ *Central Authority (South Africa) v A* supra (n166), the facts being that the Applicant sought an order for the return of the 17 month old child to Australia in terms of the Hague Convention (at para [1]). The child was born to unmarried parents in Australia and was removed to South Africa by the mother (respondent) in March 2005 (at para [2]). This case dealt predominantly with the concept of habitual residence however the respondent raised the defence that since the father had not objected to the child's return to South Africa, that he had acquiesced to the minor's removal (at para [26]).

³³² Ibid at para [26].

³³³ Ibid at para [27].

³³⁴ *Central Authority v B* supra (n200) revolves around an application brought for the return of the minor child to the USA after being removed to South Africa by the respondent (her mother) in May 2006 (at para [1]). The respondent and the father were married in South Africa in December 2003 and moved back to the USA in 2004, the respondent however left their place of habitual residence in May 2006 and returned to South Africa with the minor child (at para [2]). The court in this case, although setting out the defence of Article 13(a) and its requirements, referred to the fact that the child was settled in the new environment and thus the court on this basis refused to order the child's return. The case was thus decided in terms of Article 12 (at paras [7]-[9]).

³³⁵ Ibid at para [3].

³³⁶ Loc cit.

conduct or expressions unequivocally consistent with consent or acquiescence would suffice.³³⁷ It was further suggested that such disputes surrounding consent and acquiescence were only able to be resolved through the hearing of oral evidence, however that this would delay the matter further and thus defeat the primary object of expeditious return in terms of the Hague Convention and thus the matter should only be decided on the papers before the court.³³⁸

[6] The case of *Family Advocate, Cape Town, and Another v EM*³³⁹ considered the concept of whether or not consent could be given through the left-behind parent's writing of a letter.³⁴⁰ It was held that the letter *in casu* merely allowed for easy travel and was not specifically addressed³⁴¹ and the father had also not instituted action immediately after being informed that the respondent and the child would not be returning and did not object unequivocally or protest to the aforementioned either.³⁴² The father also made arrangements with the respondent for the child's safe passage to visit the UK and also took no action to secure her presence in the UK while she was there during November-December 2007.³⁴³ Neither were objections made to the mother-in-law during the visit.³⁴⁴ Therefore it was this conduct that the respondent relied on as acquiescence and which lead her to believe that the father had consented to the child's removal and retention.³⁴⁵ However the case of *EM* also considered what foreign jurisdictions held herein:

‘Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.’³⁴⁶

³³⁷ Ibid at para [5].

³³⁸ Loc cit; *Central Authority v H* supra (n213) at para [21].

³³⁹ *Family Advocate, Cape Town, and Another v EM* supra (n245) revolved around a minor child, born in 2004 in the UK, who was brought to South Africa by the respondent (the mother) to visit her family, as the marriage to the child's father was in trouble (at paras [1] & [5]). The arrangements regarding the holiday tickets as well as where the respondent and child were going, were all performed with the consent of the father (second applicant) (at para [5]). While in South Africa, the respondent indicated to the father that she and the child would be remaining in South Africa permanently despite the fact that she had not sought or obtained the father's consent in this regard (at para [6]). However, in November 2007 the minor child travelled to the UK with her grandmother to visit the father and they both returned to South Africa in December 2007 (at para [7]). The grandmother experienced problems at the passport control points and at her request, the father wrote a letter to facilitate easy travel by stating that he gave permission for the minor child to travel with the grandmother to South Africa (at para [7]).

³⁴⁰ Ibid at paras [28] & [29].

³⁴¹ Ibid at para [31].

³⁴² Ibid at para [33].

³⁴³ Loc cit.

³⁴⁴ Loc cit.

³⁴⁵ Ibid at para [36].

³⁴⁶ *Family Advocate, Cape Town, and Another v EM* supra (n245) at para [37] e.g. *Friedrich v Friedrich* supra (n313).

Further the case of *Rovetto v Walter-Rovetto*³⁴⁷ also concerned a written letter, one of many, which indicated that the children should continue to reside with the respondent and in which the left-behind parent indicated how they were going to try to gain employment and make a life in South Africa. However, it was held that the actual subjective acquiescence had occurred as a result of the instilled belief in the mother that the left-behind parent was not going to pursue a return order.³⁴⁸ The court also found that the inquiries made by the left-behind parent with attorneys indicated that the left-behind parent was well aware of all their rights and thus his acquiescence was informed.³⁴⁹

[7] Thus the exception of acquiescence will fail if the left-behind parent does not make adequate and expeditious attempts to have the child returned because if no action is taken or the left-behind parent or party is not timeous herein, it has been held that this is not indicative of someone who is prepared to take all necessary steps to bring about a summary return and this is not in line with the Hague Conventions intentions as it is not a bargaining tool or threat.³⁵⁰

[T]he longer a child is allowed to remain unopposed in its new place of residence the greater the ties it will develop and the more integrated it will become. In such circumstances a summary return could merely replicate the deleterious removal. For this reason it can only be proper for the issue of return to be determined while having regard to what is in the child's best interests.³⁵¹

Therefore the failure to take expeditious steps will not ensure automatic return of the child in light of the above reasons. Thus it is submitted that the above discussion provides a clear description of how the South African courts apply Article 13(a). The exceptions which are available to the abducting parent therefore should not be lightly considered by the judicial or administrative authorities.

c) Article 13(b): Grave risk of physical or psychological harm or placement in an intolerable situation

[1] Article 13(b) provides:

³⁴⁷ *Rovetto v Walter-Rovetto* supra (n268) involved the removal of the children, by the mother, to South Africa during May 2000, without informing the appellant (at 1-2). The appellant on receiving this information informed all the relevant authorities immediately and throughout the proceedings the appellant had a mature and responsible attitude towards his children as well as the children's best interests before anything else (at 2). In July 2000 the appellant was served with Divorce proceedings, the appellant left South Africa late in July 2000, after visiting, and proceeded to implement a return application (at 3). Letters from the appellant indicated that he wanted to remedy the situation with the respondent and thus that he was clearly aware from July 2001 that the respondent had no intention of ever returning the US and was therefore attempting to arrange access rights to the children (at 4-6).

³⁴⁸ Ibid at 4-6.

³⁴⁹ Ibid at 7.

³⁵⁰ *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [18].

³⁵¹ Ibid at para [20].

‘Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested [s]tate is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

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.’

According to Du Toit, this exception, although the most litigated³⁵² is the least successful defence in terms of case law.³⁵³ However, according to Clark the defence/exception is most often successfully invoked despite a generally narrow and strict interpretation adopted in most jurisdictions.³⁵⁴ The aforementioned is due to the fact that the courts still find it necessary to consider the best interests of the child while also considering and giving affect to the Hague Convention’s objectives.³⁵⁵ The nature and extent of the limitation are considered to be mitigated by the consideration of the best interests of the child in applying Article 13.³⁵⁶ In light of this, parents also have a responsibility to their children to let the law resolve issues and to not resort to self-help measures.³⁵⁷ This is because these often increase the suffering of all parties involved and the Hague Convention recognizes the aforementioned through proceeding along the basis that the child’s best interests are normally served by returning the child to the jurisdiction of their habitual residence, however the Hague Convention makes provisions for instances where the aforementioned is not the case e.g. through the existence of Article 13.³⁵⁸

The Article 13(b) exception raises within itself three separate defences.³⁵⁹ The abducting parent merely has to prove any one of these three available exceptions³⁶⁰ in an attempt to prevent the order of return being granted. However, on closer inspection it seems that these three separate exceptions

³⁵² Du Toit op cit (n25) 363; *Family Advocate v B* 2007 (1) All SA 602 (SE) at paras [11] & [13]; *Chief Family Advocate v G* supra (n35) at 611J–612I; Lowe, Everall & Nicholls op cit (n227) 324; Nicholson op cit (n2) 235; Clarke op cit (n191) 586; Weideman & Robinson op cit (n5) 74-75; Nicholson in Davel op cit (n2) 239. This, from the sources, is due to the fact that the courts feel obligated to consider the principle of the child’s best interests while ensuring and giving effect to the objectives of the Hague Convention e.g. to return the abducted child.

³⁵³ Du Toit op cit (n25) 363.

³⁵⁴ Clark op cit (n2) at para [20]; Weideman & Robinson op cit (n5) 75; SALC op cit (n204) 1070. The SALC indicates that this narrow and strict approach ‘is necessarily correct as, not only is it in accordance with the original aims of the drafters it is also clear that, unless Article 13(b) fulfils its original purpose, that of a provision allowing for non-return in exceptional cases, it will destroy the effectiveness of the [Hague] Convention.’

³⁵⁵ Nicholson op cit (n2) 235. This has been fully discussed above in Chapter [1], at point [5].

³⁵⁶ *Sonderup v Tondelli* supra (n28) at para [33]; Section 28(2) of the Constitution of the Republic of South Africa, 1996.

³⁵⁷ SALC op cit (n204) 1067.

³⁵⁸ *Sonderup v Tondelli* supra (n28) at para [43].

³⁵⁹ Du Toit op cit (n25) 363; Nicholson op cit (n250) 250; Skelton & Carnelley op cit (n146) 280.

³⁶⁰ Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Du Toit op cit (n25) 363-364; *Secretary of Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* supra (n238) at para [39] confirmed that each aspect of the Article 13(b) defence is a separate exception from the others. Section 39 of the Constitution of the Republic of South Africa, 1996 allows for the consideration of foreign decisions.

can be raised and considered at the same time by the courts to assist in satisfying either of them. The individual facts³⁶¹ of each case will determine whether the exception is successful however, the establishment of the exception does not automatically determine that the child will be immediately returned as it merely provides the courts with a discretion to determine whether the child is to be returned or not.³⁶² This exception is determined on an objective basis.³⁶³ The grave risk and intolerability of a situation are also determined in regards to the harm the specific child would perhaps be exposed to and it cannot be successful merely on the grounds that the abducting parent refuses to return with the child.³⁶⁴

For ease of reference, the following categories of harm are not considered serious enough to prevent a child's return in terms of the Hague Convention.³⁶⁵ a court-ordered return, a dispute of custody or harm which is the natural result of the child's removal from their place of habitual residence. These types of harm are considered by the Hague Convention and are taken into account in terms of the remedies it provides.³⁶⁶

[2] In light of the above and in order to understand the application of Article 13(b) it must be noted that case law is the greatest source of information herein and therefore a detailed discussion of the relevant court decisions shall take place below.

[3] Firstly, the concept of 'grave risk' shall be defined. The Hague Convention in terms of its customary practice does not provide a definition of this term and therefore it has been presumed that the drafters intended for the courts to be able to interpret and develop the term while determining such matters.³⁶⁷ Different jurisdictions have also interpreted this exception in many ways in order to conform to the laws and principles which govern the respective states.³⁶⁸

³⁶¹ Nicholson op cit (n250) 250; Weideman & Robinson op cit (n5) 75.

³⁶² Nicholson op cit (n250) 250.

³⁶³ *WS v LS* 2000 (4) SA 104 (C) at 115E-F; Weideman & Robinson op cit (n5) 75; Du Toit op cit (n25) 364.

³⁶⁴ *Family Advocate, Cape Town & another v Chirume aka Munyuki* supra (n294) at para [36].

³⁶⁵ Du Toit op cit (n25) 364; Heaton (2010) op cit (n4) 316; Woodrow & Du Toit op cit (n3) at [17-18].

³⁶⁶ *Sonderup v Tondelli* supra (n28) at paras [45]-[46]; Du Toit op cit (n25) 364.

³⁶⁷ Weideman & Robinson op cit (n5) 75.

³⁶⁸ Loc cit.

Many South African cases have considered the concept and definition of ‘grave risk’.³⁶⁹ It has been determined that this exception is specifically focused on the risk of either physical or psychological harm that the individual child concerned would perhaps be exposed to if a return order was granted³⁷⁰ and thus harm of a general nature is not considered.³⁷¹ The South African courts have interpreted the meaning of ‘grave risk’ as that which would occur if the child was ordered to return to the requesting state and not the requesting parent.³⁷² Therefore the requirement of ‘grave risk’ was deliberately incorporated in order to increase the level of satisfaction from that of substantial harm to that of intensive harm.³⁷³ A relevant factor which may be considered as determining whether a risk of harm exists is therefore the conduct of the abducting parent in appropriate cases which may assist in determining the gravity of such harm.³⁷⁴

The case of *WL v LS* also held that the words ‘grave risk’ do not introduce an onus any greater than that which would ordinarily be applicable in other civil proceedings and therefore it only needs to be shown that there are serious and well-founded reasons as to why the child’s situation would be intolerable if a return order was granted.³⁷⁵

[4] Section 39 of the Constitution allows for the consideration of foreign case law and therefore in order to understand the South African definition and use of this exception, the approach of the English courts is briefly discussed as they are relied on by the South African authorities in determining parental abduction matters.³⁷⁶ The Bill of Rights herein is relevant as the court ordered

³⁶⁹ Clark op cit (n2) at para [20]; Heaton (2010) op cit (n4) 316. The South African cases which discuss the concept of grave risk are *Sonderup v Tondelli* supra (n28); *K v K* supra (n10); *WS v LS* supra (n363); *Chief Advocate and Another v G* supra (n35) and *Senior Family Advocate, Cape Town v Houtman* supra (n52). Other jurisdictions which have considered the interpretation of ‘grave risk’ are the UK and the USA: Clark op cit (n2) at para [20]. Examples of UK cases for further general reference are: *Re C (A Minor) (Abduction)* [1989] 1 FLR 401 (in this case the harm considered must be substantial); *Re A (A Minor) (Abduction)* supra (n298); *E v E (Child Abduction: Intolerable Situation)* [1998] 2 FLR 980; *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145; *Re W (Abduction: Domestic Violence)* [2005] 1 FLR 727; *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2007] EWHC 2807 (Fam); *Re M (Abduction: Child’s Objections)* [2007] 2 FLR 72. USA cases for general reference are: *Becker* 15 Fam LR (BNA) 1605 (NJ Super Ct 1989); *Tahan v Duauette* 259 NJ Super 328; 613 A 2d 486 (App Div 1992).

³⁷⁰ Clark op cit (n2) at para [20]; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [50]; Hodson op cit (n73) 261.

³⁷¹ Hodson op cit (n73) 261.

³⁷² Labuschagne op cit (n68) 283; Nicholson op cit (n2) 250. South Africa has in certain instances been considered as a type of state where the child would be at risk: RJ Levy ‘Memoir of an academic lawyer: Hague Convention theory confronts practice’ (1995) 29 (1) *Family Law Quarterly* 180–182.

³⁷³ Pérez-Vera op cit (n72) at para [116].

³⁷⁴ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [50]; Weideman & Robinson op cit (n5) 82.

³⁷⁵ *WL v LS* supra (n363) at 115E-F; Nicholson op cit (n250) 250; Weideman & Robinson op cit (n5) 75 fn31.

³⁷⁶ Weideman & Robinson op cit (n5) 92.

of return of a child into a potentially harmful situation may result in a violation of the best interests of the child standard in South Africa and this may therefore amount to a subsequent violation of the Bill of Rights. Traditionally the English courts have applied a narrow interpretation of this defence as they require clear and convincing evidence for it to be successful,³⁷⁷ e.g. *Re A (A Minor) (Abduction)* held that the exceptions under Article 13(b) required strict interpretation.³⁷⁸ Therefore in order to constitute a grave risk of physical or psychological harm, the risk must entail something more than an ordinary risk or something greater than that which would normally be expected when taking a child away from one parent.³⁷⁹ Thus the risk must be weighty and substantial, not merely trivial in order for the exception to succeed.³⁸⁰ It must also have significant results and effects on the child³⁸¹ and the proof of such harm must be through obvious and incontrovertible evidence.³⁸²

In regards to the above, there are many factors which are used in order to determine the existence and the gravity of the risk of harm to a specific child.³⁸³ ‘Harm’ has been described by the court in the case of *Chief Family Advocate v G* as having the following effects:

‘These are formative years and uprooting a child from an environment in which he has been brought up can leave indelible long term scars. A forced adjustment to another environment and then compelling the child to remain in that environment can create harm which, although not immediately apparent, can affect the child in the long term.’³⁸⁴

However, the court may include certain undertakings and conditions in order to eliminate any potential risk which a child may be exposed to if their return is ordered.³⁸⁵ In terms of the South African law, section 278(2) of the Children’s Act also imposes a duty on the courts to provide protective relief for a child, applicant or respondent prior to the making of an order for the child’s

³⁷⁷ Ibid at 75; CS Bruch ‘The unmet needs of domestic violence victims and their Children in Hague Child Abduction cases’ (2004-2005) 38 *Family Law Quarterly* 532.

³⁷⁸ Weideman & Robinson op cit (n5) 75.

³⁷⁹ Loc cit.

³⁸⁰ Ibid at 75–76.

³⁸¹ Clark op cit (n2) at para [20]. See generally *Re C (A Minor) (Abduction)* supra (n369); *B v B (Abduction)* [1993] 1 FLR 238; *Re L (Child Abduction: Psychological Harm)* [1993] 2 FLR 401; *N v N (Abduction: Article 13 Defence)* [1995] 1 FLR 107.

³⁸² Weideman & Robinson op cit (n5) 76; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at 143; Clark op cit (n2) at para [20].

³⁸³ Heaton (2010) op cit (n4) 316.

³⁸⁴ *Chief Family Advocate and Another v G* supra (n35) at 618G-H.

³⁸⁵ For further discussion see Weideman & Robinson op cit (n5) 86 & 89-90; Nicholson in Davel op cit (n2) 240; SALC op cit (n204) 1074 notes that ‘such action alone will not usually offer realistic protection. More is required, e.g. in terms of mirror orders, and more may not always be possible or available. In such cases, where protection cannot presently be guaranteed, courts should not flinch from refusing to return a child. This is the reason for the existence of Article 13(b) and the Convention, which is based on the premise that a child’s best interests are, in general, served by not being abducted, envisages situations which are outside of the normal.’

return and this can assist in protecting a child's best interests.³⁸⁶ The court in the case of *K v K* specified that such undertakings needed to be ordered and put into practice in order to ensure the child's safety.³⁸⁷

[5] *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* has held that Article 13(b) is specifically focused on the child in question and the risk of harm to which that child would be exposed if they were to be returned.³⁸⁸ It was further held that in evaluating the risk to which a child may be exposed, the abducting parent may not rely on their own unwillingness to take reasonable steps to protect themselves and the child as a relevant factor to the risk.³⁸⁹ The age of the child may also be a relevant factor in determining whether the exception is satisfied. However, no grounds exist to differentiate in principle on the basis of age or to be swayed by a version of the 'tender years' principle when the Hague Convention is applied.³⁹⁰

[6] The case of *Sonderup v Tondelli* emphasized that the exceptions to the rule of mandatory return are also intended to protect the welfare of children in extreme circumstances³⁹¹ and that this should occur without undermining the principles of the Hague Convention.³⁹² This case also considered the issue of domestic violence as it may play a role in mothers seeking protection by running to another country.³⁹³ The court, however, has held that where there is an established pattern of domestic violence, even if it is not directed at the child, a return order may place the child at a risk of harm as provided for in terms of Article 13.³⁹⁴ An established pattern of domestic violence may also indicate

³⁸⁶ Woodrow & Du Toit op cit (n3) at [17-7].

³⁸⁷ *K v K* supra (n10) at 7711J-712E.

³⁸⁸ *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* supra (n55) at 144B-C; Weideman & Robinson op cit (n5) 82.

³⁸⁹ *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* supra (n55) at 145C-E; Weideman & Robinson op cit (n5) 82.

³⁹⁰ *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* supra (n55) at 144F-G; Weideman & Robinson op cit (n5) 82.

³⁹¹ *Sonderup v Tondelli* supra (n28) at para [32].

³⁹² *Ibid* at para [33].

³⁹³ *Ibid* at para [34]: The concept of domestic violence shall however not be considered in detail within this study. However it has been held that our courts should not trivialise the impact of violence against women on children and families. The Constitutional Court quoted the following with approval from the case of *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC): 'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person.'

³⁹⁴ *Sonderup v Tondelli* supra (n28) at para [34]; *Family Advocate, Cape Town & another v Chirume aka Munyuki* supra (n294) at para [38].

that there may be a higher risk to the child.³⁹⁵ The mere existence of domestic violence is, however, not a ground for immediately refusing the child's return.³⁹⁶ Section 278(1) and (2) of the Children's Act allows the courts in such instances to request the requisite Central Authority to provide a report on the child's domestic circumstances prior to the abduction and before the order is made.³⁹⁷ Therefore this may be considered as a factor, if the risk satisfies the requisite criteria, which satisfies the exception.

Further the definition and purpose of the exception, in regards to the issue of domestic violence, is the following:

'The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.'³⁹⁸

In determining this defence the court must place in balance the desirability and interests of the child and the appropriate court retaining its jurisdiction, with the likelihood that the child's best interests would be undermined by the return order to the jurisdiction of habitual residence.³⁹⁹ The nature of the enquiry in terms of Article 13 has been described by the Constitutional Court as the following:

'An art 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.'⁴⁰⁰

Therefore in order for the exception to be satisfied, the harm which the child may be exposed to must be of a serious level and there must also be a heavy weight of risk of substantial not trivial harm, as well as a high level of severity, as the type of harm considered is that which is more than the mere uncertainty, anxiety and disruption which the return order may cause to the child.⁴⁰¹ The concept of

³⁹⁵ *Sonderup v Tondelli* supra (n28) at para [34]; Heaton (2010) op cit (n4) 316; Labuschagne op cit (n29) 244; Heaton (2007) op cit (n5) 913; Buck (2005) op cit (n61) 142.

³⁹⁶ *Family Advocate, Cape Town & another v Chirume aka Munyuki* supra (n294) at para [38].

³⁹⁷ Human op cit (n2) 1.2.

³⁹⁸ *Sonderup v Tondelli* supra (n28) at para [35].

³⁹⁹ Loc cit; Labuschagne op cit (n29) 244.

⁴⁰⁰ *Sonderup v Tondelli* supra (n28) at para [44].

⁴⁰¹ Nicholson op cit (n2) 250; Hodson op cit (n73) 261: According to Hodson the types of risks which may result in a successful Article 13(b) defence are those which relate to political persecution or terrorist attacks (according to Buck (2005) op cit (n61) 143, the level of harm of such situations should be assessed initially in order to determine whether the requirements of Article 13(b) would be satisfied, prior to the refusal of the order the return being made). This however has not been raised as a defence in terms of the present South African case law and shall thus be discussed under the Australian law in Chapter [3] of this study. The probable arrest or implementation of criminal proceedings against the abducting party if they were to return to the requesting state are not likely to amount to what is considered a grave risk of harm as a safe harbour order may be sought in this regard (see also *K v K* supra (n10) at 712E-F). In instances where the

‘grave’ classifies the risk and not the harm which is suffered⁴⁰² and with regards to an intolerable situation, the level of intolerability which the child may suffer as a result of being returned must also be very high and result in extreme reactions on behalf of the child.⁴⁰³ An ‘intolerable situation’ is likely to arise if the child would suffer grave risk of physical or psychological harm if they were ordered to return and therefore it is submitted that this is why no specific definition of what is an intolerable situation is provided.

[7] The Constitutional Court held, in light of the above, that the courts in South Africa should follow the stringent tests which the courts of other countries have set out in determining when Article 13(b) will succeed.⁴⁰⁴ Therefore a restrictive and narrow interpretation of Article 13(b) should be adhered to in order to prevent an Article 13(b) enquiry becoming a substitution for the determination of a child’s best interests.⁴⁰⁵ The aforementioned is because this exception was not intended to be available as an opportunity for defendant’s to litigate or re-litigate a child’s best interests after abduction.⁴⁰⁶ However, it must be noted that in terms of *Central Authority of the Republic of South Africa and Another v LG*, the South African courts are still compelled to place particular emphasis on the best interests of the child, not only because of their role as the upper guardians of all minors but also because of the provisions of the Constitution.⁴⁰⁷ A narrow and strict interpretation also prevents the undermining of the Hague Conventions prompt return objective.⁴⁰⁸

physical or psychological harm are weighted with the risk of the psychological harm of no return and both the risks are substantial, then the court should give due weight to the primary purpose of the child’s swift return in terms of the Hague Convention. *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [32] referring to *Re A (A Minor) (Abduction)* supra (n298) and *Thomson v Thomson* supra (n298).

⁴⁰² Lowe, Everall & Nicholls op cit (n227) 329.

⁴⁰³ *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [22]; Nicholson op cit (n2) 250-251; *B v B (Abduction)* supra (n381); *Re F (Minor: Abduction: Rights of Custody Abroad)* [1995] 3 All ER 641 (CA).

⁴⁰⁴ *Sonderup v Tondelli* supra (n28) at para [44].

⁴⁰⁵ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [31]; *K v K* supra (n10) at 707C; *Pennello v Pennello* supra (n55) at 105D; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [22]; Nicholson op cit (n2) 235. See generally *C v C (Minor: Abduction: Rights of Custody Abroad)* supra (n147); *B v B (Abduction: Custody Rights)* supra (n381); Silberman op cit (n17) 9.

⁴⁰⁶ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at para [31]; Nicholson op cit (n2) 235.

⁴⁰⁷ *Central Authority of the Republic of South Africa and Another v LG* supra (n52) at the ‘Flynote’ & 392C-F where the court referred to the case of *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [23] & section 28(2) of the Constitution of the Republic of South Africa, 1996: “‘A child’s best interests are of paramount importance in every matter concerning the child ...’” The drafters of the Convention have made provision for the reference to the law of independent states with the insertion of art 20, which states that: The return of the child under the provisions of art 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.” *Chief Family Advocate and Another v G* supra (n35) at 618D.

⁴⁰⁸ *Chief Family Advocate and Another v G* supra (n35) at 611I-612A; *Sonderup v Tondelli* supra (n28) at para [32]; Nicholson op cit (n2) 235.

The case of *Sonderup v Tondelli* is however an example of an unsuccessful Article 13(b) defence⁴⁰⁹ as the risk of harm suggested was centred around that associated with the child's removal and possible return during a custody dispute. However, it was still held that all abducted children are subjected to and are likely to suffer this harm and as such, the Hague Convention has taken this into account through the remedy it provides.⁴¹⁰ The aforementioned is considered to be obvious as generally there is some level of psychological harm which is always inherent in child abductions.⁴¹¹ The court also indicated that there was insufficient evidence to support an Article 13(b) exception as there were no allegations that the father had ever abused the child in any way⁴¹² as well as the fact that the child's needs could adequately be catered for in the requesting state⁴¹³ and the court could make an order satisfying the mothers concerns of return through the ordering of undertakings.⁴¹⁴

[8] Further considerations which can be taken into account when determining whether an order for return should be granted are the state of the health of the parents, their physical and emotional ability to exercise their responsibilities of parenthood, as well as their respective longevity⁴¹⁵ and marital history.⁴¹⁶ The contemporary society may also have an effect on the respective roles which parents are expected to play in a child's life, as these may vary in different jurisdictions⁴¹⁷ and this may also be another factor to be considered.

[9] The *court a quo* in the case of *Pennello v Pennello*⁴¹⁸ emphasized that a 'robust approach' should be adopted in dealing with applications in terms of the Hague Convention as well as towards the exceptions raised, in order to ensure that such matters are dealt with expeditiously.⁴¹⁹ This case also attempted to define the concepts of 'harm' or 'grave risk'.⁴²⁰ The court suggested that the type of risk contemplated in terms of the exception could have two possible sources: firstly, it could be a risk

⁴⁰⁹ *Sonderup v Tondelli* supra (n28) at para [46].

⁴¹⁰ Loc cit; Buck (2005) op cit (n61) 142.

⁴¹¹ *Chief Family Advocate and Another v G* supra (n35) at 618A-C.

⁴¹² *Sonderup v Tondelli* supra (n28) at para [47]; Heaton (2007) op cit (n5) 913.

⁴¹³ *Sonderup v Tondelli* supra (n28) at para [47].

⁴¹⁴ Loc cit.

⁴¹⁵ *Chief Family Advocate and Another v G* supra (n35) at 619A.

⁴¹⁶ Ibid at 618H-J.

⁴¹⁷ Ibid at 619A-B.

⁴¹⁸ *Pennello v Pennello* supra (n55): The facts herein were that the applicant applied for an order of return in terms of Article 12 of the Hague Convention directing the respondent to return the minor child (born in May 2001) to New Jersey, USA (the child's habitual residence) (at 105A-B). The respondent removed the child from the USA during September 2002 and brought her to KwaZulu Natal, South Africa (at 105B-C).

⁴¹⁹ Ibid at 111B-C.

⁴²⁰ Ibid at 111G-H.

which emerges as a matter of probability from an assessment of the affidavits⁴²¹ and secondly, it could refer to a risk which may be associated with the rejection of the respondent's claims without the benefit of the claims having been tested at a hearing of *viva voce* evidence.⁴²² The court in considering whether to return a child should also be alert to the consequences which may result if the respondent's evidence is true in regards to the possibility of the child being exposed to grave risk.⁴²³

The court held that as stipulated in the Preamble of the Hague Convention, which states that the child's interests are of paramount importance, South Africa could not accept the suggestion that the principle of international comity should outweigh the child's interests.⁴²⁴ It further held that an abducting parent should be unable to rely on a situation which they created in order to prevent the court ordering the child's return – however, the SCA indicated that the court should have considered the question of Article 13(b) from the view of the specific child and the harm that child would be exposed to and not that of the parent, although this may be considered as a contributing factor.⁴²⁵

The court in the case of *Pennello v Pennello* also relied on a report which stated that the child would be exposed to 'severe trauma' and 'chronic interpersonal difficulties' if she was separated from her mother at that stage of her life, in refusing the child's return.⁴²⁶ Another question which required answering further rested on whether Article 13(b) would be satisfied if the child's mother was to accompany the child, due to the fact that there had been violence between the parents over the child in public, where the police were called and further that the applicant had no intention to reconcile.⁴²⁷ The *court a quo* held that there was a grave risk which would arise from the aforementioned and as a result of the reservations expressed by the report, the potential risk of harm to the child was considered to be far more serious than that which a child in the ordinary course of divorce proceedings would endure.⁴²⁸ The court therefore did not order the child's return.⁴²⁹

⁴²¹ Ibid at 111H.

⁴²² Ibid at 111H-I.

⁴²³ Ibid at 111I-112A.

⁴²⁴ Ibid at 113B-D.

⁴²⁵ Ibid at 113D-E; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55) at paras [50], [52] & [54]; *Central Authority v H* supra (n213) at paras [16] & [18]; Heaton (2010) op cit (n4) 316; *TB v JB (Abduction: Grave Risk of Harm)* (2001) 2 FCR 497 (CA).

⁴²⁶ *Pennello v Pennello* supra (n55) at 113H-114C.

⁴²⁷ Ibid at 116A-F.

⁴²⁸ Ibid at 116G-H.

⁴²⁹ Ibid at 116H-I.

[10] The appeal decision in *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)*⁴³⁰ had to determine whether Article 13(b) applied and thus whether it should prevent the child's return.⁴³¹ The court found that the respondent had failed to prove the requirements of Article 13(b) and thus upheld the appeal.⁴³² The SCA referred to the courts in England, Canada, USA and Australia who have emphasized that the threshold which needs to be crossed is raised in terms of Article 13(b) to a high and difficult one to satisfy as it must be a grave and serious risk and the court's must ensure that the wrongdoer does not benefit from their own wrongdoing as they should not be able to rely on a situation which they created.⁴³³

Subsequently the SCA held that the *court a quo* had misinterpreted the objectives of the Hague Convention as well as misunderstood the English case of *C v C*⁴³⁴ in regards to the statement made by the full court that the principle of international comity should not be accepted as outweighing the child's best interests. This was considered to have been misunderstood as the purpose and scope of the Hague Convention, whose basic premise in terms of international comity is the policy of prompt return, is to protect the interests of the child generally by reversing the ill-effects of the wrongful removal or retention as quickly as possible and through deterring wrongful removals and retentions in the first place.⁴³⁵

The SCA further agreed that the following approach of the *court a quo* was also questionable as the child's age may in certain circumstances be one of the factors which is relevant to the determination of whether a court ordered return would expose the child to a grave risk of harm or place them in an intolerable situation. However, there is no basis to differentiate in principle on the basis of age or to be swayed by some kind of 'tender years' principle in the application of the Hague Convention.⁴³⁶ The court expressed concern in regards to the appropriateness of a court to engage in speculation on the possible outcome of a custody dispute or application to relocate which would be heard in the child's state of habitual residence.⁴³⁷

⁴³⁰ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n55).

⁴³¹ Ibid at para [24].

⁴³² Ibid at 'Headnote' at 122G-H.

⁴³³ Ibid at para [33]), referring to *Sonderup v Tondelli* supra (n28).

⁴³⁴ Ibid at para [44].

⁴³⁵ Ibid at para [48].

⁴³⁶ Ibid at para [52].

⁴³⁷ Loc cit.

The SCA also held that the court must differentiate between the role it plays in terms of the Hague Convention and that which it plays in determining the issues of care and contact.⁴³⁸ This must be done to ensure that the proceedings in terms of the Hague Convention are not converted into care and contact proceedings which are solely determined according to the best interests of the child.⁴³⁹ In regards to the best interests principle it has been indicated that it is not without limitation as the purpose of the Hague Convention is to encourage comity between state parties as well as to facilitate co-operation in child abduction cases, as confirmed in *Sonderup v Tondelli* which held that these purposes are important and consistent with the values endorsed in an open and democratic society.⁴⁴⁰ Thus it would be contrary to the intention and terms of the Hague Convention if a court hearing an application under the Hague Convention allowed the proceedings to be converted into a custody application.⁴⁴¹

Furthermore, the risk to the child should be determined on the basis that the parent who abducted the child will take all reasonable steps to protect themselves and the child.⁴⁴² Thus it is reasonable to expect the abducting parent to appropriately make use of all the judicial and welfare machinery available to protect them in the requesting state.⁴⁴³

[11] The case of *Family Advocate v B*⁴⁴⁴ found that the allegations of domestic violence were serious enough that the mother had to leave the home to reside elsewhere and therefore the court considered reports and the child's view and concluded that returning the child would place them in an intolerable situation,⁴⁴⁵ as although the likelihood of physical harm was not evident towards the child, the psychological harm was.⁴⁴⁶ The psychological harm considered was that if the respondent were to return to England with the child, she would immediately be arrested and the child would be placed in some form of social institution pending the outcome of the litigation and thus would be separated from the mother as well as all those who nurtured him/her, and the anxiety involved in this would be devastating to the child.⁴⁴⁷ The court held that the psychological harm that the child would

⁴³⁸ Heaton (2010) op cit (n4) 316. Previously 'custody' and 'access': Section 1 of the Children's Act 38 of 2005.

⁴³⁹ *Sonderup v Tondelli* supra (n28) at para [28]; *Senior Family Advocate, Cape Town v Houtman* supra (n52) at paras [24]-[25]; Heaton (2010) op cit (n4) 316.

⁴⁴⁰ *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [24].

⁴⁴¹ *Ibid* at para [25].

⁴⁴² Heaton (2010) op cit (n4) 316.

⁴⁴³ *Loc cit*.

⁴⁴⁴ *Family Advocate v B* supra (n352).

⁴⁴⁵ Heaton (2007) op cit (n5) 911-912; Heaton (2010) op cit (n4) 316-317.

⁴⁴⁶ *Family Advocate v B* supra (n352) at para [13].

⁴⁴⁷ *Loc cit*.

suffer would be immeasurable and the child would be placed in an intolerable situation which would certainly not be in their best interests.⁴⁴⁸ Thus the order for return was not granted as a result of the success of Article 13(b).⁴⁴⁹

[12] *Family Advocate Port Elizabeth v Hide*⁴⁵⁰ considered the allegation that there was a ‘stormy’ relationship between the parents and the abducting parent alleged there was physical violence as well as instances of verbal and psychological abuse in the presence of the minor child and that the father had been using drugs.⁴⁵¹ The court however held that the instances of alleged abuse on the two instances described (which included a kick to the respondent’s shin and the pushing of her)⁴⁵² as well as the verbal abuse, were not of such a serious nature that the child would be exposed to harm if ordered to return.⁴⁵³ The requirements for the degree of harm set out in *Sonderup v Tondelli* had not been established in this case and thus the defence was not successful.⁴⁵⁴ The court ordered the child’s return but also put in place undertakings which included an interdict against the father to not assault, threaten, harass or abuse the respondent.⁴⁵⁵ Thus this case is an example of the potential undertakings a court can attach to their order to protect the child, even if it is found that there is an insufficient threat of grave risk otherwise.

[13] The case of *WS v LS* considered the meaning of the word ‘otherwise’, in that a child could ‘otherwise’ be placed in an intolerable situation and the learned judge indicated that this meant that the intolerability of the situation did not have to be based on the proof of physical or psychological harm in order for the risk to exist.⁴⁵⁶ It was further held herein that the concept of grave risk also meant that there needed to be a serious or well-founded reason as to why the child’s situation to which they would be returned would be considered intolerable.⁴⁵⁷ The court also held that it would be intolerable for a very young child to be separated from its mother, although the mother could perhaps return with the child.⁴⁵⁸ The judge herein also referred to the English courts decision that a high level of intolerability and grave risk was required, and held that this test was not required in

⁴⁴⁸ Loc cit.

⁴⁴⁹ Ibid at para [15].

⁴⁵⁰ *Family Advocate Port Elizabeth v Hide* supra (n322).

⁴⁵¹ Ibid at para [12]; Heaton (2007) op cit (n5) 912.

⁴⁵² *Family Advocate Port Elizabeth v Hide* supra (n322) at para [13].

⁴⁵³ Ibid at para [14].

⁴⁵⁴ Loc cit; Heaton (2007) op cit (n5) 912.

⁴⁵⁵ *Family Advocate Port Elizabeth v Hide* supra (n322) at para [17] at 2.7; Heaton (2007) op cit (n5) 912.

⁴⁵⁶ *WS v LS* op cit (n363) at 109F-G.

⁴⁵⁷ Ibid at 112I–113A.

⁴⁵⁸ Ibid at 113B.

South Africa due to the existence of the Bill of Rights.⁴⁵⁹ This case however has not been taken on appeal although it is the only case so far which determines the aforementioned and thus suggests that the concept of separation at such a young age is able to satisfy the requirements of Article 13(b).

[14] The following, it is suggested, are instances in which an intolerable situation may arise if the order of return was made and there was a possibility that the issue of custody would only be determined after a period of 12 months. However, a high degree of possibility herein must be evident as hardship, discomfort and the application of religious laws do not apply in determining this and thus intolerability must relate to the child and not the parent.⁴⁶⁰ The lack of state benefits on the return of the child is not a sufficient ground to refuse the child's return. However, if this would render the abducting parent or the child destitute on their return, it could be considered as creating an intolerable situation.⁴⁶¹ It has been rejected that the possible custody decision in favour of the abducting parent would place the child in an intolerable situation, due to the fact that the Hague Convention is not concerned with the ultimate best interests of the child, as its function is merely to support the return order mechanism so that the state of habitual residence can determine the custody issue on the merits of the case.⁴⁶²

[15] The following are also suggestions as to instances which are not considered to satisfy the requirements of Article 13(b). For instance, the psychological harm suffered by the parent cannot be relied upon when determining the child's psychological harm.⁴⁶³ It has also been suggested that an improvement to Article 13(b) would occur if the court ordered the return of the child to the custody of a third party in the state of the child's habitual residence⁴⁶⁴ as the courts would then be able to determine whether the child's return to the left-behind parent or care-giver would be possible, or whether the custody order should be altered.⁴⁶⁵ This would therefore discourage abducting parents as they would then have to explain their actions before the court and would not be afforded the

⁴⁵⁹ Ibid at 113G-H.

⁴⁶⁰ Hodson op cit (n73) 262.

⁴⁶¹ Loc cit.

⁴⁶² Buck (2005) op cit (n61) 143.

⁴⁶³ Clark op cit (n2) at para [20]; *Re S (Abduction: Custody Rights)* [2002] 2 FLR 815.

⁴⁶⁴ Nicholson op cit (n2) 235.

⁴⁶⁵ Ibid at 235–236; BJ Shirman 'International treatment of child abduction and the 1980 Hague Convention' (1991) 15 *Suffolk Transnational Law Journal* 218-219.

opportunity of the advantage of judicial discretion in regards to the child's best interests, despite the increased costs and dragging of procedures and movement from court to court.⁴⁶⁶

The application at this point seems subjective to each court which hears the application because although the criteria is objective, the application thereof seems to be subjective according to the court's considerations of the evidence of such harm placed before it. Once again it should be acknowledged that in each instance of child abduction, a level of psychological harm exists. However, more than this mere level of harm must be present to satisfy the exception.⁴⁶⁷

[16] The court in the case of *Senior Family Advocate, Cape Town v Houtman* also discussed Article 13(b)'s application and its interpretation by the South African courts.⁴⁶⁸ However contrary to the strict and narrow interpretation of the English courts, the judge pointed out two important considerations which favoured a much wider approach to the defence of grave risk.⁴⁶⁹ The South African courts are therefore compelled to place a particular emphasis on the best interests of the child, not only as a result of the fact that they are the upper guardians of all minors⁴⁷⁰ but also due to the provision of the best interests of the child in the Constitution and the ever increasing occurrence that the abducting parent is the primary caretaker of the child.⁴⁷¹ The aforementioned impacts on the question of the best interests of the abducted child because the primary caretaker is the parent who usually takes care of the child and provides for their basic needs and thus with whom the child's main securities lie.⁴⁷² The court further held: 'It is clear that the exceptions are a vital part of the Convention and have been inserted to permit the circumstances of children to be taken into account in each individual situation.'⁴⁷³ It must be noted that the best interests principle is not without limitation and the purpose of the Hague Convention must still be protected and upheld.⁴⁷⁴ This decision was upheld by *Sonderup v Tondelli*.⁴⁷⁵

⁴⁶⁶ Nicholson op cit (n2) 235: ES Horstmeyer 'The Hague Convention on the Civil Aspects of International Child Abduction: an analysis of *Tehan* and *Viragh* and their impact on its efficacy' (1994) 33 *University of Louisville Journal of Family Law* 133.

⁴⁶⁷ Buck (2005) op cit (n61) 142.

⁴⁶⁸ Weideman & Robinson op cit (n5) 85.

⁴⁶⁹ Loc cit.

⁴⁷⁰ Loc cit; Du Toit, op cit (n25) 371, indicates instances where the Constitutional Court has appointed a *curator ad litem* to protect the child's best interests in matters concerning them e.g. *S v M (Centre for Child Law as Amicus Curiae)* supra (n242).

⁴⁷¹ Weideman & Robinson op cit (n5) 85.

⁴⁷² Loc cit. The court in the case of *Houtman* (supra (n52)) refers to the case of *TB v JB (Abduction: Grave Risk of Harm)* supra (n425) at 43 in this regard.

⁴⁷³ *Senior Family Advocate, Cape Town v Houtman* supra (n52) at 285I-J; Weideman & Robinson op cit (n5) 85.

⁴⁷⁴ *Senior Family Advocate, Cape Town v Houtman* supra (n52) at 287B-C; Weideman & Robinson op cit (n5) 85.

⁴⁷⁵ Weideman & Robinson op cit (n5) 85-86.

[17] The case of *Central Authority of the Republic of South Africa and Another v LG* also supports the decision of grave risk of psychological harm existing where a child may be returned to a country where they have no proper emotional support or even a close relationship with the left-behind parent.⁴⁷⁶

Thus in light of the aforementioned, the final exception in terms of Article 13 shall be considered below.

d) Article 13: The child's objections

[1] The final exception within Article 13 states:

‘The judicial and 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.’

Therefore the courts allow the child an opportunity to interpret their own interests.⁴⁷⁷ This exception/defence has been of interest in the international sphere as it touches upon the extent to which a child's autonomy rights should be respected.⁴⁷⁸ This exception however does not form a specifically numbered exception in terms of Article 13 however a large amount of case law accepts that this defence is a separate exception to the rule of mandatory return.⁴⁷⁹

[2] In terms of South African law, the child's right to participate in legal proceedings, or to be assigned a separate legal representative, was initially considered in section 6(4) of the Divorce Act 70 of 1979.⁴⁸⁰ After the ratification of the UNCRC as well as the implementation of the Constitution, section 8A was included in the Child Care Act 74 of 1983⁴⁸¹ which provided the guidelines for

⁴⁷⁶ *Central Authority of the Republic of South Africa and Another v LG* supra (n52) at 394I-J.

⁴⁷⁷ Pérez-Vera op cit (n72) at para [30]. The consideration of this possibility however only becomes available as a result of the abducting parent raising it as an exception (SALC op cit (n204) 1075).

⁴⁷⁸ Buck (2010) op cit (n61) 235.

⁴⁷⁹ Du Toit op cit (n25) 365. The Scottish courts have considered the child's objection as related to the concept of Article 13(b) in that if the child objects so vehemently that it would cause the child physical or psychological harm or place them in an intolerable situation if they were to be ordered to return, then the defence would succeed. However, this has been rejected in English cases, such as *Re S (A Minor) (Abduction: Custody Rights)* [1993] 2 All ER 683 and *Re T (Children)* [2000] EWCA Civ 133 (18 April 2000).

⁴⁸⁰ C Du Toit 'Legal representation of children' in T Boezaart *Child Law in South Africa* (2009) 93; Woodrow & Du Toit op cit (n3) at [17-19]-[17-21]; Skelton & Carnelley op cit (n146) 280.

⁴⁸¹ Du Toit op cit (n480) 93.

appointing a child's legal representative however; it has subsequently been repealed by the Children's Act.⁴⁸²

In terms of International law, the child's right to participate in every matter concerning them is evident in the UNCRC as well as in the African Charter on the Rights and Welfare of the Child.⁴⁸³ Participation of children has been recognized by the UNCRC as a key principle and it recognizes that children are potentially autonomous individuals who possess fundamental human rights, views and feelings regarding situations pertaining to them.⁴⁸⁴

In South Africa, section 28(1)(h) of the Constitution provides that every child has a right to have a legal practitioner assigned by the state, at the state's expense, in all civil matters affecting the child if a substantial injustice might otherwise occur.⁴⁸⁵ Although this section only refers to a child's right to a legal practitioner, it has been interpreted by the Constitutional Court, in conjunction with international law, to give effect to the child's general right to participate.⁴⁸⁶ It has also been

⁴⁸² Loc cit; Section 10 of the Children's Act 38 of 2005; D Kassan 'Children's right to legal representation in divorce proceedings' in J Sloth-Nielsen & Z Du Toit (Eds) *Trials and Tribulations and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 229.

⁴⁸³ Du Toit op cit (n480) 94. Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996 has as a requirement when interpreting the Bill of Rights that a court should consider international law and in terms of section 233, when interpreting legislation, that a court must prefer any reasonable interpretation of the legislation which is considered to be consistent with international law. Article 12(2) of the UNCRC expressly recognises the ability of a child to express their views directly or through a representative: JM Kruger 'State intervention and child protection measures in Scotland – lessons for South Africa' (2006) 39 *CILSA* 519; T Davel 'General principles' in CJ Davel & AM Skelton (Eds) *Commentary on the Children's Act* (Loose leaf) Revision Service 1 (2007) at 2-12; Kruger op cit (n69) 36.

⁴⁸⁴ Du Toit op cit (n480) 94-95; Article 12 of the UNCRC entrenches the child's right to express their views in matters which affect them and in terms of Article 12(2) there is an obligation on the states to provide the child to participate in the formal proceedings and express their views. See also A Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 219-220; G Van Bueren *The International Law on the Rights of the Child* (1995) 137. Article 4(2), read with Article 7, of the African Charter on the Rights and Welfare of the Child guarantees the right of children to be heard in all judicial and administrative proceedings: Davel op cit (n483) 2-14. However, no obligation exists in such return applications for the court to ascertain the child's views if the defence is not raised (SALC op cit (n204) 1078). Without this obligation it is suggested that this defence becomes quite hollow: M Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria in SALC op cit (n204) 1078.

⁴⁸⁵ Du Toit op cit (n480) 96; Du Toit op cit (n25) 367; Section 279 of the Children's Act 38 of 2005 provides the same: *Central Authority v MV (LS Intervening)* supra (n48) at para [13]; Heaton (2010) op cit (n4) 168. In South Africa the issue of separate legal representation and the child's objections are advanced by the Children's Act 38 of 2005 and the Constitution of the Republic of South Africa, 1996: P Nyachowe 'Stealing children and the search for applicable law' (May 2009) *Without Prejudice* 30-32.

⁴⁸⁶ Du Toit op cit (n480) 96. The Constitutional Court in *Du Toit and Another v Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) saw the court appoint a *curator ad litem* in order to protect the interests of the child. Protecting a child's interests in matters concerning the child is of paramount importance and is evident in further cases before the courts.

interpreted to mean that the child's right to legal representation is separate to that of their parents.⁴⁸⁷ The importance in granting the child separate legal representation is that the child has a specific point of view, although it may be aligned with the abducting parent, it should still be considered independently thereof.⁴⁸⁸ Section 10 of the Children's Act also affords every child who is of such an age, maturity and stage of development to be able to participate in any matter concerning them. This is a right to participate in an appropriate way and the court must have due consideration to their views and thus whether this section is complied with.⁴⁸⁹ In regards to the South African law, the child is able to participate in matters concerning them if the aforementioned is satisfied or they are entitled to be separately represented.⁴⁹⁰ South African courts must also determine this issue in light of section 278(3) of the Children's Act.⁴⁹¹

Section 278(3) of the Children's Act provides that the court must provide the child with an opportunity to raise an objection to the return and must also give weight to such objections.⁴⁹² Section 279 of the Children's Act subsequently provides a mechanism which ensures that the child's views are placed before the court and it does this through stating that a legal representative must be appointed for the child in all Hague Convention applications.⁴⁹³ The impact of the provisions in terms of the Constitution and the Children's Act are that a stronger duty is placed upon the South African courts in considering the child's views and objections than that imposed by the Hague Convention.⁴⁹⁴

⁴⁸⁷ Du Toit op cit (n25) 366; Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996; M Carnelley 'The right to legal representation at State expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia' (2010) *Obiter* 638-639. See for example *Soller NO v G and Another* 2003 (5) SA 430 (W); *Central Authority v De Wet and Another* case number 2028/2006 (WLD) (unreported to date).

⁴⁸⁸ Du Toit op cit (n25) 367; *Re L (A Minor) (Abduction: Jurisdiction)* [2002] WLR 3208 at para [40].

⁴⁸⁹ Heaton (2010) op cit (n4) 168; Davel op cit (n483) 2-12 & 2-14: Section 10 of the Children's Act 38 of 2005 incorporated Article 12(1) of the UNCRC into the domestic law of South Africa; Carnelley op cit (n487) 638. Section 10 of the Children's Act 38 of 2005 and section 28(1)(h) of the Constitution of the Republic of South Africa, 1996 confirms that the South African courts must take into consideration the right of the child to be heard in all matters affecting them as well as their right to separate legal representation (Carnelley at 648).

⁴⁹⁰ Davel op cit (n483) 2-13; Article 12(2) of the UNCRC. Participation refers to all the rules which allow a child to be heard directly without an intermediary. Representation indicates the rules which allow children to instruct attorneys, seek legal advice or have other forms of adult representation in judicial hearings: L Edwards 'Hearing the voice of the Child: Notes from the Scottish experience' in CJ Davel (ed) *Children's Rights in a Transitional Society* (1999) 39.

⁴⁹¹ Woodrow & Du Toit op cit (n3) at [17-21]; Du Toit op cit (n25) 367.

⁴⁹² Du Toit op cit (n25) 366; Woodrow & Du Toit op cit (n3) at [17-21]; Skelton & Carnelley op cit (n146) 280.

⁴⁹³ Du Toit op cit (n25) 366; Woodrow & Du Toit op cit (n3) at [17-21], which also states that a legal representative must represent the child in every matter in terms of the Hague Convention, subject to section 55 of the Children's Act 38 of 2005.

⁴⁹⁴ Woodrow & Du Toit op cit (n3) at [17-19]-[17-21]; Skelton & Carnelley op cit (n146) 280-281.

The case of *Central Authority v MV (LS Intervening)* refers to section 278(3) of the Children's Act which provides that a court must, in considering an application for the return of the child, ensure the child has an opportunity to raise an objection to being returned and in allowing this they must give due weight to that objection through taking account of the child's age and maturity.⁴⁹⁵ Article 13 requires, along with section 10 of the Children's Act, that the court must give due consideration to the views expressed by the child and allow it to participate with due regard to the child's age, maturity and stage of development.⁴⁹⁶

[3] In terms of the South African case law there have only been three reported cases in which this exception was mentioned, these being: *Chief Family Advocate and Another v G*; *Central Authority v B* and *Central Authority v MV (LS Intervening)*.⁴⁹⁷ Despite the lack of case law regarding this defence in terms of the South African law, the guidelines have been created regarding the respect of the child's view in divorce, care and contact matters.⁴⁹⁸ International case law has also established several principles regarding the child's objections and these have also been consistently applied in foreign jurisdictions.⁴⁹⁹

[4] In the case of *Family Advocate v B* it was held that although the child was only seven years of age at the time of the application, a fundamental reason for refusing to order the child's return was based on the consideration that the child was sufficiently mature to make an informed decision as he indicated that he wished to remain with the abducting parent and not return to England, as evidenced in the filed reports.⁵⁰⁰ In the case of *Chief Family Advocate v G* the court ordered the child's return as it was clear that the child had a preference for his school and the friends he had grown up with as well as the environment in which this occurred.⁵⁰¹

⁴⁹⁵ *Central Authority v MV (LS Intervening)* supra (n48) at para [13]. Article 13 has found resonance in section 278(3) of the Children's Act 38 of 2005 (at para [26]) and section 6(5) which also provides that in regards to the child, a court must have regard to their age, maturity and stage of development and must be informed of any action or decision taken in a matter concerning the child and which significantly affects the child (at para [26.2]).

⁴⁹⁶ *Central Authority v MV* supra (n48) at para [26.4].

⁴⁹⁷ *Chief Family Advocate and Another v G* supra (n35); *Central Authority v B* supra (n200) and *Central Authority v MV* supra (n48).

⁴⁹⁸ Du Toit op cit (n25) 364.

⁴⁹⁹ Loc cit; for examples kindly refer to *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390; *Urnesh v Minto* 194 SC 249, *N v N (Abduction: Article 13 Defence)* supra (n381); *Re K (Abduction: Child's Objections)* [1995] 1 FLR 977; *Singh v Singh* 1998 SLT 1084; *The Ontario Court v M and M* [1997] 1 FLR 475; *Secretary for Justice v P, Ex Parte C* [1995] NZFLR 827; *De L v Director-General, NSW Department of Community Services* 187 CLR 640 (1996).

⁵⁰⁰ *Family Advocate v B* supra (n352) at paras [13]-[14].

⁵⁰¹ *Chief Family Advocate v G* supra (n35) at 618G.

[5] In light of the above it is now necessary to dissect the requirements of the exception. According to Du Toit, the word ‘objects’ should be given its literal meaning and not any other definition because its meaning does not provide any further strength of feeling which is beyond that of the usual ascertainment of the child’s wishes in a custody dispute.⁵⁰² The question of the child’s age and maturity are questions of fact which are to be determined by the presiding officer in the jurisdiction of where the application is to be heard.⁵⁰³ It is necessary however to determine the reasons why the child objects.⁵⁰⁴

For instance, if the child’s only reason is a wish to remain with the abducting parent, then this becomes a very relevant factor when the court exercises its discretion in determining whether or not to order the child’s return.⁵⁰⁵ The court cannot refuse to order a return on the grounds that the child merely refuses to return to the left-behind parent.⁵⁰⁶ If however the court concludes that the child’s views have been influenced by a person or that the reason the child objects is due to their wish purely to remain with the abducting parent, then it is probable that little or no weight will be attached to these views.⁵⁰⁷ The child’s views must be determined as having been made out of free will and choice in order for the defence to have a higher chance of success⁵⁰⁸ and they must show more than a mere preference.⁵⁰⁹ The younger the child is, the more chance they will be found to be lacking in the requisite degree of maturity, although there have been instances where children as young as seven years of age have been found to have satisfied this level.⁵¹⁰

[6] There is also no age specified at which the child may be considered as not having reached the required degree of maturity in order for their views to be considered and it was felt that the discretion should be left to the competent authorities to determine whether the exception is satisfied.⁵¹¹ In light of this, the court needs to assess whether or not the child is sufficiently mature to form a view which the court must consider.⁵¹²

⁵⁰² Du Toit op cit (n25) 365; Lowe, Everall & Nicholls op cit (n227) 354; *Re R (A Minor: Abduction)* [1992] 1 FLR 105 at 107.

⁵⁰³ Du Toit op cit (n25) 365.

⁵⁰⁴ Loc cit.

⁵⁰⁵ Loc cit; Clark op cit (n2) at para [22].

⁵⁰⁶ Lowe, Everall and Nicholls op cit (n227) 355.

⁵⁰⁷ Du Toit op cit (n25) 365. See *Re S (A Minor) (Abduction: Custody Rights)* supra (n479), *sub nom S v S (Child Abduction) (Child’s Views)* [1992] Fam 242; Clark op cit (n2) at para [22].

⁵⁰⁸ Hodson op cit (n73) 263.

⁵⁰⁹ Nicholson in Davel op cit (n2) 239.

⁵¹⁰ Hodson op cit (n73) 263.

⁵¹¹ Du Toit op cit (n25) 365; Pérez-Vera op cit (n72) at para [30]; Clark op cit (n2) at para [22]; Hlophe op cit (n5) 256.

⁵¹² Clark op cit (n2) at para [22].

The child's objection has been described in other jurisdictions as one 'which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and short term.'⁵¹³ It is therefore in the court's discretion whether or not to consider the child's objections as valid when determining whether to order their return. It has been considered that it should only be in exceptional cases in which the court should refuse to order the child's immediate return.⁵¹⁴

[7] In South Africa a two-stage enquiry is used.⁵¹⁵ Information regarding the child's social background which can be provided by the competent Central Authority of the child's habitual residence must also be considered by the court⁵¹⁶ and the court must determine the validity and strength of the child's views, which involves an examination of the following:⁵¹⁷

(a) What is in the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?⁵¹⁸

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?⁵¹⁹

The attempt by the parent or applicant in terms of (c) and (d) above does not require any form of malice or any preventative attempt at influencing the child, however, it must be considered that the child had been living with and in the company of the abducting parent or person and perhaps under their sole influence⁵²⁰ or the influence of other family members. The child's objection should as far as possible be considered at the point of removal and in terms of how long the child has spent with the abducting parent.⁵²¹ The court should also consider each child separately although this does not mean it should do so in isolation as the child's place in the family must also be considered.⁵²² These considerations allow the court to consider the child's best interests although this is against the normal

⁵¹³ *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 827 referred to in *Du Toit op cit* (n25) 365.

⁵¹⁴ *Re T (Children)* supra (n479) referred to in *Du Toit op cit* (n25) 365.

⁵¹⁵ *Re T (Children)* supra (n479) referred to in *Du Toit op cit* (n25) 365-366; *Clark op cit* (n2) at para [22]; *Hodson op cit* (n73) 263; *Nicholson op cit* (n2) 236; *Woodrow & Du Toit op cit* (n3) at [17-20].

⁵¹⁶ *Skelton & Carnelley op cit* (n146) 281.

⁵¹⁷ *Du Toit op cit* (n25) 366; *Woodrow & Du Toit op cit* (n3) at [17-20].

⁵¹⁸ *Beatty v Schatz* 2009 BCCA 310 referred to in *Du Toit op cit* (n25) 366.

⁵¹⁹ *Re T (Children)* supra (n479) referred to in *Du Toit op cit* (n25) 366.

⁵²⁰ *Du Toit op cit* (n25) 366.

⁵²¹ *Loc cit*; *Emmett v Perry; Director General of Family Services and Aboriginal and Islander Affairs, Attorney General (Ctb) (Intervener)* (1995) FLC 95-645.

⁵²² *Clark op cit* (n2) at para [22]. See also *Zaffino v Zaffino (Abduction: Children's Views)* [2006] 1 FLR 410.

rule in terms of the Hague Convention.⁵²³ All evidence must be obtained from the child using sensitivity and it should be obtained without bias.⁵²⁴

[8] A suggested problem in regards to this exception is that if it were applied by using direct questioning of the child, who although may understand the situation, they may also suffer psychological harm if they thought they were being forced to choose one of their parents⁵²⁵ and this could result in their view point not being considered. However this type of provision is necessary due to the fact that the Hague Convention only applies to children under the age of sixteen.⁵²⁶ This is because the courts, and people with common sense, may find it difficult to believe that a child of fourteen or fifteen years-of-age should be ordered to return where it is clear from their objections that they do not want to.⁵²⁷ The court may thus determine the child's views and are able to take these into consideration; however this does not prevent the courts from determining the weight which is to be attached to such objections.⁵²⁸ It has also been indicated that with the child's increase in age, comes the increase in mental and emotional maturity as well as the ability of the courts to attach more weight to the child's opinion.⁵²⁹

[9] A supporting feature of the Hague Convention which prevents abuse of the exceptions is that the court is only entitled to refuse the child's return in exceptional circumstances.⁵³⁰ However, it has been indicated by Du Toit that there is no precedent in South African law which provides the guidelines setting out when this exception should succeed.⁵³¹ Although in *Sonderup v Tondelli* the court provided that the exceptional circumstances standard shall not apply in South African law as a result of the Constitutional Court's interpretation and application *in casu* that the exceptions must be informed by the best interests of the child principle and thus should be interpreted according to the

⁵²³ Skelton & Carnelley op cit (n146) 281; *Sonderup v Tondelli* supra (n28) at paras [32]–[33] and *Family Advocate v B* supra (n352) at para [11].

⁵²⁴ Hlophe op cit (n5) 255.

⁵²⁵ Pérez-Vera op cit (n72) at para [30].

⁵²⁶ Loc cit.

⁵²⁷ Loc cit; Buck (2005) op cit (n61) 144; Hlophe op cit (n5) 256.

⁵²⁸ Clark op cit (n2) at para [22]. See for example: *Re J and K (Abduction: Objections of the Child)* [2004] EWHC 198 (Fam), [2005] 1 FLR 273.

⁵²⁹ Labuschagne op cit (n1) 336; ML Allen 'Visitation rights of a grandparent over the objection of a parent: the best interests of the child' (1976-1977) 15 *Journal of Family Law* 54.

⁵³⁰ Du Toit op cit (n25) 367.

⁵³¹ Loc cit.

constitutional values.⁵³² The duty to consider the objections of the child should however lower the ‘exceptional circumstances’ threshold.⁵³³

[10] It was also alleged that this exception contradicted Article 19 of the Hague Convention as it allowed the courts to make merit judgments instead of allowing the matter to be heard in the state of the child’s habitual residence.⁵³⁴ A further criticism was that if a liberal interpretation was applied to this exception, the child and not the presiding officer would determine the order of return.⁵³⁵ It was further argued that the exception was also open to misuse as it was alleged that too wide a discretion was given to the judicial and administrative authorities.⁵³⁶ The reasoning provided by Nanos was that the Hague Convention does not specify an age at which the child is considered mature enough that the court may subjectively determine the matter and therefore may employ biased tactics when considering the child’s preferences.⁵³⁷ This could result in an inconsistent application as well as an arbitrary interpretation of the Hague Convention.⁵³⁸ Although these concerns have been raised, guidelines have also been created in order to combat such problems and the option of appeal and review of the decision is also available to the respondents.

Thus it is submitted as evident that the court must consider the views and objectives of the child prior to ordering the child’s return, however, the court, in performing the aforementioned, needs to determine on the evidence whether the child is mature enough and has remained uninfluenced in expressing their views. In light of this discussion, the final exception to the rule of peremptory return shall now be discussed.

8.3 Exception three: Article 20

[1] The final exception which may be raised is provided for in Article 20 of the Hague Convention which states the following:

‘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 [s]tate relating to the protection of human rights and fundamental freedoms.’

⁵³² Loc cit.

⁵³³ Woodrow & Du Toit op cit (n3) at [17-21].

⁵³⁴ Labuschagne op cit (n68) 283.

⁵³⁵ Loc cit.

⁵³⁶ Loc cit.

⁵³⁷ Loc cit, referring to R Nanos ‘The views of a child: Emerging interpretation and significance of the child’s objective defense under the Hague Child Abduction Convention’ (1996) *Brooklyn Journal of International Law* 447.

⁵³⁸ Labuschagne op cit (n68) 284; Nanos op cit (n537) 447.

This defence is also usually invoked only in exceptional circumstances⁵³⁹ and will only be made use of where a return order will offend a fundamental principle of public policy of the state from which the child's return is requested⁵⁴⁰ or where due process is absent.⁵⁴¹ Therefore the Hague Convention has allowed the courts hearing an application to consider the states own independent law in this specific regard.⁵⁴²

In South Africa there is no evidence of a reported case where this exception has been considered in detail or even succeeded in its application. Therefore South Africa could benefit from the consideration of the law in regards to this exception and its application evidenced in a foreign jurisdiction,⁵⁴³ e.g. Australia – see Chapter [4], point [7.3] for further discussion herein.

[2] The scope of this provision is considered by Professor Pérez-Vera to be unusual in light of private international law and its scope and is therefore also difficult to define.⁵⁴⁴ This clause takes into account a public policy restriction concerning the laws which govern the children and family in the requested state.⁵⁴⁵ The type of possible exceptions to the peremptory return in the previous exceptions were based on facts whereas this exception is based on legal arguments prefaced on the internal law of the requesting state and thus this exception is different to the rest of the Hague Convention's structure.⁵⁴⁶ This exception also includes that although there are many international treaties regarding human rights throughout the world, it must specifically prove that the rights of the child would be violated and therefore that the principles of the protection of human rights also prevent the court from ordering the child's return.⁵⁴⁷

[3] In order to prove this exception in terms of South African law, the abducting parent will have to *prima facie* prove that one or more of the child's fundamental rights in terms of the Bill of Rights⁵⁴⁸

⁵³⁹ Nicholson in Davel op cit (n2) 240; Nicholson op cit (n2) 236-237.

⁵⁴⁰ The Constitution of the Republic of South Africa, 1996 would thus need to be considered when making such determinations (especially sections 10, 12, 14 and 28): Woodrow & Du Toit op cit (n3) at [17-23].

⁵⁴¹ Nicholson in Davel op cit (n2) 240.

⁵⁴² *Central Authority of the Republic of South Africa and Another v LG* supra (n52) at 'Flynote' and 392C-F, referring to *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n52) at para [23].

⁵⁴³ Section 39 of the Constitution of the Republic of South Africa, 1996.

⁵⁴⁴ Pérez-Vera op cit (n72) at para [31].

⁵⁴⁵ Loc cit.

⁵⁴⁶ Ibid at para [32].

⁵⁴⁷ Ibid at para [33].

⁵⁴⁸ Chapter 2 of the Constitution of the Republic of South Africa Act, 1996; Clark op cit (n2) at para [23]; which indicates that if the rights (in terms of the Constitution) to dignity (section 10), freedom and security of the person (section 12), Privacy (section 14) and children's rights (section 28) would be infringed by the child's return, then the court should not order the return of the child; Heaton (2010) op cit (n4) 317; Skelton & Carnelley op cit (n146) 281.

would be violated if the child's return was ordered.⁵⁴⁹ An example provided by Du Toit in this regard is that of where a female child would be sent to a country where she would be forced into an arranged marriage or would be subjected to the cultural practice of female genital mutilation.⁵⁵⁰ It is also necessary to show that the child's return is not permitted in terms of the laws that the requested state subscribes to, this is because mere incompatibility between the states individual laws is not enough to prove the exception.⁵⁵¹ The fact that parental child abduction is an international matter does not allow the requested state to refuse the order of return on these grounds on more occasions than they would actually grant it within their own country.⁵⁵² A strict interpretation must therefore be applied.⁵⁵³

[4] Although limited guidelines are suggested in regards to the application of this exception, it is suggested that the South African judiciary would benefit from the consideration of the Australian approach and perspective herein.

9. Conclusion

[1] This chapter has considered the place of the Hague Convention within the South African law and as a result of the judgment in the constitutional case of *Sonderup v Tondelli* it has been determined that the Hague Convention's adoption into South African law is constitutional.

[2] The requirements for a valid application to be launched in terms of the Hague Convention e.g. wrongful removal and retention; custody rights and habitual residence, were discussed in limited detail in order lay out the background for the launching of a valid application and this was done in order to provide the backdrop for the discussion of the exceptions to the rule of peremptory return available to the abducting parent or opposing party before a judicial or administrative body. The abducting parent or opposing party bares the onus of proof on a balance of probabilities if they raise one or more of the exceptions/defences to the rule of peremptory return.

[3] This chapter further discussed the five individual exceptions available to the abducting parent or opposing party against the rule of peremptory return of a child in terms of the Hague Convention.

⁵⁴⁹ Du Toit op cit (n25) 367; Skelton & Carnelley op cit (n146) 281.

⁵⁵⁰ Du Toit op cit (n25) 367.

⁵⁵¹ Pérez-Vera op cit (n72) at para [118].

⁵⁵² Loc cit.

⁵⁵³ Clark op cit (n2) at para [23].

These included a discussion of the peremptory rule of return in terms of Article 12 which provides a time frame of a one year period for the valid launch of an application for the child's return in terms of the Hague Convention as well as when the courts are able to exercise a discretion afforded to them in terms of Article 18 of the Hague Convention.

[4] Article 12 also provides a defence in terms of applications launched outside of the one year time period and the consideration of whether or not the child is now settled in their new environment. The court is required to consider each exception raised prior to exercising their discretion of whether to order the child's return or not. This exception, however, has raised little interpretative problems in regards to the South African approach herein.

[5] Article 13 incorporates three separate exceptions/defences within itself. In regards to the actual exercise of custody rights, it is submitted that this would need to have been satisfied by the applying party as existing to ensure the valid launch of an application in terms of the Hague Convention as it forms part of the initial requirements for the launching of such an application. The custody rights and their actual exercise are therefore determined according to the law of the country of the child's habitual residence as well as in terms of a South African abducted child, in light of the relevant sections of the Children's Act and the Constitution.

Consent or acquiescence were also discussed as exceptions to the rules of peremptory return herein and the requirements of each have adequately been considered in terms of the case law discussion in the above. In regards to the exception of the grave risk of harm, the South African case law was discussed herein and the requirements of such a defence were also deciphered and made evident in the aforementioned discussion.

[6] In terms of the child's objections in regards to Article 13 of the Hague Convention, this exception was explained with reference to both the Children's Act, Constitution as well as the international instruments of the UNCRC and the African Charter on rights of the child which have adequately provided for the requirements for the satisfaction of such a defence.

[7] The exception in terms of Article 20 of the Hague Convention, although not raised in a case presented before the judiciary of South Africa, has been considered in light of the fact that the internal laws of the country concerned need to be considered. Thus the Bill of Rights in terms of the

South African Constitution would be the major determining factor in regards to whether a human rights violation would occur if the child was subsequently ordered to return to the state of habitual residence if exceptional circumstances were present.⁵⁵⁴ However, it is submitted that South Africa would benefit from the consideration of the Australian approach herein which shall be discussed in the following Chapter of this Study.

Thus in conclusion and in light of the principles of South African law and its adoption of the Hague Convention, the Australian approach to this Study shall now be discussed in Chapter [3] following hereon.

⁵⁵⁴ Kruger op cit (n69) 113 however suggests, after there International study in Belgium and with reference to the Hague Conference's Fifth Special Commission, review of the operation of the Hague Child Abduction Convention, 1980 and the 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 (Hague Child Protection Convention, 1996), available at <http://www.hcch.net/upload/conventions/txt34en.pdf>, accessed on 4th October 2011; The Hague Conference on Private International Law (HCCH) 'Special Commission on the practical operation of the 1980 and 1996 Hague Conventions' (1-10 June 2011) at paras [57]-[62], available at www.hcch.net/upload/wop/concl28sc6_e.pdf, accessed on 4th October 2011 that agreements and mediation can be of importance in resolving issues of international child abduction. This is however not dealt with in further detail herein. South Africa is however not a signatory to this Convention, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=70#nonmem, accessed on 4th October 2011. Australia however has ratified this Convention and it entered into force on the 1st August 2003 however this has not acceded the use of the Family Law (Child Abduction Convention) Regulation, 1986 in regards to the regulation of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 within Australia. This Convention (1996) is suggested as being broader than the 1980 Convention but also complementing it: Kruger op cit (n69) 128-129.

Chapter Three: Australian Law

1. Introduction

[1] In Australia many children are victims of international parental child abduction¹ and according to the Australian Attorney-General's Office, an estimated two to three children are illegally removed in and out of Australia by a parent each week.² A brief discussion of the Australian family law shall now proceed, followed by a determination of the Hague Convention's place within Australian law.

1.1 Family law in Australia

[1] Family law disputes in Australia are a complex and ever-changing concept influenced by the constitutional law,³ political decisions, substantive and case law analysis, as well as the fact that it is not based on any modern or popular understanding of the concept of 'family law', but rather on the concept of federalism within the old Constitution.⁴

'The Australian Constitution divides responsibility for several areas of Australian family law between the [s]tate and the Commonwealth. The dual system created as a consequence, particularly in relation to child protection issues, provides for confusion and duplication.'⁵

It is thus evident from the above that the concept of Family law and its surrounding terminology, suggests that it is a body of laws which deals with the legal issues relating to families in Australia.⁶ However, the ambit of what is generally considered to be 'family law' in Australia is small, narrow and considered to be a sub-discipline of law.⁷ This is partly a result of the Federal Government possessing powers in terms of the Constitution to create laws relating to divorce and marriage, and these are exercised mainly through the implementation and existence of the Family Law Act, 1975 (Cth) (hereinafter referred to as the 'FLA').⁸

¹ 'Living in Limbo: The experience of International Child Abduction - the call for a national support service' International Social Service Australian Branch (February 2005) 3, available at <http://www.missingpersons.gov.au/Assets/Files/9bb6de98-a9ab-436f-8c08-cb63c21ff155.pdf>, accessed on 19th April 2011. International Child Abduction is not a localised occurrence and it occurs world-wide. See Chapter 1 of this Study for further discussion for the reasons hereof.

² Living in Limbo op cit (n1) 3.

³ Commonwealth of Australia Constitution Act, 1990.

⁴ A Nicholson 'Family law in Australia: Bargaining in the shadow of the Constitution' (Autumn 2000) 55 *Family Matters*, Australian Institute of Family Studies 22, available at <http://www.aifs.gov.au/institute/pubs/fm2000/fm55/an.pdf>, accessed on 8th July 2011.

⁵ Nicholson op cit (n4) 22.

⁶ G Monahan & L Young (Eds) *Children and the law in Australia* (2008) 355.

⁷ B Fehlberg & J Behrens *Australian Family Law: The Contemporary Context* (2008) 19; Monahan & Young (2008) op cit (n6) 355.

⁸ Monahan & Young (2008) op cit (n6) 355.

[2] The FLA is a major attempt at a substantial re-organization of the family law in Australia.⁹ However, it only covers a few areas herein.¹⁰ Thus many areas which would usually be classified as family law are actually excluded from the legislative domain of the Commonwealth Parliament and are thus not afforded any form of protection by the FLA or any other federal legislation.¹¹ In terms of the Constitution, the Commonwealth Parliament thus has no general legislative power regarding family law.¹² The only legislative power it possesses in this regard is mainly to legislate over marriage and divorce.¹³ The FLA is regulated by Commonwealth of Australia Constitution Act¹⁴ and came into operation in January 1976, repealing the Matrimonial Causes Act.¹⁵

During the 1980s all the Australian states, except Western Australia, referred certain powers regarding children to the Commonwealth Parliament.¹⁶ International parental child abduction however was included in the Australian domestic law by the FLA¹⁷ and the Family law (Child Abduction Convention) Regulations, 1986 (hereinafter referred to as the 'Regulations'). These Regulations were made in 1986 and have been amended in several respects since.

⁹ L Young & G Monahan *Family Law in Australia* (7th ed) (2009) 29.

¹⁰ Fehlberg & Behrens op cit (n7) 19.

¹¹ Ibid at 20.

¹² Loc cit; *Vitzdamm-Jones v Vitzdamm-Jones; St Clair v Nicholson* (1981) 148 CLR 383 at 402 (Barwick CJ) and 416 (Stephen J).

¹³ Fehlberg & Behrens op cit (n7) 20. Therefore most of what is referred to as 'family law' revolves around the concepts of marriage and divorce as well as matrimonial causes - specifically parental rights, custody and guardianship: Section 51 of the Commonwealth of Australia Constitution Act, 1990; *Nicholson* op cit (n4) 22. The Commonwealth laws govern a large range of other matters not specifically dealt with in terms of the FLA, i.e. the formation and dissolution of marriages: Monahan & Young (2008) op cit (n6) 355. Thus as a consequence, public disputes regarding child protection are also excluded from Commonwealth powers and those matters which are not specifically referred to by the Constitution are specifically the states responsibility: *Nicholson* op cit (n4) 22-23.

¹⁴ Young & Monahan (2009) op cit (n9) 29.

¹⁵ *Nicholson* op cit (n4) 23.

¹⁶ Fehlberg & Behrens op cit (n7) 22. This pertained to all matters regarding children, except those of child protection, juvenile justice and adoption. See also section 3(2) of each of the Commonwealth Powers (Family Law-Children) Act 1986 (New South Wales, Victoria, South Australia and Queensland); Commonwealth Powers (Family Law-Children) Act 1987 (Tasmania).

¹⁷ Section 111B of Division 2 of the Family Law Act, 1975 (Cth) was inserted in the FLA in 1983 and provides for the enactment of the Regulations in order to give effect to Australia's obligations under the Hague Convention on the Civil Aspects of International Child Abduction, 1980: see Young & Monahan (2009) op cit (n9) 344 and L Curtis 'The Hague Convention on the Civil Aspects of International Child Abduction: the Australian experience' (April 1989) 15 *Commonwealth Law Bulletin* 629.

[3] The Family courts deal with matters of international child abduction.¹⁸ However, there are also many other forums which exist where similar issues can be dealt with and as a result it is often impossible to determine which law/forum actually presides over the matter.¹⁹ Orders of the Family court are, however, applicable across Australia.²⁰ The task of the Family court in relation to international child abduction proceedings is therefore to apply the Family law Regulations to the facts established on the evidence in each case.²¹ In light of this, a discussion of the Regulations and their application within Australia shall now proceed.

2. A place for the Hague Convention in Australia

[1] Australia ratified the Hague Convention on the 29th October 1986²² in order to control the problem of international parental child abduction. It entered into force in Australia on the 1st January 1987²³ and to give effect to this ratification and the obligations of the Hague Convention, section 111B was inserted into the FLA providing for the making of regulations ‘to enable the performance of the obligations of Australia [and] to obtain for Australia any advantage or benefit under [the Convention].’²⁴

¹⁸ Nicholson op cit (n4) 24; Part 4 of Division 3 of the Family Law Act, 1975 (Cth). The Family Court is a specialist court however its powers do not cover some instances and areas which, many agree, actually fall within the ambit of family law (Nicholson at 22).

¹⁹ Nicholson op cit (n4) 27.

²⁰ Loc cit.

²¹ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* [2001] 206 CLR 401 at para [25]. Australia is a state party to the Hague Convention: Fehlberg & Behrens op cit (n7) 67.

²² M Kirby ‘Children caught in conflict – the Child Abduction Convention and Australia’ (Autumn 2010) 21(1) *Australian Family Lawyer* 3; M Nicholls QC ‘International child abduction: Australian law, practice and procedure’ (July 2010) 2, this paper was based on a presentation given by the author in London for the Centre for Family Law and Practice’s Conference on international child abduction. The author of this study received a copy of this personally from the author during a visit to Perth, Western Australia in June 2011 (Received 17th June 2011); KM Bowie ‘International application and interpretation of the Convention on the Civil Aspects of International Child Abduction’ (March 2001) [1980] *FamCA Federal Judicial Scholarship* 2, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/1980/1.html?stem=0&synonym_s=0&query=International%20child%20abduction, accessed on 3rd October 2011. The Hague Convention is an international treaty in terms of which arrangements can be made for the child’s return if they have been wrongfully removed or retained outside of their country of habitual residence: see Australian Government Attorney-General’s Department *International Child Abduction*, available at <http://www.ag.gov.au/childabduction>, accessed on 31st March 2011.

²³ Australian Central Authority, Australia Attorney-General’s Department, Canberra ‘Hague Child Abduction Convention: Information for Parents of Abducted Children’ (November 2001) 1, available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(C99C9C662AE008709B6A1B06BCF8E5CF\)~parentsofabducted+childrenNov01.pdf/\\$file/parentsofabducted+childrenNov01.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(C99C9C662AE008709B6A1B06BCF8E5CF)~parentsofabducted+childrenNov01.pdf/$file/parentsofabducted+childrenNov01.pdf), accessed on 8th July 2011; Curtis op cit (n17) 627; Young & Monahan (2009) op cit (n9) 344; *De L v Director-General, NSW Department of Community Services* [1996] 187 CLR 640 at 673; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [23]. The Regulations required consequential amendments after the enactment of the Family Law (Amendment) Act 2000 (Cth) and the necessary amendments were effected by the Family Law Amendment Regulations of 2004 and these subsequently remedied any defects in the regulations which became apparent. See Young & Monahan (2009) op cit (n9) 344.

²⁴ Kirby op cit (n22) 3. For further information regarding the history of the Hague Convention and the Australian law, see *De L v Director-General NSW Department of Community Services* supra (n23) at 671; Bowie op cit (n22) 2.

[2] These Regulations are referred to as the Family Law (Child Abduction Convention) Regulations, 1986²⁵ which also came into force and effect on the 1st January 1987 and which provide the legislative structure for the application of the Hague Convention as a part of the Australian law.²⁶ Schedule One of the Regulations contains the Hague Convention which is included for the purposes of interpreting the Regulations and ascertaining the position in terms of the law where the Regulations are otherwise silent.²⁷ Schedule 2 incorporates a list of all the Hague Convention countries.²⁸ The Regulations provide the procedure for launching applications in terms of the Hague Convention as well as set out the powers of the courts and functions of the Central Authorities.²⁹ When a child is abducted to, or removed from Australia, the principles which are to be applied are dependant on whether or not the country to which the child is removed to or retained has signed and ratified the Hague Convention.³⁰

[3] In terms of section 111B(1) of the FLA it is provided that the Regulations may make such provision as is necessary or convenient in order to enable Australia to perform its obligations under the Hague

²⁵ Regulation 1 of the Family Law (Child Abduction Convention) Regulations, 1986; C Nicholson 'Introduction to the Hague Convention on the Civil Aspects of International Child Abduction' in CJ Davel (Ed) *Introduction to Child Law in South Africa* (2000) at 233 & 233 fn8.

²⁶ Living in Limbo op cit (n1) 17 and Nicholls op cit (n22) 2-3; *De L v Director-General, NSW Department of Community Services* supra (n23) at 673. The purpose and effect of the Hague Convention and its regulations is succinctly described in the case of *In the Marriage of Emmett and Perry* (1995) 20 Fam LR 380 at 383. In terms of the 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 (Hague Child Protection Convention, 1996), available at <http://www.hcch.net/upload/conventions/txt34en.pdf>, accessed on 4th October 2011 the Family Law Amendment (Child Protection Convention) Act 2002, which entered into force and effect within Australia on the 1st August 2003, regulated by the Family Law (Child Protection Convention) Regulations, 2003 ensure the applicability of the Hague Child Protection Convention, 1996 which assists and is beneficial to the control and adjudication of the concept of international parental child abduction. This Convention however is not applicable within South Africa and despite it being of assistance with Australia, it shall not be considered in further detail within this Study.

²⁷ Schedule One of the Family Law (Child Abduction Convention) Regulations, 1986; *McCall and State Central Authority* (1995) FLC 92-552 at para [19]; Kirby op cit (n22) 4. The Hague Convention is however not in force between all signatory countries as there are sub-requirements which need to be satisfied in order to bring it into force between them all: (Kirby at 4) & Regulation 10 of the Family Law (Child Abduction Convention) Regulations, 1986 which states the following in this regard: 'Subject to Article 40 of the Convention, each of the following countries is a convention country: (a) a country specified in Schedule 2, being a country: (i) as between Australia and which the Convention entered into force on the date specified in column 2 in relation to that country; and (ii) that has acceded to the Convention with reservations in accordance with Article 42 of the Convention in respect of any provisions specified in column 3 in relation to that country; (b) any other country in respect of which the Convention has entered into force for Australia.' See also Articles 35, 37-40, 43 & 44 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 for further information herein. See also Living in Limbo op cit (n1) 17. The Regulations express what the governing law of the country is: *MW v Director-General, Department of Community Services* [2008] HCA 12 at para [145].

²⁸ Article 24 and 26 (3rd paragraph) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 provisions apply.

²⁹ Living in Limbo op cit (n1) 19.

³⁰ Fehlberg & Behrens op cit (n7) 67.

Convention.³¹ Section 111B[1A] also provides guidelines regarding what the Regulations should or should not contain:

‘In relation to proceedings under regulations made for the purposes of subsection (1), the regulations make provisions: (a) relating to the onus of establishing that a child should not be returned under the Convention; and (b) establishing rebuttable presumptions in favour of returning a child under the Convention; and (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.’³²

In Australia, if the Hague Convention applies, the route to recover the child will follow in light of the Hague Convention. However, if it does not apply then an application can be made in terms of the FLA and this shall be dealt with as a non-convention country proceeding.³³ Referral is initially made to the Regulations in regards to international parental child abduction; however, if the Regulations are unclear, then it is acceptable to refer to the Hague Convention in order to assist in determining how the matter should be dealt with.

[4] There are three significant legislative provisions in Australia which assist in dealing with international child abduction and these were all enacted by the Commonwealth Parliament³⁴ and have together brought the 1996 Hague Protection Convention into effect in Australia.³⁵ In December 2004 the Regulations were amended in order to clarify that their purpose was to give effect to section 111B of the FLA and that they were intended to be construed as having regard to the objects and principles of the Hague Convention.³⁶

[5] The International Family Law Section of the Commonwealth Attorney-General’s Department of Australia is responsible for the co-ordination and implementation of the Hague Convention in Australia

³¹ Nicholls op cit (n22) 2-3; Section 111B of the Family Law Act, 1975 (Cth) provides the Regulations which give effect to the Hague Convention and are subsequently authorised by this section: Curtis op cit (n17) 629.

³² Nicholls op cit (n22) 3.

³³ Loc cit. Non-convention countries and the approach adopted by the Australian courts are discussed in Chapter [1] at point [7] of this Study.

³⁴ The return of children in terms of the Hague Convention is provided for in Part XIII AA, Division 2, section 111B of the FLA and the Family Law (Child Abduction Convention) Regulations, 1986. The recognition of overseas orders relating to children made in overseas jurisdictions is provided for in Part VII, Division 13, Subdivision C of the FLA; and jurisdiction, recognition and enforcement of orders which are provided for in Part XIII AA, Division 4, section 111CA of the FLA and the Family Law (Child Protection Convention) Regulations, 1986: Nicholls op cit (n22) 1-2.

³⁵ Nicholls op cit (n22) 2.

³⁶ Ibid at 4; Regulation 1A of the Family Law (Child Abduction Convention) Regulations, 1986.

and carries out the function of the Commonwealth Central Authority (CAA) for Australia.³⁷ Having signed and ratified the Hague Convention, Australia has undertaken to preserve international comity and recognise the authority of the systems of law of other Convention countries. Proceedings instituted under the Regulations are to be heard in a prompt and summary way and only in exceptional circumstances may a court give consideration to the child's return.³⁸ Therefore the objects of the Hague Convention remain unchanged within Australia and the role of the court to secure the child's prompt return remains paramount.

3. The constitutionality of the Australian legal framework and the Hague Convention

[1] The case of *McCall and State Central Authority* involved a challenge to the constitutional validity of the Family Law (Child Abduction Convention) Regulations, 1986.³⁹ Ultimately this challenge was rejected by the full Family court of Australia which held that the Regulations were valid for various reasons.⁴⁰ This case raised a number of issues which ultimately concerned the nature and validity of the Australian legal framework concerned with the determination of international child abduction cases where the Hague Convention was applicable.⁴¹

Briefly the facts were that the parents were married in England in November 1991 and the child was born in April 1992.⁴² In May 1994 the wife removed the child to Australia, which removal was alleged to be wrongful within the meaning of Article 3 of the Hague Convention. At the time of the alleged wrongful removal, both England and Australia were signatories to the Hague Convention.⁴³

³⁷ Australian Government Attorney-General's Department op cit (n22) 1; *Living in Limbo* op cit (n1) 3; Nicholls op cit (n22) 2; Curtis op cit (n17) 629.

³⁸ *Darryl Emmett Husband And: Penelope Anne Perry Wife And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* [1995] FamCA 77 at para [10].

³⁹ *McCall and State Central Authority* supra (n27).

⁴⁰ P Parkinson *Australian Family Law in Context: Commentary and Materials* (4th ed) (2009) 822; C Staker 'Australian cases involving questions of Public International Law 1994 – 1995' (1996) 17 *Australian Year Book of International Law* 308.

⁴¹ *McCall and State Central Authority* supra (n27) at para [2].

⁴² *Ibid* at para [4].

⁴³ *Ibid* at para [5]. In June 1994 the Central Authority instituted an application in terms of Regulation 13 (at para [6]). The wife however sought that the application be dismissed (para [7]) and subsequently filed an application which sought orders regarding custody and guardianship of the child and this application was served on the husband in September 1994 (at para [8]).

[2] *McCall* held that the general scheme of the Regulations provided a legislative structure for the application of the Hague Convention as a matter of Australian domestic law.⁴⁴ The Hague Convention, as already indicated, is not directly incorporated into Australian law although it is provided for in Schedule One to the Regulations.⁴⁵ Although the Hague Convention is thus not itself operative, it may be considered to assist in interpreting the Regulations.⁴⁶

[3] Although direct correspondence does not always exist between the words of the Regulations and those of the Hague Convention, it was not suggested that these differences actually affected the validity of the Regulations.⁴⁷ Section 111B of the FLA does not require the complete and verbatim adoption of the Hague Convention into the Australian domestic law. However, it does enable the Regulations to make ‘such provision as is necessary to enable the performance’ of the obligations of Australia in terms of the Hague Convention.⁴⁸ The purpose of the Regulations is thus merely to give effect to section 111B of the FLA.⁴⁹

[4] In terms of the Preamble and Article 1 of the Hague Convention in regards to the best interests of the child (child’s welfare), the Australian court consistently held that the principle of the child’s welfare played no role in terms of Hague Convention applications.⁵⁰ The case of *Director-General of the Department of Family & Community Services v Davis* (1990) FLC 92-182 reiterates the aforementioned:

‘... [T]he question of the welfare of the child as the paramount consideration does not apply. For the Convention is not directed to that question. It is directed to ... two main issues: firstly, to discourage, if not eliminate, the harmful practice of unilateral removal or retention internationally; and secondly, to ensure that the question of what the welfare of the children requires is determined by the jurisdiction in which they were habitually resident at the time of removal.’⁵¹

⁴⁴ Ibid at para [19].

⁴⁵ Loc cit.

⁴⁶ Loc cit.

⁴⁷ Ibid at para [20].

⁴⁸ Loc cit; *MW v Director-General, Department of Community Services* supra (n27) at para [28].

⁴⁹ *McCall and State Central Authority* supra (n27) at para [21].

⁵⁰ Ibid at para [26]; See also *Murray v Director of Family Services ACT* (1993) FLC 92-416 at 80, 258-9; *Brown v Director General* (Nicholson CJ 6 September 1988, unreported); *Gsponer v Director General Dept. Community Services, Victoria* (1989) FLC 92-001; *Director General of the Department of Family and Community Services v Davis* (1990) FLC 92-318; Bowie op cit (n22) 5. This was confirmed in the case of *De L v Director General, NSW Department of Community Services* supra (n23) at 658.

⁵¹ *McCall and State Central Authority* supra (n27) at para [28]; *Director-General of the Department of Family and Community Services v Davis* supra (n50) at 78, 226; F Bates ‘“Escaping mothers” and the Hague Convention – the Australian experience’ (2008) 41 (2) *CILSA* 245-246. This view is consistent with the approach of the English courts in the cases of *Re A (A minor)* (1988) 1 Fam LR (Eng) 365 and *C v C* (1989) 1 WLR 654; [1989] 2 All ER 465. The case of *Director-General*

The Court in the case of *De L* also held that the Hague Convention is not strictly an exception to the usual concern of the child's best interests in terms of Australian law, or that the Regulations incorporating the Hague Convention exclude this consideration entirely⁵² leaving it no part to play in the relevant decisions.⁵³ But rather that the Hague Convention, reflected by the Regulations, recognizes that it is in the children's best interests not to be subjected to the turmoil and emotional trauma of international abduction as the issues surrounding the child's access and custody would best be dealt with by the court of the child's state of habitual residence.⁵⁴ The best interests of the child will thus only be considered in exceptional circumstances.⁵⁵

[5] In *McCall* it was argued that as Australia had implemented the Hague Convention by way of Regulation rather than through direct incorporation, the Regulations were invalid because the laws of the Commonwealth were considered inconsistent with section 64(1)(a) of the FLA.⁵⁶ It was also argued that the concept of 'rights of custody' in terms of the Hague Convention and the Regulations was inconsistent with that within the FLA and as a result that the Regulations were invalid.⁵⁷

The court however held that although the welfare jurisdiction (best interests of the child principle) was broad and unlimited, it provided no ground for the conclusion that an application under the Regulations must be regarded as an application in terms of the welfare provisions and jurisdictions of the court.⁵⁸ Therefore proceedings under the Regulations should not be characterized as falling under sections 63 and 64 of the FLA but should be treated as a separate head of jurisdiction under section 111B of the FLA.⁵⁹ It was also determined that the Hague Convention's purpose and thus that of the Regulations was not to determine custody but was rather to provide a mechanism of summary return to the child's

of the Department of Family & Community Services v Davis supra (n50) involved *ex tempore* decision which Justice Nygh delivered and the Full Court ordered the return of two children (ages 8 & 4) who were abducted by their mother to the UK, where they had been habitually resident. See Kirby op cit (n22) 11.

⁵² *De L v Director-General, NSW Department of Community Services* supra (n23) at 684.

⁵³ Loc cit; *McCall v State Central Authority* (1994) 18 Fam LR 307 at 318; 121 FLR 45 at 57.

⁵⁴ *De L v Director-General, NSW Department of Community Services* supra (n23) at 684; *Living in Limbo* op cit (n1) 17. The case of *State Central Authority & Quang* [2010] FamCA 231, is an example of case law pertaining to access orders where the principles of the Hague Convention, although not applicable, were used to assist in the court determining this issue.

⁵⁵ Curtis op cit (n17) 627.

⁵⁶ *McCall and State Central Authority* supra (n27) at paras [9], [25], [26] & [36]-[37]; Section 64(1)(a) of the Family Law Act, 1975(Cth) deals with the determination of custody, access and guardianship on the grounds of the child's welfare being of paramount consideration; Parkinson op cit (n40) 824.

⁵⁷ *McCall and State Central Authority* supra (n27) at para [38].

⁵⁸ Ibid at para [63].

⁵⁹ Ibid at para [64].

country of habitual residence from which they were wrongfully removed so that those courts could determine the custody issues.⁶⁰ It was further held that section 111B and the FLA derived their constitutional stance from an external affairs power.⁶¹

It was further held, in regards to bestowing jurisdiction on a forum, that this was not considered to make the Australian framework unconstitutional and thus section 111B of the FLA and the Regulations could be regarded as a source of jurisdiction.⁶² The court further held that if any inconsistency exists between sections 111B and 64(1)(a), that section 111B would prevail due to the fact that the inconsistency was not between the Regulations and the sections and in enacting section 111B Parliament must have intended that the Regulations would place the Hague Convention in effect in so far as it concerned Australia.⁶³ Thus the best interest's principle is again not applicable to the Regulation proceedings and is thus not unconstitutional.⁶⁴

Reference was made to *Murrays* case where it was argued that no inconsistency existed between the Regulations and section 64(1)(a):

'If the proceedings are correctly characterized as being brought in the Court's welfare jurisdiction ... they are predicated, as we have said, upon the basis that the Hague Convention and the Regulations contemplate that it is in the best interests of the child for issues such as custody and access to be determined in the courts of the country of the child's habitual residence unless the exceptions referred to in regulation 16 are made out. The issue in a Hague Convention application is purely one of forum, subject to those exceptions, and the paramountcy principle is accordingly not relevant.'⁶⁵

The court further held that the argument that the concept of the rights of custody is inconsistent with the FLA in terms of section 63E(2) also failed on the above grounds.⁶⁶ No inconsistency exists as custody is also defined in Article 5(a) of the Hague Convention which is incorporated into the regulations by Regulation 2(1) and thus the expression in the Hague Convention encompasses a broader range of rights

⁶⁰ Ibid at para [65].

⁶¹ Ibid at paras [49] & [67]; Section 51(xxix) of the Constitution, not section 51 (xxii) of the Commonwealth of Australia Constitution Act, 1990; however these sections are not discussed in further detail within this Study.

⁶² *McCall and State Central Authority* supra (n27) at paras [72]-[74]. This argument treats section 64(1)(a) as governing proceedings under the Regulations and this should be rejected as the Regulations reflect the objects of the Hague Convention to settle issues of jurisdiction between the contracting states by favouring the forum of the child's habitual residence: Parkinson op cit (n40) 824.

⁶³ *McCall and State Central Authority* supra (n27) at paras [76]-[77].

⁶⁴ Parkinson op cit (n40) 824.

⁶⁵ *McCall and State Central Authority* supra (n27) at paras [78]-[79]; *Murray v Director of Family Services A.C.T* op cit (n50) at 80, 258-9.

⁶⁶ *McCall and State Central Authority* supra (n27) at para [83].

than that which is defined in terms of the Australian law, however, the Hague Convention is an international instrument, written in international language and thus it cannot be expected to mirror the language used in the domestic law of any specific country.⁶⁷ It is also important to note that the Hague Convention is concerned with rights of custody under the law of the country from which the child has been removed and with the return of that child to that country and is thus not concerned with the rights of custody in terms of Australian law.⁶⁸

In regards to the argument that the Hague Convention and the Regulations are inconsistent with the Declaration of the Rights of the Child and the United Nations Convention on the Rights of the Child, 1989 (UNCRC), it is necessary to note that the Declaration of the Rights of the Child was superseded by the UNCRC and as held in the case of *Murray*, that no inconsistency existed between the Hague Convention and the UNCRC, although if such inconsistency existed, the Hague Convention would prevail because it was incorporated into the domestic law of Australia by section 111B of the FLA as well as the Regulations.⁶⁹ If, however, there was any inconsistency, the Australian courts should comply with the plain language of the valid Australian law.⁷⁰ The court felt that the UNCRC was a ratified Australian Convention which had not been given specific statutory recognition and thus that its use was to resolve ambiguities in the legislation, fill the gaps in such legislation and resolve ambiguities and lacunae in the common law.⁷¹ The Hague Convention is thus not inconsistent with the UNCRC in Australia as its Preamble indicates it is predicated on the paramountcy of the rights of the child, which

⁶⁷ Ibid at paras [84]-[86]. The language which empowers the making of the Regulations is not confined to the literal implementation of the Hague Convention, as international treaties are generally expressed in a language negotiated at international conferences and thus when translating an international treaty into a specific country, e.g. Australia, some discretion should be allowed. The aforementioned is recognized by section 111B of the Family Law Act, 1975 (Cth), as those terms emphasize the making of Regulations which will secure advantages and benefits for Australia from the reciprocity that the Hague Convention provides: *De L v Director-General, NSW Department of Community Services* supra (n23) at 680.

⁶⁸ *McCall and State Central Authority* supra (n27) at para [89].

⁶⁹ Ibid at paras [97]-[99]; *Murray v Director of Family Services A.C.T* supra (n50) at 80,255-8; Bates op cit (n51) 252. This was argued as a result of the decision in the case of *Teoh v Minister of State for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1017, which held these Conventions as being incorporated into Australian domestic law to the extent which was necessary to apply the paramountcy principle of the child's welfare in considering applications under the Regulations (*McCall* at para [43]). This was due to the fact that the principle of the best interests of the child as the paramount consideration was contained in Principle 2 of the Declaration of the Rights of the Child and in Article 3 of the UNCRC: *McCall and State Central Authority* supra (n27) at para [41]; *De L v Director-General, NSW Department of Community Services* supra (n23) at 682.

⁷⁰ *De L v Director-General, NSW Department of Community Services* supra (n23) at 682.

⁷¹ *Murray v Director, Family Services A.C.T* supra (n50) at 80, 257. In the case of *Murray* the court considers the status of international instruments, which was a subject covered in the case of *Minister for Foreign Affairs v Magno* (1993) 112 ALR 529 at 534 and it was also provided as to what categories certain ratified Conventions and treaties fell into. However, this shall not be considered in further detail herein. Bates op cit (n51) 250-252.

are best protected through custody and access issues being determined by the courts of the state of the child's habitual residence (subject to the exceptions in Article 13 of the Hague Convention and Regulation 16) and because the applications concern where and in what court these issues should be determined, and not the child's welfare.⁷²

[6] Ultimately the Regulations were held to be valid laws of the Commonwealth of Australia and that the Family court of Australia maintained jurisdiction in terms of the Regulations to exercise jurisdiction without having regard to section 64(1)(a) of the FLA.⁷³ These therefore stand separately.⁷⁴

[7] A further argument regarding the constitutional validity of the Regulations and the Hague Convention was raised in the case of *De L v Director-General, NSW Department of Community Services* which was based on the variance between the Regulations and the Hague Convention in regards to the burden of proof for establishing an objection, and, whether it represented a departure from the actual terms of the Hague Convention resulting in the Regulations being applied beyond the imputed intention of Parliament in terms of section 111B of the FLA.⁷⁵ The assignment of the burden of proof to the person opposing the child's return is not unique to the Regulations of Australia.⁷⁶ This conforms to the experts opinion emphasized at the Hague Conference on Private International Law where it was stated in a communication from the Deputy Secretary-General of the Hague Conference that:

'... [T]he Convention leaves States Parties free to allocate the onus of proof under this paragraph to the person opposing return, as well as to fix the onus of persuasion, as Australia, New Zealand and the United States have done in their various ways.'⁷⁷

In light of this discussion, the Regulations aims and objectives shall be briefly discussed below.

⁷² *Murray v Director, Family Services A.C.T* supra (n50) at 80, 258 & 259; see generally *Brown v Director General* supra (n50) and *Gsponer v Gsponer* (1989) FLC 92-001; Bates op cit (n51) 252 fn41: 'The Hague Convention because it proceeded on the basis that those rights were best protected y having relevant issues determined by the courts of the child's habitual residence, save for the exceptions contained in article 13. In the United Nations Convention the negative effect on children of being abducted was clearly contemplated by Articles 11 and 35.'

⁷³ *McCall and State Central Authority* supra (n27) at para [113].

⁷⁴ Parkinson op cit (n40) 824.

⁷⁵ *De L v Director-General, NSW Department of Community Services* supra (n23) at 680.

⁷⁶ Ibid at 681. This burden of proof requirement is evident in New Zealand, the United States of America (USA) and South Africa.

⁷⁷ *De L v Director-General, NSW Department of Community Services* supra (n23) at 681.

3.1 The objects and aims of the Hague Convention and the Family Law (Child Abduction Convention) Regulations, 1986

[1] Regulation 1A provides the purposes of the Regulations:

(1) The purpose of these Regulations is to give effect to section 111B of the Act.

(2) These Regulations are intended to be construed:

(a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the [Hague] Convention; and

(b) recognising, in accordance with the [Hague] Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and

(c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries.'

It is therefore submitted that Regulation 1A gives effect to the aligning of their aims and objectives with that of the Hague Convention and thus indicates that the Regulations are also based on the concept that the child's best interests are of paramount importance in all matters regarding custody. They also desire to protect children internationally from the harmful effects of wrongful removal and retention and establish procedures to ensure an abducted child's prompt return to their state of habitual residence.⁷⁸

Regulation 1B provides that: 'Unless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these regulations as the [Hague] Convention.'⁷⁹ Thus the objects and aims of the Hague Convention remain the same for Australia although they are subject to regulation.⁸⁰ In light of the above, the requirements for a successful Hague Convention application in terms of the Australian law and approach shall now be discussed, prior to considering the presence and application of the exceptions/defences to the rule of peremptory return.

[2] The requirements which must be satisfied in terms of the Australian law are the same as those required in the South African law. The aforementioned is evident from the fact that the Regulations have been enacted in order to give effect to the Hague Convention and its operation within Australia. In terms of the Regulations, these specific requirements are found in Regulation 16 which deals with the obligation of the courts to order the child's return and provides: 'If an application for the child's return is

⁷⁸ Living in Limbo op cit (n1) 17.

⁷⁹ Regulation 1B of Part 2 of the Family Law (Child Abduction Conventions) Regulations, 1986.

⁸⁰ For further discussion kindly refer to Chapter [1] at point [5] of this Study.

made;⁸¹ and the application (or, if Regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention;⁸² and the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under sub-regulation (1A);⁸³ the court must, subject to sub-regulation (3), make the return order.'

4. Wrongful removal and retention: Regulations 16(1)(c) & 16(1A)

[1] Regulation 16(1A) states that a child's removal to or retention in Australia is wrongful if: 'The child was under the age of 16;⁸⁴ the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia;⁸⁵ and the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to or retention in Australia;⁸⁶ and the child's removal to or retention in Australia is in breach of those rights of custody;⁸⁷ and at the time of the child's removal or retention, the person, institution or other body:⁸⁸ was actually exercising the rights of custody (either jointly or alone);⁸⁹ or would have exercised those rights if the child had not been removed or retained.'⁹⁰ The aforementioned must all be satisfied in order for an application to be successful for the child's return because if one of the aforementioned requirements is not satisfied, the child's return will not be ordered.⁹¹

[2] According to Regulation 2(1B) '[u]nless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these regulations as in the Convention.' There is no indication that the concept of wrongful removal or retention has a contrary meaning in terms of the Regulations and thus the removal or retention is wrongful in terms of Article 3

⁸¹ Regulation 16(1)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸² Regulation 16(1)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸³ Regulation 16(1)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁴ Regulation 16(1A)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁵ Regulation 16(1A)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁶ Regulation 16(1A)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁷ Regulation 16(1A)(d) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁸ Regulation 16(1A)(e) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁸⁹ Regulation 16(1A)(e)(i) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁹⁰ Regulation 16(1A)(e)(ii) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁹¹ Australian Central Authority op cit (n23) 2. Regulation 16 continues with how to launch an application however this shall not be discussed further within this study. Neither will its referral to legal expenses and other costs and the checklists of what to do and what not to do if you fear a child has been abducted. These guidelines are however specific to Australia; see Australian Central Authority op cit (n23) 2-5.

of the Hague Convention.⁹² The case of *State Central Authority and Ayob* (1997) FLC 92-746 provides that Regulations 3 and 4 are of particular relevance in determining removal in regards to custody rights.⁹³ Therefore in order for there to be a wrongful removal or retention, the requirements indicated in paragraph [1] above must be satisfied.⁹⁴

[3] The case of *Marriage Of: Hanbury-Brown and Hanbury-Brown and Director General of Community Services (Central Authority)* [1996] FamCA 23 (14 March 1996) held:⁹⁵

‘Regulation 2(1) defines "removal" in relation to a child, for the purposes of the Regulations, as meaning the "wrongful removal or retention" of the child "within the meaning of the Convention", and Regulations 13, 15 and 16 all refer either to a child who has been "removed" to Australia, or to circumstances involving the "removal" of a child to Australia, it is necessary, in applying the Regulations, to construe the Articles of the Convention which define or give meaning to the expression "wrongful removal".’

It was also held that:

‘its purpose and effect is to ensure only that the question of the wrongfulness or otherwise of a particular removal or retention of a child is to be determined by the law of the place of the child's habitual residence immediately before the removal or retention, and not by the law of any other place such as the country to which the removing parent may choose to take the child.’⁹⁶

Therefore the Hague Convention protects custodians from choosing the forum to determine the disputes as a result of the wrongful act of another person, even though they may possess equal custodial rights.⁹⁷

[4] Regulation 17 refers to a declaration that a removal or retention was wrongful, which a court may by order declare in regards to a removal of a child from Australia to another Convention country;⁹⁸ or that the retention was wrongful within the meaning of Article 3 of the Hague Convention.⁹⁹ In terms of Regulation 17(2), the court may also ask the Central Authority to obtain a court order, or a decision of a competent authority of the child’s country of habitual residence, declaring that the removal or retention

⁹² Regulation 2(2) in Part 1 of the Family Law (Child Abduction Convention) Regulations, 1986; *Murray v Director, Family Services A.C.T* supra (n50); Young & Monahan (2009) op cit (n9) 345.

⁹³ *State Central Authority and Ayob* (1997) FLC 92-746; 21 Fam LR 567.

⁹⁴ Curtis op cit (n17) 628.

⁹⁵ *Marriage Of: Hanbury-Brown and Hanbury-Brown and Director General of Community Services (Central Authority)* [1996] FamCA 23 at para [5.3].

⁹⁶ Ibid at para [5.4].

⁹⁷ Loc cit. This case confirmed that the meaning of the words ‘removal’ and ‘retention’ were to be construed in terms of the Hague Convention’s context, at paras [5.26]–[5.29]; Bowie op cit (n22) 12.

⁹⁸ Regulation 17(1)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁹⁹ Regulation 17(1)(b) of the Family Law (Child Abduction Convention) Regulations, 1986; *Brown & Burke* [2007] FamCa 1421 at para [50].

was wrongful within the meaning of Article 3 of the Hague Convention. Regulations 16 and 17 provide that which requires satisfaction. The case of *Brown & Burke* [2007] FamCa 1421 involved a declaration in terms of Regulation 17.¹⁰⁰ Article 15 of the Hague Convention is the corresponding provision to Regulation 17.¹⁰¹ A Regulation 17 declaration however does not bind another Convention court¹⁰² and is a summary proceeding.¹⁰³ This is because,

‘... ordinary procedures can be used to undermine the objectives of any international treaty with important benefits for Australia, to frustrate the will of the parliament that Australia should enjoy and reciprocate those benefits and to defeat the application of valid Regulations which contemplate that Australian courts will deal with such cases quickly and accurately.’¹⁰⁴

[5] The appeal case of *Murray v Director, Family Services A.C.T*¹⁰⁵ considered when wrongful removal or retention should be determined. It is clear that the Hague Convention treats removal and retention as separate concepts.¹⁰⁶ Regulation 2(1) defines ‘removal’ as the ‘wrongful removal and retention of a child within the meaning of the [Hague] Convention’ which indicates that both concepts are encompassed.¹⁰⁷ The court in *Murray* agreed that the terms ‘removal’ and ‘retention’ were alternative and past events for the purposes of the Hague Convention.¹⁰⁸ This case further agreed with the English decision of *Re H and S* (1991) 3 All ER 230 where it was held that Article 12 of the Hague Convention refers to the time period (one year) running from the date of wrongful removal or retention and thus both removal and retention were to be regarded as specific events occurring on a specific occasion as otherwise the time period would be difficult to determine.¹⁰⁹ Therefore as retention refers to a specific event, removal and retention are mutually exclusive concepts:

‘For the purposes of the Convention, removal occurs when a child, which has previously been in a state of habitual residence, is taken away across the frontier of that state, whereas retention occurs where a child, which has

¹⁰⁰ *Brown & Burke* supra (n99) at para [1].

¹⁰¹ *Ibid* at paras [37]-[38].

¹⁰² *Ibid* at para [45]; *Resina v Resina* (unreported, Family Court of Australia, Barblett ACJ, Fogarty and Anderson JJ, 22 May 1991), in particular per Fogarty J).

¹⁰³ *Brown & Burke* supra (n99) at para [46].

¹⁰⁴ *Ibid* at para [47]; *De L v Director-General Department of Community Services* supra (n23) at 690.

¹⁰⁵ *Murray v Director, Family Services A.C.T* supra (n50): This case involved three children who had been brought to Australia by their mother from New Zealand in 1993. The parents were married in 1993 and after this the mother brought them to Australia.

¹⁰⁶ *Murray v Director, Family Services A.C.T* supra (n50); *Barraclough and Barraclough* (1987) FLC 91-838.

¹⁰⁷ *Murray v Director, Family Services A.C.T* supra (n50).

¹⁰⁸ *Loc cit*. This approach was also taken by the House of Lords in the case of *Re H and S* (1991) 3 All ER 230, to which the court in *Murray* refers.

¹⁰⁹ *Murray v Director, Family Services A.C.T* supra (n50).

previously been for a limited period of time outside the state of its habitual residence, is not returned to that state at the expiry of such limited period'¹¹⁰

Thus the Australian courts are required to initially examine when the removal occurred and then when the retention occurred.¹¹¹

[6] If there is inconsistency between the Hague Convention and the Regulations, as long as this does not place the Regulations outside the scope of the Commonwealth's powers to make such regulations, the duty of the Australian courts is to comply with the plain language of valid Australian law and thus to rely on the Regulations rather than the Hague Convention; however the term 'Convention' is defined in terms of the text of Schedule 1 of the Regulations and thus these provisions must be read with those of the Hague Convention.¹¹² Therefore it is evidenced as to what is considered wrongful removal and retention in terms of the Australian law.

5. Rights of custody: Regulations 3, 4 and 16(1A)(c) & (e)

5.1 The concept of parental responsibility in terms of Australian law

[1] The case of *Department of Community Services & Raddison* [2007] FamCA 1702 is authority herein.¹¹³ Regulation 16(1A)(c) relates to whether the person institution or other body seeking the child's return had rights of custody in relation to the child under the law of the child's habitual residence immediately before their removal or retention in Australia.¹¹⁴ Regulation 2(2) further provides that 'the removal or retention of a child is wrongful in the circumstances mentioned in Article 3 of the

¹¹⁰ This approach was also taken by the House of Lords in the case of *Re H and S* supra (n108) at 240, to which the court in *Murray v Director, Family Services A.C.T* supra (n50) refers.

¹¹¹ *Murray v Director, Family Services A.C.T* supra (n50); Bates op cit (n51) 250; *Jiang & Director-General, Department of Community Services* [2003] FamCA 929 at para [15]. In *Murray*, Nygh J criticized the interpretation of the requirements for wrongful removal and retention as he suggested that the interpretation was in conflict with the express words of Regulation 16(3)(a) which includes both removal and retention within the meaning of the Hague Convention and the request of the courts to consider each of these at separate time was an incorrect interpretation hereof: PE Nygh *Conflict of Laws in Australia* (5th ed) at 409; The construction provided by Nygh J gains force from Regulation 18 of the Family Law (Child Abduction Convention) Regulations, 1986 which is derived from Article 17 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹¹² *De L v Director General New South Wales Department of Community Services* (1996) 20 Fam LR 390 at 420; FLR 92-706 at 83, 468 & 83, 449; *State Central Authority and Ayob* supra (n93).

¹¹³ *Department of Community Services & Raddison* [2007] FamCA 1702: This case involved a removal of two children from South Africa to Australia by their mother in December 2005 (at para [1]). The case of *Department of Communities (Child Safety Services) & Kentwell* [2010] FamCA 639 is another example where a return order was granted on the basis of the existence of custody rights.

¹¹⁴ *State Central Authority and Ayob* supra (n93).

Convention.¹¹⁵ Regulation 16(3)(a)(i) also provides that a court can refuse to grant a child's return if an abducting parent can prove that,

'[T]he person, institution or other body seeking the child's return: ... was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained...'¹¹⁶

[2] 'Rights of custody' are defined in Article 5(a) of the Hague Convention which was adopted by Regulation 4 of the Child Abduction Regulations.¹¹⁷ Within Australia the notion of 'rights of custody' must be interpreted broadly without attributing them with a specialist meaning and they are thus to be determined with reference to the statutory definition provided in terms of Regulation 4 and not determined with reference to domestic law.¹¹⁸

[3] The case of *McCall and McCall; State Central Authority (Applicant); Attorney-General (Cth) (Intervener)* recognized two classes of powers and responsibilities in terms of the Australian domestic law: guardianship and custody.¹¹⁹ As a result, in 1996 and 2006 the Family Law Reform Act of 1995 (Cth) made significant changes to the law relating to children and significantly replaced the concepts of custody and guardianship with the concept of parental responsibility.¹²⁰ This, however, resulted in complicated statutory provisions regarding the effect of these amendments on the Regulations and the operation of the Hague Convention as seen in sections 111B[2]-[5].¹²¹

Regulation 4(1)(b) allows the consideration of the domestic law of Australia to assist in determining the custody rights. Section 111B(2) of the FLA provides: '(a) A parent/guardian of a child is no longer expressly stated to have custody of the child; and (b) a court can no longer make an order under this Act

¹¹⁵ *Department of Community Services & Raddison* supra (n113) at para [32]. According to Regulation 2(1B) of the Family Law (Child Abduction Convention) Regulations, 1986, '[u]nless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these regulations as in the Convention.'

¹¹⁶ *Department of Community Services & Raddison* supra (n113) at para [33].

¹¹⁷ *Ibid* at para [34]; *Bowie* op cit (n22) 13.

¹¹⁸ *Department of Community Services & Raddison* supra (n113) at paras [35]-[36]; *MW v Director-General, Department of Community Services* supra (n27) at para [86]; *McCall and McCall; State Central Authority (Applicant); Attorney-General (Cth) (Intervener)* supra (n27); English cases referred to by the Australian courts, which held the same principles, for general reference are: *Re B (a Minor)* [1994] 2 Fam LR 249 at 257; *Re F* [1995] 2 Fam LR 31 at 41; *Re H* [2000] 1 Fam LR at 378. Thus the Australian domestic law shall not be referred to herein as regards to rights of custody, whereas the South African law is discussed in Chapter [2] due to the reference therein.

¹¹⁹ *Nicholls* op cit (n22) 4.

¹²⁰ *Ibid* at 4-5; *Young & Monahan* (2009) op cit (n9) 345; *Fehlberg & Behrens* op cit (n7) 248.

¹²¹ *Nicholls* op cit (n22) 5.

expressed in terms of granting a person custody of, or access to, a child.’ Section 111B(3) of the FLA states that the purpose of subsection (4) is to resolve doubts about the implications of these changes for the Hague Convention. Section 111B(4) provides that for the purposes of the Hague Convention those instances in which a parent or individual has custody, access or parental responsibility in regards to a child.

[4] The concept of custody in the Hague Convention therefore goes far beyond that of custody in terms of the FLA as custody is defined in the FLA as¹²² ‘(a) the right to have the daily care and control of the child, and (b) the right and responsibility to make decisions concerning the daily care and control of the child.’¹²³ Guardianship¹²⁴ involves the responsibility for the long-term welfare of the child and the powers, rights and duties that are, apart from the Act, vested by law or custom in the guardian of the child.¹²⁵ The rights of custody are however specifically excluded from the rights and responsibilities of guardianship.¹²⁶

The right to determine the child’s place of residence is not a matter which deals with the every day care and control of the child and is thus a matter which falls within the scope of the guardianship for the purposes of the Act.¹²⁷ Regulation 4(2) adopts Article 5 of the Hague Convention. The practical significance of the aforementioned is that unless an order is made giving the custodian the sole guardianship of the child or an agreement is registered with the same effect, the parents remain joint guardians.¹²⁸ Thus the child’s removal in the case of joint guardianship in terms of Australian law can also lead to wrongful removal and retention and the Hague Convention would thus be applicable even without a specific breach of a custody order.¹²⁹ The Australian interpretation of Regulation 4, provided in the case of *Jiang and Director-General Department of Community Services*, was that ‘rights of custody’ require that the bundle of rights held by the left-behind parent include a right to determine the child’s place of residence.¹³⁰ The FLA prohibits the removal of a child subject to an order with respect

¹²² Section 63E(2) of the Family Law Act, 1975 (Cth).

¹²³ Curtis op cit (n17) 628; Fehlberg & Behrens op cit (n7) 248.

¹²⁴ Section 63E(1) of the Family Law Act, 1975 (Cth).

¹²⁵ Curtis op cit (n17) 628; Fehlberg & Behrens op cit (n7) 248.

¹²⁶ Curtis op cit (n17) 628.

¹²⁷ Ibid at 629.

¹²⁸ Section 63F(1) of the Family Law Act 53 of 1975 (Cth); Curtis op cit (n17) 629.

¹²⁹ Curtis op cit (n17) 629.

¹³⁰ *Wenceslas and Director-General, Department of Community Services* [2007] FamCA 398; (2007) FLC 93-321 at paras [113], [116] & [165]-[167]; *Jiang and Director-General Department of Community Services* supra (n111) at paras [59]-[60]; *Department of Community Services & Raddison* supra (n113) at para [111].

to custody or guardianship, without the consent of any person who is in terms of the court order entitled to custody, guardianship or access in regards to that child.¹³¹ Therefore, in Australia if a person, in terms of access rights under a court order, has not consented to the child's removal or a court ordered removal, the removal is wrongful.¹³² It, however, remains clear that where a removal is wrongful under the FLA as the only result of the lack of consent of a person entitled to access to the child, whether such removal would be wrongful for the purposes of the Hague Convention is still questionable.¹³³

A right of veto, which is the right of the parent to determine the child's residence, thus provides the left-behind parent with custody rights in terms of the Hague Convention as well as the Australian Regulations.¹³⁴ A right of veto may therefore give rise to a right to determine that there be no change in that place of residence¹³⁵ and the other party has an obligation to observe the status quo and the observance of the obligation will attract the relevant remedies available.¹³⁶ Regulation 4 is also broad enough to consider the court as the holder of custody rights.¹³⁷

¹³¹ Section 70A(1) of the Family Law Act, 1975 (Cth); Curtis op cit (n17) 629.

¹³² Curtis op cit (n17) 629.

¹³³ Loc cit. The 1996 reforms abolished the concepts of guardianship, access and custody and replaced them with the concept of parental responsibility which was to be shared jointly by parents except to the extent provided for in any parenting order. The idea behind the aforementioned was to try and encourage movement away from the belief that custody was a prize: see Fehlberg & Behrens op cit (n7) 247-248. Parental responsibility is defined in the FLA to mean 'all the duties, power, responsibilities and authority, which by law, parents have in relation to children'. In the absence of a court order, joint parental responsibility is enjoyed although it can be exercised independently of each other. However, the FLA also provides little guidance on what exactly parental responsibility is and contains and it merely states that parental responsibility 'in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.' See also Monahan & Young (2008) op cit (n6) 361; Section 61B of the Family Law Act, 1975 (Cth).

¹³⁴ *Department of Community Services & Raddison* supra (n113) at para [115]; see generally *Resina v Resina* (supra (n102)) and *State Central Authority and Pankhurst* [2007] FamCA 1345; *Northern Territory Central Authority & Gambini* [2008] FamCA 544 at paras [68]-[69] generally.

¹³⁵ *Jiang & Director-General, Department of Community Services* supra (n111) at paras [63] & [66]; *Northern Territory Central Authority & Gambini* supra (n134) at para [60]; *Brown & Burke* supra (n99) at para [69]; *Wenceslas v Director-General Department of Community Services* supra (n130) at para [186].

¹³⁶ *MW v Director-General, Department of Community Services* supra (n27) at paras [75]-[76] & [79]. Therefore the 'right to determine' in terms of Article 5 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and Regulation 4 of the Family Law (Child Abduction Convention) Regulations, 1986 is deciphered.

¹³⁷ *MW v Director-General, Department of Community Services* supra (n27) at para [86]; *Wenceslas v Director-General Department of Community Services* supra (n130) at para [223]; *Brown & Burke* supra (n99) at para [92]; *Department of Community Services & Raddison* supra (n113) at para [114]; *Northern Territory Central Authority & Gambini* supra (n134) at paras [79]-[80] & [83]; *Brooke, S v Director General, Department of Community Services* [2002] FamCA 258; (2002) FLC 93-109 at para [27].

[5] Section 111B(4)(a) of the FLA provides that both parents retain joint parental responsibilities under Australian law and rights of custody, for the purposes of the Hague Convention, unless parental responsibility has been expressly removed by a court order.¹³⁸

5.2 Rights of custody

[1] In determining rights of custody in Hague Convention matters in terms of the Regulations, the court must have regard to the law at the relevant time in the country from which the child was removed.¹³⁹ If no order regarding custody exists, then the state concerned must have regard to the possible custody statutes existing by operation of law in the child's state of habitual residence.¹⁴⁰ Regulation 4(3) provides that rights of custody 'may arise' by operation of law, judicial or administrative decision or agreement 'having effect under a law in force in Australia or a Convention country' which therefore indicates that custody rights can arise from other sources.¹⁴¹

[2] The case of *Wenceslas v Director-General Department of Community Services* considered the following:

'... [M]ere rights of access are insufficient to constitute rights of custody, unless accompanied by the right to determine the place of residence of the child. In other words, the right to determine the place of residence of the child is not just sufficient, but necessary to establish 'rights of custody' for the purposes of Regulations.'¹⁴²

¹³⁸ Australian Government Attorney-General's Department *Frequently Asked Questions about International Parental Child Abduction*, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_InternationalFamilyLawFrequentlyAskedQuestionsaboutInternationalParentalChildAbduction, accessed on 31st March 2011; Young & Monahan (2009) op cit (n9) 345.

¹³⁹ *Department of Community Services & Raddison* supra (n113) at para [39]; *Department of Community Services v Crowe* (1996) 135 FLR 443; 21 Fam LR 159; FLC 92 – 217; F Bates 'Child abduction, the Hague Convention and Australian law – a specific overview' (1999) 32 *CILSA* 93-94. This was also supported by the case of *Police Commissioner of South Australia v Temple* (1993) FLC 92-365 at 79, 827; *McCall and McCall and State Central Authority* supra (n27); *State Central Authority and Ayob* supra (n93).

¹⁴⁰ Curtis op cit (n17) 628; *Department of Community Services & Raddison* supra (n113) at paras [52]-[53].

¹⁴¹ *Department of Community Services & Raddison* supra (n113) at para [40]. Professor Pérez-Vera discusses that these agreements must have legal effect in the country concerned and not be prohibited. In order to have legal effect they must include any agreement not prohibited by law and which may provide a basis for presenting a legal claim to the competent authorities. In regards to Regulation 4(3) however there is no Australian law which interprets the phrase 'legal effect' although the Judge in *Raddison* refers to the fact that the Hague Convention is an international treaty and decisions of other signatory countries also provide guidance in the interpretation hereof: *Department of Community Services & Raddison* supra (n113) at paras [76], [78] & [80]; E. Pérez-Vera 'Explanatory Report on the Hague Child Abduction Convention' (1982) at para [70], available at <http://hcch.e-vision.inl/upload/expl28.pdf>, accessed on 12 June 2010.

¹⁴² *Brown & Burke* supra (n99) at para [67]; *Wenceslas and Director-General, Department of Community Services* supra (n130) at paras [166]-[167]: 'Given the desirability of consistency in matters relating to the interpretation of international conventions, and especially in the absence of informed argument on both sides of the present appeal, we are of the firm view there is no reason for us to depart from the approach adopted by the Full Court in *Jiang*. Hence, we conclude that mere rights of access or contact are insufficient to constitute rights of custody, unless accompanied by the right to determine the place of

[3] *Gambini* referred to the decision in *Jiang* which accepted a ‘three-stage approach’ in Australia to determining whether a removal breached rights of custody and would thus be wrongful: *Wenceslas* stated this three-stage approach as the following:¹⁴³

- ‘1. The first task of the court is to establish, on the evidence before it, what rights, if any, the parent seeking the return had under the law of the foreign country in relation to the child at the time of removal;
2. The next stage is to resolve, as a matter of Australian law under the Regulations (being the law of the forum where the Convention has been invoked), whether they amount to ‘rights of custody’ within the meaning of the Regulations; and.
3. Finally, the question is whether or not the removal or retention of the child was in breach of those rights, and therefore whether or not the removal was wrongful within the Regulations.’

This three-stage process is also used by the Australian courts to be able to capably make requisite decisions. The final requirement for a successful application, ‘Habitual residence’, shall be discussed below.

6. Habitual residence: Regulation 16(1A)(b)

[1] The concept of ‘habitual residence’ is not defined in either the Regulations or Hague Convention.¹⁴⁴ Australian case law has made reference to the concepts of ‘settled purpose’ or ‘settled intention’¹⁴⁵ and it has been noted that the term ‘habitually resident’ is not to be treated as a term of art, as it presents ‘a question of fact which needs to be determined with consideration to all evidence presented in the specific case.’¹⁴⁶ This question of fact comprises two elements: the fact of residence and the intention to reside habitually.¹⁴⁷

residence of the child. In other words, the right to determine the place of residence of the child is not just sufficient, but necessary to establish “rights of custody” for the purposes of the Regulations.’ See also *Northern Territory Central Authority & Gambini* supra (n134) at para [67].

¹⁴³ *Northern Territory Central Authority & Gambini* supra (n134) at para [66]; *Jiang and Director-General Department of Community Services* supra (n111); *Wenceslas & Director-General, Department of Community Services* supra (n130) at paras [22] & [91]. For further cases on custody rights kindly see *In the Marriage of Resina* [1991] FamCA 33; *Director-General Department of Families, Youth and Community Care and Hobbs* [1999] FamCA 2059, *Family court & Department of Child Safety & Hunter* [2009] FamCA 263 as examples hereof as the concept of custody rights shall not be dealt with in any further detail within this Study.

¹⁴⁴ *DW and Director-General, Department of Child Safety* (2006) FLC 93-255 at 80, 328; *Secretary, Attorney-General’s Department (Cth) & Donald* [2011] FamCA 482 at para [36]; F Bates ‘More abduction cases from Australia: An inevitable development’ (2006) 14 *Asia Pacific Law Review* 127.

¹⁴⁵ *LK v Director-General, Department of Community Services* [2009] HCA 9 at para [39].

¹⁴⁶ *Loc cit*, referring to the English case of *In Re J (A Minor) (Abduction)* [1990] 2 AC 562 at 578; *Zotkiewicz & Commissioner of Police (No. 2)* [2011] FamCAFC 147 at para [14]; *State Central Authority & Wattey* [2008] FamCA 1108 at paras [13] & [14]; *Panayotides and Panayotides* (1997) FLC 92-733 at 83,897; Bates *op cit* (n144) 128. The fifth meeting of the Special Commission on the Child Abduction Convention suggests that debates and contests over the ‘habitual residence’ of children are becoming more common as an effective defence against return, as the Hague Convention ordinarily foresees. It was also held regarding habitual residence decisions that if habitual residence proceedings were to become the Hague Convention’s focus, there is a risk that that this strategy may conflict with the substantive and procedural objects of the

[2] The leading case which subsequently determined the content and meaning of habitual residence in Australia was that of *LK v Director-General, Department of Community Services* [2009] HCA 9¹⁴⁸ which stated:¹⁴⁹

‘International treaties should be interpreted uniformly by contracting states.¹⁵⁰ Although the questions in this matter turn immediately upon the proper construction and application of the Regulations, the Regulations provide that,¹⁵¹ unless the contrary intention appears, an expression used in the Regulations and in the Abduction Convention has the same meaning in the Regulations as in the Abduction Convention. It follows that, unless it is shown that the term is used in the statute law of other contracting states in a sense different from the way in which it is used in the Abduction Convention, care is to be exercised to avoid giving the term a meaning in Australia that differs from the way it is construed in the courts of other contracting states. But it is no less important to recognise that, because the term is not defined in the Abduction Convention, and the absence of definition reflects the stated intention that it should be treated "as a question of pure fact", conclusions reached in the courts of other jurisdictions are not lightly to be treated as establishing principles of law which govern the term's meaning and application. Rather, they are to be read and understood as resolving the particular controversy tendered for decision.’

Regulation 1A(2) provides that the Regulations are to be construed as having regard to the principles and objects mentioned in the Preamble and Article 1 of the Hague Convention in ‘that the appropriate forum for resolving disputes between parents relating to a child’s care, welfare and development is ordinarily the child’s country of habitual residence.’¹⁵² This case emphasized that the abducting parent’s settled intention or purpose was a necessary and integral part of determining habitual residence.¹⁵³ However, in regards to what matters are to be taken into account when determining questions of habitual

Hague Convention: N Lowe *A Statistical Analysis of Applications made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Preliminary Document No. 3, Pt. II of November 2006 (revised version); Kirby op cit (n22) 10; Bowie op cit (n22) 15.

¹⁴⁷ *McCall v State Central Authority* supra (n27) at 81, 523 referring to *A v A (Child Abduction)* [1993] 2 FLR 225 at 235; Bates op cit (n144) 130.

¹⁴⁸ This case concerned a pre-condition that children must be habitually resident in the country from which they were taken. The main Judge held in this case that the children were habitually resident in Israel before being taken to & retained in Australia. The full court of the Family court affirmed this conclusion and the mother’s appeal was dismissed. The High Court concluded that the Family Court had applied notions of ‘domicile’ (which imports parental intention) instead of the concept of ‘habitual residence’ (which is primarily factual). See Kirby op cit (n22) 10. The fifth meeting of the Special Commission on the Child Abduction Convention seemed to suggest that contests over the ‘habitual residence’ of children are becoming more common as an effective defence against return, as the Convention ordinarily envisages. Lowe op cit (n146) and Kirby op cit (n22) 10. Another case which considered the concept of habitual residence prior to this was: *Cooper v Casey* (1995) FLC 92-575.

¹⁴⁹ *LK v Director-General, Department of Community Services* supra (n145) at ‘Order’ paras [1] & [36].

¹⁵⁰ *Povey v Qantas Airways Ltd* [2005] HCA 33; (2005) 223 CLR 189 at 202, para [25].

¹⁵¹ Regulation 2(1B) of the Family Law (Child Abduction Convention) Regulations, 1986.

¹⁵² *LK v Director-General, Department of Community Services* supra (n145) at para [6].

¹⁵³ *Ibid* at para [17]; *LK v Director-General, Department of Community Services* [2008] FamCAFC 81; (2008) 39 Fam LR 431 at 454 [73].

residence, the approach of the New Zealand case of *Punter v Secretary for Justice* [2007] 1 NZLR 40, where the approach was described as a broad factual inquiry into all the factors relevant to determining the habitual residence of the child, of which the settled purpose or intention of the parents is an important but not necessarily decisive factor, became decisive herein.¹⁵⁴

To approach the term only from a standpoint which describes it as presenting a question of fact has limitations¹⁵⁵ and the identification of what is or may be relevant to the inquiry is not to be hidden by stopping at the point of describing the inquiry as factual.¹⁵⁶ Some criteria should be engaged at some point in the inquiry and these are found in the ordinary meaning of the expression.¹⁵⁷ Consideration is given to where a person resides and whether this can be described as habitual.¹⁵⁸ However, it is sufficient that the application of the expression ‘habitual residence’ permits consideration of a wide variety of circumstances that influence where a person is said to reside and whether that residence can be described as habitual, and secondly; the past and present intentions of that person will often have effect on the significance which is to be attached to particular circumstances e.g. the duration of a person’s connections within a particular place of residence.¹⁵⁹ However, the use of the terms ‘habitual residence’ does amount to a rejection of other possible connecting factors such as domicile of nationality.¹⁶⁰ It thus has been used in the Hague Convention ‘[t]o avoid the distasteful problems of the ... concept [of domicile] and the uncertainties of meaning and proof of subjective intent.’¹⁶¹ Habitual residence does identify the centre of a person’s personal and family life which is disclosed by the facts of that individual’s activities.¹⁶² Therefore it is unlikely but not impossible that a person will be found to be habitually resident in more than one place at a time and this habitual residence can be abandoned

¹⁵⁴ *LK v Director-General, Department of Community Services* supra (n153) at para [18]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at paras [3], [13], [69] & [97]; *Secretary, Attorney-General’s Department (Cth) & Donald* supra (n144) at para [41]; *LK v Director-General, Department of Community Services* supra (n145) at para [44]; *Punter v Secretary for Justice* [2007] 1 NZLR 40 at 62-62, para [88].

¹⁵⁵ *LK v Director-General, Department of Community Services* supra (n145) at para [22]; DF Cavers “‘Habitual residence’:” A useful concept? (1972) 21 *American University Law Review* 477 - 479.

¹⁵⁶ *LK v Director-General, Department of Community Services* supra (n145) at para [22].

¹⁵⁷ *Loc cit.*

¹⁵⁸ *Loc cit.*

¹⁵⁹ *Ibid* at para [23].

¹⁶⁰ *LK v Director-General, Department of Community Services* supra (n145) at para [24].

¹⁶¹ *Ibid* at para [24]; EF Scoles, P Hay, PJ Borchers & SC Symeonides *Conflict of Laws: Hornbook Series* (4th ed) (2004) at 247, section 4.14.

¹⁶² *LK v Director-General, Department of Community Services* supra (n145) at para [25]; Scoles, Hay, Borchers and Symeonides *op cit* (n161) at 247, section 4.14.

without immediately becoming habitually resident in some other place.¹⁶³ Habitual residence is also voluntarily adopted, however, this does not need to be done consciously.¹⁶⁴

[3] The habitual residence of a child is determined through the examination into where the person or persons caring for the child have their habitual residence.¹⁶⁵ In Australia it is also difficult, in regards to a very young child, to speak of their habitual residence as distinct and separate from that of the place of habitual residence of the person or persons whom the child depends on for care.¹⁶⁶ If the parents lived together at the time of the removal and retention of the very young child, then the habitual residence of the child is that of the parents.¹⁶⁷ However, unlike domicile, considerations for determining where one is habitually resident are not confined to the concepts of physical presence and intention and this is also not given any controlling significance.¹⁶⁸ Individuals do not always act with a clearly formed and singular view of what is intended and their intentions may thus be ambiguous.¹⁶⁹ When considering where a child is habitually resident, the intentions of the parent who has the day-to-day care of the child are not the sole considerations.¹⁷⁰ It will usually be necessary to consider what each parent intends for the child. The general rule is that neither parent can unilaterally change the child's place of habitual residence as the consent of either parent (or a court order) is usually necessary.¹⁷¹ In examining both

¹⁶³ *LK v Director-General, Department of Community Services* supra (n145) at paras [25] & [32]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at paras [12] & [77]; *Kilah & Director-General, Department of Community Services* [2008] FamCAFC 81 at para [23]; *State Central Authority & Wattey* supra (n146) at para [15]; *Director-General, Department of Families and Kinnunen* [2001] FamCA 393 at 15.

¹⁶⁴ *State Central Authority & Wattey* supra (n146) at para [14]; *Re B (minor)* (1993) 1 FLR 993 at 995; *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144) at paras [36] & [41].

¹⁶⁵ *LK v Director-General, Department of Community Services* supra (n145) at para [27]; The case of *Secretary of the Attorney-General & Stamatelos* [2008] FamCA 1117 held that in regards to a child's habitual residence, this depends on the habitual residence of the people who have custody of the child. In regards to sole custody, the child's habitual residence is that of the sole parent (at paras [28]-[29]). In the case of separated parents, the child's place of habitual residence is that of whom he lives with (at para [30]). In the case of joint custody, the child's habitual residence is that of the couple and the one parent cannot unilaterally change this but it can be changed by agreement, acquiescence or court order and if one parent acts unilaterally then the child's habitual residence remains that of the left behind parent (at para [31]).

¹⁶⁶ *LK v Director-General, Department of Community Services* supra (n145) at para [27].

¹⁶⁷ *State Central Authority & Wattey* supra (n146) at para [14]; *Re B (minor)* supra (n164).

¹⁶⁸ *LK v Director-General, Department of Community Services* supra (n145) at para [28]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at para [12].

¹⁶⁹ *LK v Director-General, Department of Community Services* supra (n145) at para [29]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at para [12].

¹⁷⁰ *LK v Director-General, Department of Community Services* supra (n145) at para [33]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at para [12]; *Secretary, Attorney-General's Department (Cth) & Donald* supra (n146) at para [43].

¹⁷¹ *LK v Director-General, Department of Community Services* supra (n145) at paras [33]-[34]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at paras [12] & [73]; *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144) at para [43]; *State Central Authority & Wattey* supra (n146) at para [14]; *State Central Authority v McCall* supra (n27).

parents' intentions, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged.¹⁷²

[4] There is also no arbitrary period for acquiring habitual residence and it is important to find a strong and readily perceptible link between the child and country in which they may be habitually resident and this subsequently recognizes that if children are to be linked to a state and sent back there, they should have a real and active connection with that place.¹⁷³ The requesting party also bears the onus of proving habitual residence on a balance of probabilities.¹⁷⁴

[5] The case of *Secretary, Attorney-General's Department (Cth) & Donald* agrees that the case of *LK* is still good law¹⁷⁵ and in light of the *Punters* case, this is merely seen as assisting with the enquiry and broadening the factors. The case also expressly adopted the observations in the case of *Department of Health and Community Services v Casse*, wherein it was stated that: 'All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.'¹⁷⁶ It was stated that: '... once an intention to adopt an habitual residence has been reached and acted upon in a decisive way so as to provide a degree of certainty and continuity, then it may be open to a Court to find that habitual residence has been changed from that point.' It was also held that it follows that the authorities in regards to habitual residence do not comprise a closed list of considerations or establish principles of general application which pre-determine the weight to be given to particular factors.¹⁷⁷ Therefore it is submitted as evident as to what the concept of habitual residence is and how it is determined for discussion in the present purposes.

¹⁷² *LK v Director-General, Department of Community Services* supra (n145) at paras [33]-[34]; *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at paras [12] & [73]; *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144) at para [43]; *State Central Authority & Hajjar* [2010] FamCA 648 at para [109].

¹⁷³ *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at paras [80]-[81] & [82]; PR Beaumont & PE McEleavy *The Hague Convention on International Child Abduction* (1999) 101 & 108. This also distinguishes domicile from that of habitual residence.

¹⁷⁴ *Zotkiewicz & Commissioner of Police (No. 2)* supra (n146) at para [122]; *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144) at para [8].

¹⁷⁵ *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144). The case of *State Central Authority and Henfold* [2010] FamCA 1172 at para [47], agrees with the submissions and position of the case of *LK v Director-General, Department of Community Services* supra (n145). The case of *State Central Authority & Camden (No 2)* [2011] FamCA 666 is another example of case law dealing with the concept of habitual residence.

¹⁷⁶ *Secretary, Attorney-General's Department (Cth) & Donald* supra (n144) at para [40].

¹⁷⁷ *Ibid* at para [44].

7. Process in terms of the Regulations

[1] Article 6 requires that each contracting state must designate a Central Authority to discharge the duties imposed by the Hague Convention, and Federal states or states with more than one system of law, or those states which have autonomous territorial organizations, shall be free to appoint more than one Central Authority and specify the extent of their powers, and, in cases where more than one has been appointed, the state or territory can designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that state.¹⁷⁸ The Commonwealth Central Authority means the Secretary of the Attorney-General's Department in terms of Regulation 2(1). The responsible Central Authority in relation to action to be taken in a state or territory means the Commonwealth Central Authority or the State Central Authority of that state or territory. State Central Authority, means a person appointed under sub-regulation 8(1) to be the Central Authority of a state or territory.

[2] Regulation 5 provides the duties, powers and functions of the Commonwealth Central Authority and Regulation 5(2) states that the Commonwealth Central Authority has all the duties and may exercise all the powers and shall perform all the functions that a Central Authority has under the Hague Convention. Regulation 5(3) provides that the Commonwealth Central Authority must perform its functions and exercise its powers as quickly as possible on a proper consideration of each matter to the extent this allows. Regulation 9 deals with the State Central Authority's duties, powers and functions and it is indicated that subject to Regulation 8(3), the State Central Authority has all the duties, may exercise all the powers, and may perform all the functions of the Commonwealth Central Authority.¹⁷⁹

[3] Regulation 6 indicates that the regulations do not affect other powers or rights of applicants and thus in terms of Regulation 6(1) they are not intended to prevent a person, institution or other body that has rights of custody, in relation to a child for the purposes of the Hague Convention, from applying to a court if the child is removed to, or retained in, Australia in breach of those rights. Regulation 6(2) also provides that these regulations are not to be taken as preventing a court from making an order at any time under Part VII of the Act or under any other law in force in Australia for the return of a child.

¹⁷⁸ Australian Government Attorney-General's Department *op cit* (n22).

¹⁷⁹ C Martin 'Abduction of children – some National and International Aspects' (1987) 1 *AJFL* 125 & J Kay 'The Hague Convention – Order or chaos?' (2005) 19 *AJFL* 245.

[4] Regulation 8(1) states that the Attorney-General may appoint a person to be the Central Authority of a state or territory for the purposes of these Regulations. The International Family Law Section of the Commonwealth Attorney-General's Department is responsible for co-ordinating the implementation of the Hague Convention and performs the functions of the Commonwealth (Federal) Central Authority for Australia (CCA), which is the Secretary of the Commonwealth Attorney-General's Department.¹⁸⁰ When an application is received by the state or territory, it is then sent to the Attorney-General's department in Canberra, who co-ordinates the operation of the Hague Convention within Australia.¹⁸¹ The Regulations implemented the Hague Convention within Australia and established the Secretary of the Attorney-General's Department as the Commonwealth Central Authority.¹⁸²

[5] In terms of Regulation 13(4) the Central Authority must seek voluntary return or an amicable resolution to the situation, transfer the request to the relevant Central Authority or launch an application for the child's return and this order can be sought immediately, no waiting period is required.¹⁸³ Regulations 14 and 15 set out the orders which can be sought and which can be granted. Regulation 16 deals with the obligation of the courts to make a return order as previously discussed. Regulation 19 sets out the instances where a court cannot make certain orders e.g. if an application for return is made, a court must not make an order, except an interim order, providing for the custody of the child within the meaning of Regulation 18, until the application is determined. Regulation 20 deals with arrangements for the return of the child. Regulations 23, 24 and 25 deal with applications for access orders in terms of a convention country and in terms of Australia.

A mere guideline of the above has been presented to provide an insight into the complete operation of the Regulations and Hague Convention. However, the aforementioned has caused many difficulties which the Hague Convention's application, in certain cases, has made statements of principle difficult to extract from the case law.¹⁸⁴ It must be noted, however, that the Hague Convention and the Regulations were intended to limit the courts discretion in the country to which the child was removed to or retained

¹⁸⁰ Australian Government Attorney-General's Department op cit (n22) 1; Living in Limbo op cit (n1) 3; Nicholls op cit (n22) 2.

¹⁸¹ Living in Limbo op cit (n1) 26.

¹⁸² Australian Government Attorney-General's Department op cit (n138) 2.

¹⁸³ Young & Monahan (2009) op cit (n9) 346.

¹⁸⁴ Bates op cit (n51) 246.

in.¹⁸⁵ This, however, has also meant that Australia is not a jurisdiction which other countries can easily interact with in matters of private international law.¹⁸⁶ In light of this, the exceptions/defences to the rule of peremptory return shall follow below.

8. Exceptions to the rule of peremptory return in terms of the Regulations

[1] The Regulations provide exceptions to the rule of peremptory return in terms of the Australian law.¹⁸⁷ Both the Hague Convention and the Regulations have established grounds on which an abducting parent can rely in order to oppose the child's return and they are required to provide evidence in relation hereto:¹⁸⁸ these include that the child is over the age of sixteen years of age;¹⁸⁹ the child was outside of Australia for over 12 months and is settled in their new environment;¹⁹⁰ the child was not habitually resident in Australia at the time of the removal or retention as well as the further four exceptions provided for in terms of Regulation 16(3):¹⁹¹

'A court may refuse to make an order for return if a person opposing return establishes that: (a) the person, institution or other body seeking the child's return:¹⁹² (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;¹⁹³ or (c) each of the following applies:¹⁹⁴ (i) the child objects to being returned; (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.'¹⁹⁵

These shall each be individually examined below.

¹⁸⁵ Loc cit.

¹⁸⁶ Loc cit. For further information see F Bates 'Cave jurisdiction – recent cases on family law and conflicts in Australia' (2006) 27 *Liverpool Law Review* 233.

¹⁸⁷ Fehlberg & Behrens op cit (n7) 309; Regulation 16(3) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

¹⁸⁸ Australian Government Attorney-General's Department op cit (n138) 6.

¹⁸⁹ Regulation 16(1A)(a) of the Family Law (Child Abduction Convention) Regulations, 1986; Article 4 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980. The onus is on the opposing party and they must prove the raised exception/s on a balance of probabilities: *State Central Authority & Wattey* supra (n146) at para [18].

¹⁹⁰ Regulation 16(2) of the Family Law (Child Abduction Convention) Regulations, 1986; Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

¹⁹¹ Australian Government Attorney-General's Department op cit (n138) 6.

¹⁹² Regulation 16(3)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

¹⁹³ Regulation 16(3)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

¹⁹⁴ Regulation 16(3)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

¹⁹⁵ Regulation 16(3)(d) of the Family Law (Child Abduction Convention) Regulations, 1986.

[2] The court is, however, not independently allowed to consider whether the return is in the child's best interests and thus they may not independently exercise a discretion to order or refuse to order the child's return based on this principle.¹⁹⁶ This is an assumption of the Hague Convention which provides that where circumstances do not fall within one or more of the exceptions, the best interests of the child are served by ordering the child's speedy return to their country of habitual residence in order that issues surrounding custody can be determined by the courts there.¹⁹⁷ Thus the child's best interests may only be considered by the court of the requested country in exceptional circumstances.¹⁹⁸

[3] In terms of Regulation 16(1), a court is obligated to order the child's return¹⁹⁹ if the application was filed within one year after the child's removal or retention;²⁰⁰ and the requirements of wrongful removal and retention in terms of Regulation 16(1A) are satisfied.²⁰¹ Regulation 16(2) provides the following limitations in regards to the functioning of the Regulations in terms of the Hague Convention: 'If the application²⁰² is filed more than one year after the day on which the child was first removed to, or retained in, Australia;²⁰³ and the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment; the court must, subject to sub-regulation 16(3), grant the order of return.'²⁰⁴ Regulation 16(3) also provides other instances in which a court may refuse to order the child's return. In order for the court to consider refusing the child's return, in terms of Regulation 16(4), account must be taken of any information relating to the social background of the child which can be provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately prior to their removal or retention. In terms of Regulation 16(5) the court is also not prohibited from granting a return order just because a ground in Regulation 16(3) is satisfied by the opposing party. They retain a discretion to order the child's return.

[4] As a result of the above, these exceptions and their application in light of the Regulations and case law of Australia shall now be individually discussed. Regulation 16 is the most important set of

¹⁹⁶ Curtis op cit (n17) 631; Bowie op cit (n22) 17.

¹⁹⁷ Curtis op cit (n17) 627 & 631.

¹⁹⁸ Ibid at 627.

¹⁹⁹ Regulation 16(1)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁰⁰ Regulation 16(1)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁰¹ Regulation 16(1)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁰² Regulation 16(2)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁰³ Regulation 16(2)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁰⁴ Regulation 16(2)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

regulations for comparison between South Africa and Australia and the case of *State Central Authority and De Blasio* [2002] FamCA 804 held that the existence of the Regulation 16(3) exceptions/defences allows a court to refuse to order the child's return, however, the question regarding the exercise of this discretion still remains.²⁰⁵ The case of *De L v Director-General, NSW Dept of Community Services* states in this regard that:²⁰⁶

'... The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations] enable it to be said that a particular consideration is extraneous ... That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.'

8.1 Exception one: Regulation 16(2)

[1] If an application for the child's return is filed more than one year after the day on which the child was first removed to or retained in Australia, and the court is satisfied that the person opposing the return has not established that the child is settled in their new environment, the court must order their return subject to Regulation 16(3). The time allocation to lodge an application is therefore one year from the date on which the child was first removed or retained in Australia; therefore if the period of a year has passed, the court maintains a discretion to refuse the child's return. However, in terms of Regulation 16(2)(c) if an application is filed after the period of one year and the abducting parent (opposing parent) is unable to prove that the child is settled in their new environment, then the court must order the child's return.²⁰⁷

[2] No presumption exists that a child is settled merely because they have lived in the state to which they were removed for more than a year.²⁰⁸ The defence provided in Regulation 16(2) is thus the same as that provided for in terms of Article 12 of the Hague Convention. Regulation 16(2) must however be read in the context of the Hague Convention as being aimed at discouraging a unilateral court order being made

²⁰⁵ *Kilah & Director-General, Department of Community Services* supra (n163) at para [28]; *State Central Authority and De Blasio* [2002] FamCA 804 at para [33].

²⁰⁶ *De L v Director-General, NSW Dept of Community Services* supra (n2) at 661; *Kilah & Director-General, Department of Community Services* supra (n163) at para [28]; *State Central Authority and De Blasio* supra (n205) at para [33].

²⁰⁷ Young & Monahan (2009) op cit (n9) 346; Regulation 16(2) of the Family Law (Child Abduction Convention) Regulations 1986; *Northern Territory Central Authority & Gambini* supra (n134) at para [53].

²⁰⁸ *Northern Territory Central Authority & Gambini* supra (n134) at para [92]; *Graziano and Daniels* (1991) FLC 92-212 at 78,436.

in the child's country of residence, and being made rather with the objective of achieving a prompt return of the child to the forum which is best suited to deal with issues surrounding the child's future.²⁰⁹

[3] The case of *Marriage of Graziano v Daniels* (1991) 14 Fam LR; FLC 92 – 212 considered the concept of 'settled in their new environment'.²¹⁰ It proposed that the test for determining whether a child is settled in their new environment was more than a determination of whether the child was considered as happy, secure and adjusted to their surrounding circumstances.²¹¹ However, uncertainty existed regarding what the appropriate test actually was in Australia.²¹² *Graziano and Daniels* regarded the word 'settled' as that of a physical element relating to being established within a community and environment.²¹³ The aforementioned also denoted an emotional element of security and stability.²¹⁴ The court held that the relevant environment was considered to be a community within a geographically defined place and in order for the child to be considered as settled there, it must have significance to the child.²¹⁵

However there has been a dramatic move away from *Graziano's* position regarding the meaning of the word 'settled'.²¹⁶ The test was finally settled by the case of *Director-General, Department of*

²⁰⁹ SCA & CR [2005] FamCA 1050 at para [57]; In *Re HB (Abduction: Children's Objections) (No 2)* [1998] 1 FLR 564, Hale J at 568: '... the object of the Hague Convention is set out in its preamble. In essence this is to further the best interests of children by ensuring their speedy return to the country where they have been habitually resident. Once the time for a speedy return has passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after the very limited inquiry into the merits which is involved in these cases...'

²¹⁰ Young & Monahan (2009) op cit (n9) 346; F Bates 'Undermining the Hague Child Abduction Convention: The Australian way ...?' (2001) 9(1) *Asia Pacific Law Review* 47; Bates op cit (n139) 72.

²¹¹ Young & Monahan (2009) op cit (n9) 346; Bates op cit (n210) 47-51. This view is similar to that expressed in the English case of *Re N (Minors) (Abduction)* [1991] 1 FLR 413 at 417 where the Judge said that the abducting parent was required to establish the degree of settlement as more than that of a mere adjustment to the surroundings. This view was confirmed by the cases of *De L v Director-General, New South Wales Department of Community Services* supra (n23); *Director-General, Department of Community Services & M & C & Child Representative* [1998] FamCA 1518 at paras [11] & [51]. This view was also supported by the case of *State Central Authority v Ayob* supra (n93); *Director-General Department of Families, Youth and Community Care & Moore* [1999] FamCA 284 at paras [61], [64] & [66]; *Graziano and Daniels* supra (n208) followed the decisions of the single judges of the English High Court in *Re Mahaffey (a Minor)* (Unreported High Court of Justice England 8 October 1990 CA910/90).

²¹² SCA & CR supra (n209) at paras [35]-[36]; *Department of Child Safety & Kells* [2009] FamCA 452 at paras [18].

²¹³ Young & Monahan (2009) op cit (n9) 346-347; *Department of Child Safety & Kells* supra (n212) at para [18].

²¹⁴ Young & Monahan (2009) op cit (n9) 347; *State Central Authority & Hajjar* supra (n172) at para [168].

²¹⁵ Young & Monahan (2009) op cit (n9) 347.

²¹⁶ Loc cit; Bates op cit (n210) 47, where the case of *Graziano* adopted the view of *Re N*, supra (n211) at 78, 436, in that the word 'settled' included two elements and the first involved a physical element or being established in the community and environment, and the second that it also included a constituent which denoted security as well as stability. This case also held that the child's mother could not be considered as the new environment. The court also indicated that the environment must have attained a special significance for the child; *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [12].

*Community Services v M and C*²¹⁷ which refers to the case of *De L v Director-General, New South Wales Department of Community Services* which held that (although in relation to a different regulation) no additional gloss was to be applied to the phrase.²¹⁸ This was thus the same in regards to the case for the word ‘settled’ found in Regulations 16(2) and 16(1).²¹⁹ The court in the case of *M and C* finally held that ‘[t]he test, and the only test to be applied, is whether the children have settled in their new environment.’²²⁰ *Townsend v Director-General, Department of Families, Youth and Community Care* (1999) 24 Fam LR 495 agreed that the word ‘settled’ should be given its ordinary meaning and not a restrictive meaning, as *Graziano* departed from this simplified test and added an unacceptable gloss.²²¹ This therefore widened the meaning of the word and made it easier for the courts to determine if the child was settled and thus also made it less easy to ensure their return to their countries of habitual residence.²²² Bates made the following comment regarding *Graziano*:

‘... *Graziano* ... has potential to mislead, in two respects. First, the notion that the abductor “must establish the degrees of settlement which is more than mere adjustment to surroundings” suggests that there are degrees of settlement, only some of which satisfy the legislative requirement. It thereby suggests a more exacting test than the regulation actually requires. It may also be taken to imply that matters which would demonstrate adjustment to the environment are somehow irrelevant or to be discounted ... Second, it could be misleading to say that “settled” has

²¹⁷ *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [91]; See also *Director-General, Department of Families, Youth and Community Care v Moore* supra (n211) at para [67]; *Townsend & Director-General, Department of Families, Youth and Community* [1999] FamCA 285 at paras [30] & [33]-[35]; Bates op cit (n139) 75.

²¹⁸ Young & Monahan (2009) op cit (n9) 347; *Department of Child Safety & Kells* supra (n212) at para [18]; *Townsend & Director-General, Department of Families, Youth and Community* supra (n217) at paras [28]-[29].

²¹⁹ *Director-General, Department of Community Services v M and C* supra (n211) at 188; Young & Monahan (2009) op cit (n9) 347.

²²⁰ This was confirmed by *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n217) at paras [28]-[29]; *Director-General, Department of Community Services v M and C* supra (n211); Young & Monahan (2009) op cit (n9) 347; *Northern Territory Central Authority & Gambini* supra (n134) at para [95]; *Department of Child Safety & Kells* supra (n212) at para [18]; *State Central Authority & Hajjar* supra (n172) at para [156]; Bates op cit (n144) 136. Kay J however indicated that expressing the test as words given their natural meaning, did not actually provide much assistance to the factual situations where a court may then reach the decision that the child was settled in their new environment: (*SCA v CR* supra (n209) at 80.012). Young & Monahan (2009) op cit (n9) 347; *Townsend & Director-General, Department of Families, Youth and Community* supra (n217) at paras [30] & [33]-[35]; Bates op cit (n210) 51; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* (1997) FLC 92-785 at 84, 669. *Northern Territory Central Authority & Gambini* supra (n134) at para [94]; See also *Director General, Department of Community Services v M and C* supra (n211); *Secretary, Attorney-General’s Department v TS* [2000] FamCA 1692; (2001) FLC 93-063.

²²¹ *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n217) at 501-502; Young & Monahan (2009) op cit (n9) 347; *Northern Territory Central Authority & Gambini* supra (n134) at para [95]; See also *Secretary, Attorney-General’s Department v TS* supra (n220) as per Nicholson CJ at para [106] and *SCA v CR* supra (n209); Bates op cit (n210) 51; *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [52]; *De L v Director General NSW Department of Community Services* supra (n23) at 655-657; *Director General, Dept of Families, Youth and Community Care v Moore* supra (n211) at paras [68]-[69]; *State Central Authority & Hajjar* supra (n172) at para [156].

²²² Bates op cit (n210) 51.

two constituent elements, one physical and one emotional ... The two-component categorization adopted in *Graziano* might lead trial judges to approach the task in a way different from that required by the words of the Act. It could, especially in finely-balanced cases, affect the weight to be attached to various matters.²²³

The case of *Director-General Department of Families, Youth and Community Care & Moore* [1999] FamCA 284 (30 March 1999) furthered the aforementioned:

‘... [T]he test requires more than evidence of a child who is happy, secure and adjusted to surrounding circumstances, and that it involves findings as to a physical element of relating to and being established in a community and an environment, as well as an emotional constituent denoting security and stability.’²²⁴

However, according to *SCA & CR* giving the words their natural meaning does not provide assistance to what is considered as the factual situation which might lead to the conclusion that the child is settled in their new environment.²²⁵

‘[I]s their ‘new environment’ simply a geographic locality or does it entail other considerations such as the household in which they live? Is the children’s environment defined by where they live rather than with whom they live? Clearly such considerations would change in emphasis depending upon the age of the child. The essential environment for a babe in arms would most likely be the immediacy of its principal caregiver no matter where that care is provided. The environment for a teenager may well be dependent on other relationships and more material factors including education, housing and the like.’²²⁶

[4] ‘Settling’ is regarded as a matter of degree²²⁷ and the cases of *Gsponer v The Director-General, Department of Community Services, Victoria; Graziano and Daniels* and *Director-General, Department of Community Services v Apostolakis* provide that it is not sufficient to only consider how the child is behaving in the home or how the child fits into the immediate environment of the home. This was supported by the case of *Thorpe*.²²⁸ The court needs to look beyond how the child is fitting into the

²²³ *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n217) at 501-502; Young & Monahan (2009) op cit (n9) 347-348; *Northern Territory Central Authority & Gambini* supra (n134) at para [94].

²²⁴ *Director-General Department of Families, Youth and Community Care & Moore* supra (n211) at para [61].

²²⁵ *SCA & CR* supra (n209) at para [37].

²²⁶ Loc cit.

²²⁷ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.24]; Bates op cit (n210) 48.

²²⁸ Loc cit. The court took the view that the test must be ‘... more exacting than that the child is happy, secure and adjusted to his new surroundings...’ See Bates op cit (n139) 77. This view was earlier expressed in the English case of *Re N* (supra (n211)) when it was said that the abductor must ‘... establish the degree of settlement which is more than mere adjustment to surroundings.’ (Bates at 77-78). The full court also adopted the English judge’s meaning of the word ‘settled’ as he had found that it contained two constituent elements (Bates at 78). The judge in *Re N* (supra (n211)) held that ‘new’ encompassed the concept of place, school, people and friends etc however, not the relationship with the mother which was always a close loving one as he found that this could only be relevant insofar as it impinged on the new surroundings. The full court noted that the relationship with the wife could not be overlooked and the court also emphasized the fact that the mother was not the new environment. It was stated by the court that the mother’s presence may be part of the environment and make the transition easier however; the children’s bonds should reach beyond that which was already familiar. In the same way a child

society in general as well as outside of the home, including the making of friends; the development of ties with school and other matters of that kind.²²⁹ It was also held that the fact that the child is missing a part of their earlier environment does not lead to a conclusion that the child is not ‘settled’ in their new environment.²³⁰ In the case of *Moore* it was also held that the court must not only look at the past and present situation, but also the future.²³¹ The view in *De L*, in respect of the word ‘objects’ holds that it has an ordinary meaning.²³²

[5] The case of *Thorpe* also considered the issue of whether the court retained a discretion to order the child's return despite the child being found to be settled in the new environment in terms of Regulation 15(1)(a).²³³ Conflicting authority exists around the aforementioned question.²³⁴ The case of *Director-General, Department of Community Services v Apostolakis* (1996) FLC 92-718 stated that ‘... I am no longer bound to order the return of these children but rather I have a judicial discretion whether or not to do so, which must be exercised in the context of the policy of the Convention ...’²³⁵ Kay J in *State Central Authority v Ayob*²³⁶ disagreed.²³⁷ The Judge also held that the word ‘unless’ clearly meant to

whose main relationship is with its mother and who does not have a lasting relationship beyond their mother, cannot be said to have settled in the mother’s new environment’ (Bates at 78). ‘The fact that a child has lived in one place for a long time will no doubt tend to support the conclusion that it is settled there, but ... that conclusion will be less easily reached where the children have in their short lives moved about a great deal, as have the children also in this case.’ The judge in the case of *Thorpe* dealt with the above issue by looking at the question of whether the children were settled as being one of degree however stated that ‘... it was not sufficient, really, just to look at how the child is behaving in the home or how the child is fitting into the immediate environment of the home. One needs to look beyond that at how the child is fitting into society, in general, outside the home: the making of friends; the development of ties with school; and all sorts of matters of that kind.’ (Bates at 79).

²²⁹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.24]; Bates op cit (n142) 79.

²³⁰ *Ibid* at para [3.28].

²³¹ *Director-General Department of Families, Youth and Community Care & Moore* supra (n211) at para [67]; *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [88]. The Judge herein said that it involved both a physical element of being established in a community and an environment and also an emotional constituent denoting security and stability. As the majority of the High Court pointed out in *De L*’s case (supra (n23)) it is the Regulations that must be applied. The test is to be applied either at the time of the application being made or at the time of trial.

²³² Bates op cit (n210) 50. Although this case dealt with a different regulation, Regulation 16(3)(c), the court still followed its decision.

²³³ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at paras [3.6] & [3.30]; Bates op cit (n139) 79-80.

²³⁴ Bates op cit (n139) 80; *Northern Territory Central Authority & Gambini* supra (n134) at para [108]; *Graziano and Daniels* supra (n208) at 78,437.

²³⁵ Bates op cit (n139) 80.

²³⁶ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.31].

²³⁷ *Ibid* at para [3.32]; *State Central Authority v Ayob* supra (n93) at para [79]; Bates op cit (n139) 80–81, where the Judge distanced himself from the views in *Re N* supra (n211) at 417; *Northern Territory Central Authority & Gambini* supra (n134) at paras [109]-[110]; Kay op cit (n179) 42.

qualify the word 'must'.²³⁸ The result of this is clear and without ambiguity 'that the plain meaning of the section is that the Court no longer must order the return of the child if it is satisfied the child is settled in its new environment.'²³⁹ The court in *Gambini* however held that the court does retain a discretion where a child is settled in the new environment. The aforementioned is the prevailing approach of the Judicial and Administrative authorities within Australia. The wording of the Regulations is thus clear and unambiguous and thus it is unnecessary to refer to the Hague Convention in order to assist with interpretations herein.²⁴⁰ The discretion must be carefully exercised as the child's settlement in the new environment could very well be a reason for not ordering their return.²⁴¹

[6] The relevant time for determining whether the child is settled in their new environment was questioned as being either the time at which the date of the proceedings commenced, rather than at the date of the hearing.²⁴² The better interpretation in terms of the Regulations is that of the date of

²³⁸ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.32]; *State Central Authority v Ayob* supra (n93) at para [82]; Bates op cit (n139) 81.

²³⁹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at paras [3.32] & [3.33]; *State Central Authority v Ayob* supra (n93) at para [80]. Where it has been found that a child is settled in their new environment then it is clear that the mandatory requirement in terms of Regulation 16(1) is inapplicable although it does not take away from the power of the Court to order the child's return in terms of Regulation 15 as this remains unaltered by any finding of the child's settlement in Australia, although it would continue to a factor to be considered; *State Central Authority v Ayob* supra (n93) at para [84]; Bates op cit (n139) 81. The case of *Moore*, as discussed, previously held that where ambiguity exists between Regulation 16, that Regulation 15 provides the court with the requisite discretion. It was held in the *Gambini* case that it seems on the proper construction of Regulation 15 that it is a source of a general discretion for the court to order a child's return and it should be read subject to the provisions of Regulation 16, however where this leaves the question open, Regulation 15 provides the relevant discretion: *Northern Territory Central Authority & Gambini* supra (n134) at para [111]. A contrary view was expressed in the case of *SCA and CR* where Kay J further held that the Regulations provided no source of a power to allow the court discretion to make an order where the child is settled: *Northern Territory Central Authority & Gambini* supra (n134) at paras [112] & [114]; *SCA and CR* supra (n209) at 80,016 where Kay J states that: 'If the intention of the Regulations was to permit a discretion to return to exist even though the settled exception was established, then I would expect to find that power somewhere within Regulation 16(5). It is not surprising that it is absent given that the Regulations are seen as giving effect to the preamble and the objects of the [Hague] Convention namely to secure the prompt return of children wrongfully removed to or retained in any Contracting State. As discussed at length in *Ayob*, the compromise reached between those who wanted a short time limit and those who wanted an open ended mandatory return was to opt for the settled exception. If it is established that a prompt and summary return under the Hague Convention is no longer seen as appropriate, the 'best interests' considerations that accompany the exercise of local jurisdiction should be left to determine where the case should be heard and what orders should be made to provide for the child's welfare in all the circumstances.' *Department of Child Safety & Kells* supra (n212) at paras [38].

²⁴⁰ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.32]; *State Central Authority v Ayob* supra (n93) at para [86]; Bates op cit (n139) 81.

²⁴¹ Bates op cit (n139) 81.

²⁴² *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.14]. The respondent also cited the case of *Director-General, Department of Community Services v Apostolakis* (1996) FLC 92-718 in support of this submission.

hearing.²⁴³ It was suggested in *Thorpe* that the date of the action was that of the date upon which a decision should be based as the court was considered to surely be in a better position at that stage of the proceedings to determine whether or not a child was settled in their new environment, rather than at the date of the institution of the proceedings when all the circumstances surrounding the parties may be in a state of change.²⁴⁴ However, *Ayob* and *SCA v CR* suggested that the literal words of Regulation 16(1) must be read within the context of the Hague Convention and the intention of those nations which have adopted it.²⁴⁵ It was held that the critical date to determine when a year began was the date of wrongful removal or retention and not the date of the child's appearance in Australia.²⁴⁶ Thus the words 'within a year' must be understood in accordance with reference to the word 'removal' and 'to Australia', and this also gives the Australian courts jurisdiction to hear the matters as the child needs to have been or spent time in Australia. This provides a necessary link between the wrongful removal and retention and the exercise of power of the Australian judicial or administrative authority.²⁴⁷

[7] The case of *Anderson v Scrutton* [1934] SASR 10 indicates that simple words of common use are always difficult to define.²⁴⁸ In light of this statement, in regards to the understanding and interpretation of the concept of the phrase 'new environment', it was held that the simple and ordinary meaning of the words 'new environment' should be employed and thus it is a new environment to the child, thus not the same as the previous environment and therefore there is 'no necessity to establish some fundamental difference in the underlying nature of the two environments, but only that they are different ...'²⁴⁹

²⁴³ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.15]; Bates op cit (n139) 75. The court agreed with the view in the case of *Director-General, Department of Community Services v Apostolakis* supra (n242).

²⁴⁴ Bates op cit (n139) 75.

²⁴⁵ *State Central Authority v Ayob* supra (n93).

²⁴⁶ *Ibid* at 80,009. The issue of whether the time was to be calculated at the place of the event or the forum of proceedings was also discussed within this case and the court referred positively to the decision in the case of *Loucas G Matsas Salvage and Towage Maritime Company v Fund in respect of the proceeds of the sale the Ship Ionian Mariner* (1997) 149 ALR 653 where it was held that the reference to a statutory time limit that a reference in legislation to the 'date' means the date at the place where the services were rendered (at 657) and thus Kay J stated that to apply this reasoning to hold that the time for determining when the wrongful removal took was place was thus to be measured according to the time of the place where the wrongful removal occurred (*SCR v CR* supra (n209) at 80.011).

²⁴⁷ *State Central Authority v Ayob* supra (n93).

²⁴⁸ Bates op cit (n139) 76; *Anderson v Scrutton* [1934] SASR 10 at 11.

²⁴⁹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.19]. The judge in this case did not accept the view of the case of *Director-General, Department of Community Services v Apostolakis* supra (n242) which referred to the case of *Re N* supra (n211) at para [26] regarding the word 'new': '... that the word 'new' is significant in this context. Where a relevant child merely exchanges one environment for a similar one, as will often be the case where all that happens is that the child moves from one modern city to another, particularly if the language spoken remains the same, the fact that it can be demonstrated that the child is managing quite well in the more recent

Placing additional glosses on the meaning of those words in the Regulation would be a disservice²⁵⁰ as it would lead courts to scrutinize the smallest of differences between the two environments.²⁵¹

[8] Settlement must relate to a new environment and the word ‘new’ was significant and encompassed a place, home, school, people, friends, activities and opportunities and not *per se* the existing relationship with the abducting parent.²⁵² The case of *Moore* referred to *In Re N* stated as follows:

‘... The test must therefore be more exacting than that the child is happy, secure and adjusted to his surrounding circumstances: ... We respectfully agree with the statement made by Bracewell J in *Re Novak (Minors)* unreported High Court of Justice England CA1219/90 4th December 1990, that the abductor must "establish the degree of settlement which is more than mere adjustment to surroundings".²⁵³

Guidance was offered in *Townsend* stating: ‘In order to give the term ‘is settled in his or her new environment’ a normal or usual meaning, reference must be had to the proper meaning of the words that constitute the phrase in the context in which they appear.’²⁵⁴ The most helpful definition suggested herein was that the term ‘environment’ was an aggregate of surrounding things, conditions as well as influences.²⁵⁵ This interpretation was also followed in the case of *Kells*.²⁵⁶

[9] The settlement of very young children was considered in the case of *Secretary, Attorney-General’s Department v TS* (which involved a 22-month-old child who had been wrongfully removed from New Zealand to Tasmania at the age of three-months-old). This case did not follow the American authority which suggested that children of such a tender age could not be found to be settled in their environment as the judge said, when referring to *Beaumont and McEleavey*, that this could not be accepted as it added

environment, may amount to no more than establishing that the child has adjusted to different but similar surroundings.’ Bates op cit (n139) 75. This case indicated that the word ‘new’ was significant and must include place, home, school, people, friends, activities and opportunities: *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [13].

²⁵⁰ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.20]. The meaning of the word ‘new’ in the case of *Director-General, Department of Community Services v Apostolakis* supra (n242) was considered unjustified. See Bates op cit (n144) 75. This was supported by *De L v Director-General, New South Wales Department of Community Services* supra (n23); Bates op cit (n210) 51.

²⁵¹ Bates op cit (n139) 76; The case of *De L v Director General, NSW Department of Community Services and Another* supra (n23) provides a further example of the concept of a ‘new’ environment however this shall not be discussed in further detail herein as evidently the views of *Thorpe* are preferred.

²⁵² *Director-General Department of Families, Youth and Community Care & Moore* supra (n211) at para [64].

²⁵³ Loc cit.

²⁵⁴ *Department of Child Safety & Kells* supra (n212) at paras [20]; *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n217) at 85,859 per Kay J.

²⁵⁵ *Department of Child Safety & Kells* supra (n212) at paras [21]; *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n217) at 85,859 per Kay J.

²⁵⁶ *Department of Child Safety & Kells* supra (n212) at para [22].

a gloss to the Regulations meaning, and this was not supported by anything other than the pre-supposition that the relevant children are incapable of settling into a new environment or that this type of environment for a young child is confined to the movements of the principle caregiver to preserve the environment.²⁵⁷

Therefore it is clear when this defence may be exercised and how the Australian court is to implement it.

8.2 Exception two: Regulation 16(3)(a)(i)

[1] Regulation 16(3)(a) provides two exceptions which can be raised against the mandatory return of a child. Regulation 16(3)(a) states:

‘If a person opposing the return established that: (i) the person, institution or other body seeking the child’s return was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia’²⁵⁸

The defence in Regulation 16(3)(a)(i) regarding the actual exercise of custody rights shall now be discussed below.

a) Regulation 16(3)(a)(i): Exercise of custody rights

[1] In order for the defence in Regulation 16(3)(a)(i) to succeed it is necessary that the abducting parent produces evidence that the parent, body or institution requesting the child’s return was actually not exercising their rights of custody when the child was first removed and retained and that such rights would not have been exercised even if the child had not been wrongfully removed or retained.

[2] Regulation 18 must be considered herein as it deals with the effect of other custody orders within Australia and other countries. Regulation 18 relates to requests for return in terms of Regulation 14(1) and provides, with specific reference to this exception, that the court is not able to refuse to make an order for the child’s return purely because there is in force or enforceable, an Australian order relating to the child’s custody.²⁵⁹ In regards to Regulation 18(2), custody in regards to a child includes guardianship

²⁵⁷ *Secretary, Attorney-General's Department and TS* supra (n220) at para [113]; *SCA & CR* supra (n209) at paras [40] & [47]; *Beaumont & McEleavy* op cit (n173) 204.

²⁵⁸ Regulation 16(3)(a)(i) of the Family Law (Child Abduction Convention) Regulations, 1986. This is identical to the defence provided for in terms of Article 13(a) of the Hague Convention the Civil Aspects of International Child Abduction, 1980, which South Africa prescribes to.

²⁵⁹ Regulation 18(1)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

of the child,²⁶⁰ responsibility for the long-term or day-to-day care, welfare and development of the child,²⁶¹ and responsibility as the person or persons with whom the child is to live.²⁶² Therefore it is clear in terms of Regulations 4 and 18 as to what rights of custody are.

[3] The case of *Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* involves a determination of the actual exercise of custody rights.²⁶³ The Trial court herein held that the mother had not been exercising any rights which were attached to what is ordinarily understood in Australia as guardianship and the same was held for what was ordinarily understood in Australia as custody.²⁶⁴ One of the grounds of appeal was that the aforementioned finding was incorrect.²⁶⁵ It was found on Appeal that both parents, in terms of the law of the country of habitual residence, were the child's guardians and thus in terms of Australian law, what is normally understood as rights of guardianship and custody for the purposes of section 111B of the FLA and Regulations,²⁶⁶ was possessed by both parents. This equates to the meaning of rights of custody in terms of Regulation 4(1)(b).²⁶⁷ In regards to the submission of the mother's counsel that she had a right to determine where the child should live and thus had not abandoned her custody rights or guardianship rights in light of this,²⁶⁸ the appeal court found support for this in the case of *Police Commissioner of South Australia v Temple* (1993) FLC 92-365.²⁶⁹ A right of veto and being able to determine where a child was to habitually reside was considered to confer rights of custody herein.

[4] The case of *Re Bassi; Bassi and Director-General, Department of Community Services* (1994) FLC 92-465 dealt with whether, on the grounds that the left behind parent had little contact with the children,

²⁶⁰ Regulation 18(2)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁶¹ Regulation 18(2)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁶² Regulation 18(2)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁶³ *Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* [1996] FamCA 123 at para [1].

²⁶⁴ *Ibid* at paras [20] & [28].

²⁶⁵ *Ibid* at para [29].

²⁶⁶ *Ibid* at para [38].

²⁶⁷ *Loc cit*.

²⁶⁸ *Loc cit*.

²⁶⁹ *Ibid* at para [39]; *Police Commissioner of South Australia supra* (n139) at 79,827.

the rights of custody were not actually exercised, and, it was held that this was insufficient to provide proof that they had ever given up the responsibility to determine where the child should reside.²⁷⁰

[5] The question to be answered is therefore not whether there was abandonment of rights but whether they were being exercised at, or would have been, but for the child's retention.²⁷¹ It must be noted that whether rights of custody exist or not, is determined in regards to the law of the child's country of habitual residence and thus will be determined on a case by case basis depending on the country in which the child was habitually resident and the domestic law regarding custody rights.²⁷² Therefore, this will not be completely discussed herein as it is subjective to the country from which the child is removed. *Raddison* held that these rights are to be determined as a matter of fact and that the significance of the word 'actually' is:

'It would also appear — though it is not expressly stated in the Child Abduction Regulations — that a distinction must be drawn between the actual exercise of rights of custody, and the active exercise of them. It would seem that there is no requirement that rights of custody had been actively exercised at the relevant time, because some particular rights which fall into this category are not capable of active exercise, at least on a regular basis (eg, those which involve no more than a right of veto).'²⁷³

It was further held that this exception:

'must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the non-custodial parent. That, it seems to me, cannot be right.'²⁷⁴

The requirement is therefore that those rights would not have been exercised if the child had not been removed or retained and is relevant where the child or children are removed without the knowledge or consent of the other parent.²⁷⁵ Thus it is submitted that although there is not an excessive amount of law

²⁷⁰ *Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [41]; *Re Bassi; Bassi and Director-General, Department of Community Services* (1994) FLC 92-465 at 80,825.

²⁷¹ *Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [50].

²⁷² *Kay* op cit (n179) 25.

²⁷³ *Department of Community Services & Raddison* supra (n113) at para [126]; *Re Bassi; Bassi and Director-General, Department of Community Services* supra (n270) at 80,825.

²⁷⁴ *Department of Community Services & Raddison* supra (n113) at para [127], referring to *Re H; Re S (Abduction: Custody Rights)* supra (n110).

²⁷⁵ *Department of Community Services & Raddison* supra (n113) at para [128]; Supporting cases of the above are: *State Central Authority & Hajjar* supra (n172) at para [9]; *Director-General Department of Families, Youth and Community Care & Hobbs* supra (n143) at paras [51]-[52] & [71]; *State Central Authority & Hampton* [2010] FamCA 679.

and documentation regarding this exception, it is a valid requirement in terms of the Regulations to launch a successful application and thus would need to be established as existing prior to the furthering of such a matter before the judicial and administrative authorities.

b) Regulation 16(3)(a)(ii): Consent or acquiescence

[1] This exception provides that a court may refuse to make an order of return if a person opposing the return establishes that the person, institution or other body seeking the child's return had consented or subsequently acquiesced to the child being removed to, or retained in, Australia.²⁷⁶ Within this exception it appears that the abducting parent can raise either the exception that the left-behind parent consented to the child's relocation, and thus removal or retention was not wrongful, or that they acquiesced to the child's removal or retention and this therefore was not wrongful.

[2] However, the terms 'consent' and 'acquiescence' are not the same.²⁷⁷ The difference in regards to these terms is one of timing as 'consent' usually precedes wrongful removal or retention, whereas 'acquiescence' occurs afterwards.²⁷⁸ The tests regarding 'consent' and 'acquiescence' are therefore essentially the same.²⁷⁹ Australian case law, however, refers heavily to English law in determining its views on this exception.

[3] In regards to the concept of acquiescence, it was held in the case of *Police Commissioner of South Australia v Temple (No.1)* that in order for a parent to acquiesce to a child's removal or retention, they had to be aware of the fact that the child had been removed or retained, that this removal and retention was unlawful and in general terms they must be aware of their rights *vis-à-vis* the other parent, although it is not necessary that they have knowledge of their specific rights in terms of the Hague Convention.²⁸⁰

²⁷⁶ Regulation 16(3)(a)(ii) of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁷⁷ Kay op cit (n179) 50 at para [145]; *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [246]; *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171 at 173.

²⁷⁸ Kay op cit (n179) 50 at para [145]; *Re A & Anor (Minors) (Abduction: Acquiescence)* [1992] Fam 106 at 123. The case of *Wenceslas & Director-General, Department of Community Services* held that consent and acquiescence are quite different defences (supra (n130) at paras [16], [58] & [246]). Mere acquiescence does not enliven the discretion of the court to refuse the child's return (para [246]).

²⁷⁹ Kay op cit (n179) at para [146]; *Re G and A (Abduction: Consent)* [2003] NIFam 16.

²⁸⁰ Kay op cit (n179) at para [147]; *Police Commissioner of South Australia v Temple (No.1)* supra (n139); *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [19]. This knowledge is categorised as a general and requisite knowledge of their rights.

Thus for the purposes of the Hague Convention in Australia, acquiescence ‘must be clear and unqualified’.²⁸¹

[4] The Australian case of *Thorpe* considered whether the concept of acquiescence is either active or passive. This needs to be considered as a result of Kay J discussing English case law in regards to this concept.²⁸² However, prior to discussing the case of *Thorpe* further, it is necessary to discuss the position of *Emmet v Perry* and *Department of Health and Community Services State Central Authority and Marie Lorna Casse*.

[5] The case of *Emmett v Perry* considered the exception in regards to acquiescence and sought to clarify the meaning of the term within the Regulations.²⁸³ In this case the father of the children wrote a letter to the children indicating that he was happy for them to stay with the mother as they wanted to and basically that he had no intention of forcing them to do something which they did not want to do.²⁸⁴ However, it was evident that the father’s actions in all other respects were not in line with the concept of acquiescence as he had located the relevant Central Authority and also provided evidence etc,²⁸⁵ e.g. an affidavit wherein acquiescence was denied.²⁸⁶ The court accepted in the case of *Police Commissioner of South Australia v Temple* that:

‘Since acquiescence is not a continuing state of mind, an acceptance of the unlawful removal or retention cannot be withdrawn once known to the other party, although an attempt to do so soon after the acceptance is notified to the other party will be relevant to the exercise of discretion to return the child.’²⁸⁷

²⁸¹ Kay op cit (n179) at para [147]; *Police Commissioner of South Australia v Temple (No.1)* supra (n139); Bowie op cit (n22) 19. Kay J [op cit at para [148]] also referred to the US case of *Friedrich v Friedrich* 6th Cir 1996, 78 F 3d 1060, which set out a similarly strict and narrow test which held that ‘Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.’ Kindly refer to this case for further general information herein.

²⁸² Kay op cit (n179) 51 at para [150].

²⁸³ *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [13]; Bates op cit (n139) 82.

²⁸⁴ *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [14].

²⁸⁵ *Ibid* at para [15].

²⁸⁶ *Loc cit*.

²⁸⁷ *Police Commissioner of South Australia v Temple (No.1)* supra (n139) at 79, 828; *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [16]; Bates op cit (n139) 82.

Thus it is difficult to revoke acquiescence, however; such revocation will be considered where acquiescence occurs very soon after said acceptance of the circumstances. The Court in *Emmett v Perry* held that the key component to a resolution was the focus on what is considered to be the proper level of communication of acquiescence between the parties.²⁸⁸ A letter to the children from a parent was not considered as acquiescence because this requires the following essential components: ‘... [F]irstly, an acceptance of the course of conduct of the other party and, secondly, such acceptance must be communicated to the other party. The acquiescence must also be unequivocal.’²⁸⁹ This case emphasised that a parent could only relinquish their rights or acquiesce through an agent - children are not considered their parents’ agents - and thus a letter could not be regarded as acquiescence.²⁹⁰

[6] *Thorpe’s* case considered the concept of active or passive acquiescence, knowledge thereof and the concept of delay.²⁹¹ This case held that in regards to *Casse*, that the learned Judge had misquoted the English case of *Re R* in regards to the consideration that what is required are both ‘unequivocal words and conduct’. However, the case of *Re R* found that acquiescence may be found to exist through either clear evidence of the aforementioned and thus and both need not necessarily exist.²⁹² The case of *Thorpe* also held in regards to the case of *Emmett v Perry* that the Judge was speaking about active and not passive acquiescence and held that in regards to the case of *Re R* and *Re A* [1992] 1 All ER 929; [1992] Fam 106 that both of these cases provided evidence that acquiescence within the Australian law may either be passive, therefore through conduct, or active, through words.²⁹³ *Thorpe* further held that a change of mind does not overcome the fact of acquiescence²⁹⁴ and that active acquiescence must involve

²⁸⁸ *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [17].

²⁸⁹ *Ibid* at para [20]; Bates op cit (n139) 82; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.37]; *Re R (Child Abduction)* 1995 1 FLR 716 at 727; *John Pryde Paterson Department of Health and Community Services State Central Authority and Marie Lorna Casse* [1995] FamCA 71; (1995) FLC 92-629 at para [43]; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.38].

²⁹⁰ *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [21].

²⁹¹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.4].

²⁹² *Ibid* at para [3.39].

²⁹³ *Ibid* at para [3.40]; *Re A* [1992] Fam 106 at 119-120; *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [253].

²⁹⁴ *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.47].

a clear indication and there must be some communication of this to the other party.²⁹⁵ It may also be passive, as a course of conduct of the party seeking to rely upon the Hague Convention or the Regulations, without any words expressed to the other party such as might otherwise be thought to be involved at least in regards to consent.²⁹⁶

‘[A]cquiescence had to be conduct which was inconsistent with the summary return of a child to a place of habitual residence.’²⁹⁷ The Judge in *Re R* also referred to the case of *Re S (Minors) (Abduction: Acquiescence)* where it was held that:²⁹⁸

‘... Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered ‘in all the circumstances’ necessarily means there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to the subjective elements: they remain an inherently less reliable guide than do inferences drawn from overt acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as a judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?’

[7] *Director-General, Department of Child Safety & S* [2005] FamCA 1115 considered the concept of ‘consent’.²⁹⁹ The father’s alleged spoken consent in the form of the words ‘[i]t couldn’t happen quickly enough’ in regards to the mother informing the father that she had taken legal advice in regards to relocations and that she would need his consent; the father’s consent to the application for the child’s Australian passport; the mother’s conduct and the father’s participation in the division of their possessions, knowledge that the mother was planning to leave and that the mother was selling items, was

²⁹⁵ *Ibid* at para [3.49]; Bates op cit (n139) 83.

²⁹⁶ *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.49]; Bates op cit (n139) 83.

²⁹⁷ Kaye op cit (n179) 51 at para [150]; *Re R* referring to *Re AZ (A minor) (Abduction: acquiescence)* [1993] 1 FLR 682.

²⁹⁸ *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 831; *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.42]; Bates op cit (n139) 82.

²⁹⁹ *Director-General, Department of Child Safety & S* [2005] FamCA 1115 at paras [3]-[4].

considered satisfactory of this exception.³⁰⁰ This case referred to *Re H (Abduction: Acquiescence)* [1997] UKHL 12 where it was held that clear and unequivocal conduct is not normally found to exist in passing remarks made by a parent who had recently suffered the trauma of the child's removal.³⁰¹ This was found to be equally applicable to consent prior to removal. The case of *A v A (Children) (Abduction: Acquiescence)* [2003] EWHC 3102 (Fam) also found that a passing remark made in the agony of the moment was to be considered unequivocal conduct³⁰² although this did not suggest a qualification or retraction as a matter of principle.³⁰³

[8] An issue requiring determination was whether, for the purposes of the Regulations, the issue of consent could be inferred from conduct or whether it must be expressed.³⁰⁴ It was held that acquiescence can be inferred by the court from a course of conduct by the party seeking to rely on the Hague Convention or Regulations without any words expressed to the other party which might be thought otherwise to be involved, at least in consent.³⁰⁵ *State Central Authority v Ayob* held that acquiescence can be inferred from conduct alone.³⁰⁶

The court also agreed with the submission of *Re C [Abduction: Consent]* [1996] 1 FLR 414 in its disagreement with the aforementioned.³⁰⁷ This was due to the fact that the Judge did not see why it needed to be evidenced in writing as to why this should be the case if the Hague Convention itself uses words and not writing and it was further stated that: 'parents do not necessarily expect to reduce their agreements and understandings about their children to writing, even at the time of marital breakdown.'

³⁰⁰ *Director-General, Department of Child Safety & S* supra (n299) at para [59].

³⁰¹ *Ibid* at para [63]; *Re H (Abduction: Acquiescence)* [1997] UKHL 12; [1998] AC 72 at 89C-90D.

³⁰² *Director-General, Department of Child Safety & S* supra (n299) at para [64]; *A v A (Children)(Abduction: Acquiescence)* [2003] EWHC 3102 (Fam).

³⁰³ *Director-General, Department of Child Safety & S* supra (n299) at para [64]; *Re H* supra (n301) at 89C-90D.

³⁰⁴ *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [250].

³⁰⁵ *Ibid* at para [254]; *Director General, Department of Families, Youth and Community Care v Thorpe* supra (n220) at para [3.49].

³⁰⁶ *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [256]; *State Central Authority v Ayob* supra (n93) at 84,074-84,076. *Ayob* also referred to the English case of *Re W (Abduction: Procedure)* [1995] 1 FLR 878 which held that (*Wenceslas & Director-General, Department of Community Services* supra (n130) at para [258]; *Re W (Abduction: Procedure)* [1995] 1 FLR 878 at 888) 'In normal circumstances, such consent will need to be in writing or at the very least evidenced by documentary material. Moreover, unlike acquiescence, I find it difficult to conceive of circumstances in which consent could be passive: there must in my judgment be clear and compelling evidence of a positive consent to the removal of the child from the jurisdiction of his habitual residence.'

³⁰⁷ *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [259]; *Re C [Abduction: Consent]* [1996] 1 FLR 414 at 418-419.

What matters is that consent is “established”. The means of proof will vary.’³⁰⁸ The case of *Wenceslas* further confirmed that consent can be inferred from conduct and that it must be real and unequivocal and can only be made out by clear and cogent evidence.³⁰⁹

[9] The case of *In the Marriage Of Michael Rueben Regino And Devie Maree Regino Wife And: the Director General Department of Family Services and Aboriginal and Islander Affairs Central Authority*³¹⁰ considered the concept of consent and stated that if there is evidence of consent having been given then it cannot be subsequently withdrawn by the party so as to be considered inoperative for the purposes of the Regulations.³¹¹ It was also held that consent enlivens a discretion as to whether the child should be returned and the relevant considerations herein include duress, undue influence, deceit and the emotional state of the consenting parent, as well as the child’s welfare.³¹² In regards to consent the court in the case of *Director-General, Department of Child Safety & Milson* [2008] FamCA 872 held, in consideration of foreign cases, that consent must be clear and unequivocal and that it should be real and positive.³¹³ *Department of Communities & Clementine* [2010] FamCA 746 held that in terms of the Regulation in 16(5), if the abducting parent discharges the onus, the court can still refuse to order the child’s return.³¹⁴ This case referred to *In re H (Minors)(Abduction: Acquiescence)* [1997] UKHL 12;

³⁰⁸ *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [259]; *Re C* supra (n307) at 418-419.

³⁰⁹ *Wenceslas & Director-General, Department of Community Services* supra (n130) at para [264]. The case of *Director-General, Department of Community Services New South Wales & Eager* [2007] FamCA 1269 at para [45], held that the approach of *Wenceslas* is the correct law. The court in *Eager* also agreed with the following submissions as law regarding acquiescence: *Friedrich v Friedrich* (supra (n281)) the US Court of Appeals said: ‘Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.’ *In Re H (abduction: acquiescence)* Lord Browne-Wilkinson said: ‘...Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.’ These were both adopted in *Police Commissioner of South Australia v. Temple (No. 1)* supra (n189) and *Department of Health and Community Services, State Central Authority and Casse* (supra (n289)) where it was held acquiescence must be clear and unqualified and unequivocal. *Director-General, Department of Community Services New South Wales & Eager* (supra (n309)) at paras [53]-[54]; *Friedrich v Friedrich* supra (n281) at 3d1060; *In Re H (abduction: acquiescence)* supra (n301) at 88.

³¹⁰ *In the Marriage Of Michael Rueben Regino And Devie Maree Regino Wife And: the Director General Department of Family Services and Aboriginal and Islander Affairs Central Authority* [1994] FamCA 147.

³¹¹ *Ibid* at para [4].

³¹² *Ibid* at paras [5] & [78].

³¹³ *Director-General, Department of Child Safety & Milson* [2008] FamCA 872 at para [30].

³¹⁴ *Department of Communities & Clementine* [2010] FamCA 746 at para [11].

(1998) AC 72 where it was held that in regards to the meaning of acquiescence in terms of Article 13 of the Hague Convention, that it is necessary to consider the following questions:³¹⁵

‘(1) Does ‘acquiescence’ in article 13 connote the actual state of mind of the wronged parent or the state of his mind as it is perceived to be by the other parent having regard only to the outward behaviour of the wronged parent? (2) Is acquiescence a question of fact or of law? (3) If acquiescence is a subjective question of fact, are there circumstances in which the wronged parent is precluded from demonstrating his true intentions?’

[10] The court in the case of *Clementine* considered whether acquiescence was subjective or objective³¹⁶ and held that the concept of acquiescence considers the subjective state of mind of the wronged parent and whether they have consented to the continued presence of the children in the jurisdiction to which they have been removed.³¹⁷ The meaning of acquiescence must thus be considered in terms of its ordinary wording.³¹⁸ Thus acquisition is a question of the actual subjective intention of the wronged parent and not of the outside world’s perception of their intentions.³¹⁹ The Judge usually attaches more weight to actual express words or conduct rather than subsequent evidence regarding the state of mind as these assist in reaching conclusions of fact as the actual subjective intention can be inferred from the outward conduct and visible acts of the parents.³²⁰ Each case is also determined on its own facts and attempts at reconciliation must be considered with caution in regards to acquiescence.³²¹ In regards to parents who hide their children or are insincere regarding their efforts to return them, it has been held that: ‘The important factor to emphasize is that the wronged parent who has in fact never acquiesced is not to lose his right to the summary return of his children except by words or actions which unequivocally demonstrate that he was not insisting on the summary return of the child.’³²²

Thus it is submitted as clear how the exceptions of consent and acquiescence are applied in terms of the Australian Regulations.

³¹⁵ Ibid at para [69]; *In Re H (Minors)(Abduction: Acquiescence)* supra (n309) at 87-90.

³¹⁶ *Department of Communities & Clementine* supra (n314) at para [69].

³¹⁷ Loc cit.

³¹⁸ Loc cit. This view is supported by *Friedrich v. Friedrich* supra (n281); *In Re S (Minors)(Abduction: Acquiescence)* supra (n298) and *In Re R (Child Abduction: Acquiescence)* supra (n289).

³¹⁹ *Department of Communities & Clementine* supra (n314) at para [69].

³²⁰ Loc cit.

³²¹ Loc cit.

³²² Loc cit; *Department of Communities (Child Safety Services) & Raleigh* [2011] FamCA 308 agreed with the submissions of the cases discussed above.

c) Regulation 16(3)(b): Grave risk of physical or psychological harm or placement in an intolerable situation

[1] Regulation 16(3)(b) provides that a court may refuse to order the child's return if the opposing party proves that 'there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.³²³ This Regulation mirrors that which is provided for in terms of Article 13(b) of the Hague Convention.³²⁴ The contents hereof are also related to the concept of the best interests of the child in a limited sense³²⁵ and this exception thus confers a wide discretion on courts to refuse to order a child's return.³²⁶

[2] Conflicting interpretations of this Article and the corresponding Australian Regulations have been considered by the Australian Family Court.³²⁷ Kay J has indicated that there are two possible interpretations of this exception provided on a narrower interpretation of Article 13 (Regulation 16(3)(b)): 1) '[G]rave risk to which the child would be exposed if the child were returned must be such that it amounts to an intolerable situation before the case can be said to fall within the exception'³²⁸ and 2) that it can be viewed disjunctively in that only 'activating the judicial discretion not to return where there is a grave risk that the child will be exposed to either physical or psychological harm, even if this risk is not sufficiently harmful to result in exposing the child to an intolerable situation.'³²⁹

[3] The case of *Gsponer v Director General, Department of Services, Victoria* considered the structure and meaning of Regulation 16(3)(b)³³⁰ and held that three categories of harm exist which are to be read disjunctively due to the incorporation of the words 'or otherwise' within the exception which provides guidance to what is contemplated therein.³³¹ This statement provides a link between the quality and the

³²³ Regulation 16(3)(b) of the Family Law (Child Abduction Convention) Regulations, 1986.

³²⁴ Kay op cit (n179) at para [161]; *Cooper v Casey* supra (n148) at para [17].

³²⁵ Kay op cit (n179) at para [161].

³²⁶ F Bates 'Grave risk, physical or psychological harm or intolerable situation: The High Court of Australia's view' (2003) 11 *Asia Pacific Law Review* 44.

³²⁷ Kay op cit (n179) at para [163].

³²⁸ *Ibid* at para [162].

³²⁹ *Loc cit*.

³³⁰ Bates op cit (n139) 84.

³³¹ Kay op cit (n179) at paras [163]-[164]; *Gsponer v Director General, Department of Services, Victoria* supra (n51); *Carmel Faye Gsponer and Peter Johnstone Appeal* [1988] FamCA 21 at para [50]; Bates op cit (n51) 254; Bates op cit (n139) 84 & 86; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [8] supported the view of *C v C (Abduction: Rights of Custody)* supra (n51) at 664 and supra at 473; Young & Monahan (2009) op cit (n9) 348.

physical or psychological harm which also then describes the intolerability of the situation.³³² It was also held that the exception can only be satisfied if the harm that the child would be exposed to is substantial and weighty³³³ and comparable with an intolerable situation.³³⁴ There must also be a grave risk of the occurrence of one or more such events in order for the exception to be satisfied.³³⁵ Therefore this case confirmed that the Regulation has a narrow interpretation³³⁶ although this has not always been considered appropriate,³³⁷ despite the unreported judgment of *Re Evans* providing that a practical reason for this narrow interpretation is to prevent the use of this exception as a delaying tactic.³³⁸ General and non-specific complaints will therefore not satisfy the defence.³³⁹ This narrow interpretation is a result of the fact that a grave risk of harm must arise as a result of the child being returned to the country of habitual residence (a signatory country)³⁴⁰ and not to the left-behind parent.³⁴¹ If a child is ordered to return then no doubt exists regarding the appropriate court's capability to make the necessary orders regarding the child's future custody and their general welfare.³⁴² The case of *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* provides a more liberal construction of this exception³⁴³ stating that the risk demonstrated must be grave although the

³³² *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [50]; Bates op cit (n139) 86.

³³³ Kay op cit (n179) at para [163]; *Gsponer v Director General, Department of Services, Victoria* supra (n50); *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [50]. The court in this case found support for this view in the English case of *Re A (A Minor)* supra (n51) at 372; Bates op cit (n51) 254-255; *Director General of the Department of Family and Community Services and Beverley Ann Davis* [1990] FamCA 119 at para [20]; Bates op cit (n139) 84-86; *Cooper v Casey* supra (n148) at para [21]. The case of *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra, supported by the decision in *Laing v The Central Authority* [1999] FamCA 100 and held that the degree required is that the harm must be substantial and comparable to an intolerable situation in order to fall within the exception: Kay op cit (n179) at para [164].

³³⁴ Bates op cit (n326) 45.

³³⁵ *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [50]; *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n333) at para [20]; Bates op cit (n139) 84.

³³⁶ *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [60]; Kay op cit (n179) 56 at para [162]; Bates op cit (n51) 255; *Cooper v Casey* supra (n148) at para [21]. *Emmett v Perry* supra (n38) at para [29]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [40]; *Re Corrie* (Lately, J., High Court of Justice, 14 October 1988; Court of Appeal, 14 December 1988, unreported) at 178.

³³⁷ Bates op cit (n51) 255.

³³⁸ Loc cit; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [68]; *Re: Evans* (Court of Appeal, 10 July 1988, unreported).

³³⁹ Bates op cit (n139) 85.

³⁴⁰ Loc cit; Regulation 10 of the Family Law (Child Abduction Convention) Regulations, 1986.

³⁴¹ *Laing & The Central Authority* supra (n333) at paras [29]-[30].

³⁴² *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [59]; Bates op cit (n51) 253-254. This view was also supported in the case of *Murray v Director of Family Services, A.C.T* [1993] FamCA 103; (1993) FLC 92-416; 16 Fam Lr 982.

³⁴³ Bates op cit (n144) 123. This was done in order to mitigate the effect of the unfortunate *Laing* (supra (n333)) decision.

nature and degree of the physical or psychological harm remains unspecified.³⁴⁴ Gleeson J further stated that: ‘The meaning of the regulation is not difficult to understand: the problem in a given case is more likely to be found in making the required judgment. That is not a problem of construction; it is a problem of application.’³⁴⁵

[4] The case of *Director General of the Department of Family and Community Services and Beverley Ann Davis* points out that the intention of the Hague Convention and the Regulations is to limit the discretion of the Court in the country to which the children were removed to.³⁴⁶ However, exceptions to this are evident in Article 13 and are further defined in Regulation 16(3) of the Regulations.³⁴⁷ *Davis* accepted the findings of *Gsponer* as previously discussed.³⁴⁸ In *Davis* the court referred to the English decision of *C v C*³⁴⁹ where it was held that ‘some psychological harm to the child is inherent, whether the child is returned or not. This is ... recognised by the words “or otherwise place the child in an

³⁴⁴ Kay op cit (n179) at para [164]; *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* supra (n21) at para [8] referring to *C v C (Abduction: Rights of Custody)* supra (n51) at 664 and supra at 473.

³⁴⁵ *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* supra (n21) at para [9]; Kay op cit (n179) at paras [164]-[166] which also discussed the Canadian case of *Thomson v Thomson* (1994) 6 RFL (4th) 290 at 328 which held in regards to grave risk that ‘... although the word ‘grave’ modifies “risk” and not “harm”, this must be read in conjunction with the clause “or otherwise place the child in an intolerable situation”. The use of the word “otherwise” points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.’ He also refers to the US case of *Friedrich v Friedrich* supra (n281) at 1069 which stated that “... a grave risk of harm for the purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute- e.g, returning the child to zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.’ Kay also pointed out, at 57-58 at para [167], that the English courts have adopted a more stringent approach to the concept of Grave risk as evident by the following in *Re E (A Minor) (Abduction)* [1989] 1 FLR 135 at 144-145 that the Hague Conventions aim was to ensure that the abducting parent does not benefit from their actions, e.g. in regards to the abducting parent claims that the mother was a drug addict and sexually promiscuous would, as this would ‘drive a coach and horses through the provisions of this Convention, since it would be open to any “abducting” parent to raise allegations ... and then use those allegations, whether they were of substance or not, as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained from the country of the child’s habitual residence, and so on. That is precisely what this Convention, and this Act, were intended to avoid, and ... the courts should be astute to avoid their being used as a machinery for delay.’ Kay also referred to (57-58 at para [168]) *Re C (Abduction: Grave risk of psychological harm)* [1999] 1 FLR 1145 at 1154 where it was held that in regards to psychological harm that ‘[t]here is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.’

³⁴⁶ *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n333) at para [13].

³⁴⁷ Loc cit.

³⁴⁸ Ibid at paras [19]-[20].

³⁴⁹ Ibid at para [21]; *C v C (Abduction: Rights of Custody)* supra (n51) at 664; Bates op cit (n51) 258; *Director-General Department of Community Services and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [78].

intolerable situation” which cast considerable light on the severe degree of psychological harm which the Convention has in mind.’ Therefore it is not sufficient for the abducting parent to merely show that some degree of psychological harm may be suffered but that a substantial degree of harm which is comparable to an intolerable situation must be present.³⁵⁰ Bates indicates that the Australian courts are taking the primary purpose of the Hague Convention, as indicated in *Davis*, seriously and literally.³⁵¹

[5] The case of *Bassi* rejected the notion that an intolerable situation could arise due to the left-behind parent’s unemployment and lack of income to support or accommodate the children appropriately.³⁵² However, Bates indicates that a literal reading of *Bassi* would effectively exclude a successful case under Regulation 16(3)(b).³⁵³ The case of *Murray and Director, Family Services, A.C.T* held that it would degrade the effect and reliability of the foreign courts if the order was refused on the grounds that such courts would be unable to protect the child/abducting parent from harm.³⁵⁴ Thus in terms of *Gsponer*, this Regulation should only be applicable where the safeguards of the Hague Convention are not available³⁵⁵ due to the fact that if the courts were to act on untested evidence, this could possibly undermine the purposes of the Hague Convention.³⁵⁶ Bates, however, considered this to be unjustifiably harsh.³⁵⁷ *Director-General Department of Community Services and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe*, referring to the English case of *C v C*, held further that the refusal of the abducting parent to return with the child was not satisfactory of the exception as this would then become an abused notion and unduly benefit the abducting parent.³⁵⁸

³⁵⁰ *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n333) at para [20]; Bates op cit (n51) 257.

³⁵¹ Bates op cit (n139) 95; *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n333); *Re Bassi; Bassi and Director General of Community Services* (supra (n270) at 80) followed the view of *Davis*; Bates op cit (n139) 87-88.

³⁵² Bates op cit (n139) 89.

³⁵³ Loc cit; *Bassi* strictly interpreted the application of the Regulation: Bates op cit (n326) 44.

³⁵⁴ *Murray and Director, Family Services, A.C.T* supra (n342) at para [44]; This case supported the views expressed in *Director General, Family and Community Services and Davis* supra (n50) and *Gsponer and Director General, Department of Community Services, Victoria* supra (n50); *Emmett v Perry* supra (n38) at para [29]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [40]; *Re Corrie* supra (n336) at 178.

³⁵⁵ *Murray and Director, Family Services, A.C.T* supra (n342) at para [174].

³⁵⁶ *Ibid* at para [175].

³⁵⁷ Bates op cit (n51) 255.

³⁵⁸ *Director-General Department of Community Services and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [80]; *C v C (Abduction: Rights of Custody)* supra (n51) at 661; *In Re E (A Minor) (Abduction)* supra (n345) at 142. This was exactly what the Hague Convention was attempting to avoid.

[6] Therefore it is evident that the cases of *Murray* and *Gsponer* provide a very restrictive approach to the Hague Convention's application, however, they also provide a positive and optimistic view of its international operation.³⁵⁹ These cases both dealt with the concept of domestic violence issues perpetrated against the abducting parent.³⁶⁰ However, *Gsponer* held that the Regulation has a narrow interpretation in that it deals with grave risk which would arise to the child if they were returned and not to the abducting parent.³⁶¹ The case of *Emmett v Perry* also dealt with this defence as the mother indicated that the religious and cultural practices that the children would be subjected to would cause a grave risk of harm to them.³⁶² The appellant relied on *Gsponer's* reference to the English case of *Re Corrie* (Latey, J, High Court of Justice, 14 October 1988; Court of Appeal, 14 December 1988, unreported)³⁶³ where it was held that, in terms of the Hague Convention and Regulations, the paramountcy of the child's interests were not a primary consideration in the context of this exception.³⁶⁴ The application is therefore purely one of forum.³⁶⁵

The case of *Cooper v Casey* also applied the tests for determining whether this defence is satisfied as provided for in *Murray* and *Gsponer*.³⁶⁶ However, this case also acknowledged the problem with the operation of the Hague Convention in that it was not the practice of receiving states to accept the direct responsibility for the child's welfare after their return.³⁶⁷ Nicholson CJ, however, did urge states to accept a more positive obligation for the welfare of children returned and suggested that this obligation could thus be located within Article 7 of the Hague Convention.³⁶⁸

[7] *Laing & The Central Authority* also provides that the issues of determining whether Regulation 16(3)(b) are satisfied are questions of weight.³⁶⁹ This case also emphasised that only exceptional circumstances, where the intolerable situation was extreme and compelling, would allow an alteration of

³⁵⁹ Bates op cit (n51) 246.

³⁶⁰ Kay op cit (n179) at paras [175]-[176].

³⁶¹ Loc cit; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [60]; The case of *Murray* involved allegations of violence that the abducting parent would be subjected to by the father's gang and involvement thereof and that this would negatively impact upon the children.

³⁶² *Emmett v Perry* supra (n38) at para [23].

³⁶³ *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [40]; *Re Corrie* supra (n336) at 175.

³⁶⁴ *Emmett v Perry* supra (n38) at para [26]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n331) at para [40]; *Re Corrie* supra (n336); *Cooper v Casey* supra (n148) at para [23].

³⁶⁵ *Cooper v Casey* supra (n324) at para [23], supporting the views of *Murray* supra (n50) and *Gsponer* supra (n331)

³⁶⁶ *Cooper v Casey* supra (n324) at para [3].

³⁶⁷ Young & Monahan (2009) op cit (n9) 348-349.

³⁶⁸ Ibid at 349.

³⁶⁹ *Laing & The Central Authority* supra (n333) at para [28].

the approach adopted by *Murray and Gsponer*.³⁷⁰ This case, however, does not represent a watershed in the application of Regulation 16(3)(b) as it assumed that the situation would work in favour of the children if not the abducting parent.³⁷¹

[8] *Director-General, Department of Families, Youth and Community Care & Bennett* [2000] FamCA 253 referred to the decision in the case of *DP and JLM* and agreed that a narrow and strict interpretation of the Regulations in 16(3)(b) and 16(3)(d) should be exercised by the courts within such hearings.³⁷² The court herein also noted the dissenting judgment of Kirby J in the case of *De L*, which held that any other interpretation would undermine the purposes of the Hague Convention as well as the Regulations incorporating it,³⁷³ although this view did not impinge on the narrow construction of Regulations 16(3)(b) and (d) within Australia and other Hague Convention countries.³⁷⁴ This view, however, was rejected in the main body of *De L* as it was considered to open the door to abuse of the Hague Convention and Regulations, although the court was specifically dealing the defence of the child's objections when stating this.³⁷⁵ It was further held that the exception does require some consideration of the interests of the child concerned.³⁷⁶ The risk concerned is not only the actual risk but potential risk a child could be exposed to.³⁷⁷

³⁷⁰ *Loc cit*; *Re F (Minor: Abduction: Rights of Custody Abroad)* [1995] 3 All ER 641 at 650. *Re Bassi: Bassi and Director-General of Community Services* supra (n270); Bates op cit (n51) 256.

³⁷¹ Bates op cit (n51) 259.

³⁷² *Department of Families, Youth and Community Care & Bennett* [2000] FamCA 253 at paras [27] & [28]; *Director General of Family and Community Services v Davis* supra (n50) Nygh J, with whom Strauss and Rowlands JJ agreed, stated (at 78,226): 'It is, therefore, the intention of the Convention and the Regulations which implement it to limit the discretion of the court in the country to which the children have been taken quite severely and stringently.' *Gsopner* supra (n331); The court in *Bennett* (supra at para [29]) also referred to the dictum in the US case of *Friedrich v Friedrich* supra (n281) at 1060; *Bennett* supra at para [30] referred to the English case of *Re M (Abduction: Psychological Harm)* [1997] 2 FLR 690 at 695, which held: 'Because of the strict requirements, few cases in England have crossed the Art 13 threshold and it is clearly shown from decisions of this court that it is only in exceptional circumstances that a court should not order summary return.' The English case of *Re C (Abduction: Grave risk of psychological harm)* supra (n345) at 1154 in *Bennett* supra at para [31] which held: 'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

³⁷³ *Department of Families, Youth and Community Care & Bennett* supra (n372) at para [33]; *De L v Director General, Department of Community Services* supra (n23).

³⁷⁴ *Department of Families, Youth and Community Care & Bennett* supra (n372) at para [35].

³⁷⁵ *Ibid* at para [34]; *De L v Director General, Department of Community Services* supra (n23); AE Anton 'The Hague Convention on International Child Abduction' (July 1981) 30 *International and Comparative Law Quarterly* 550.

³⁷⁶ Bates op cit (n144) 124-125.

³⁷⁷ *Loc cit*. This therefore requires clear and compelling evidence.

Bennett also confirmed that Regulation 16(3)(b) would not be satisfied if the abducting parent's refusal to return with the child was the submission as to why grave risk to the child would arise.³⁷⁸ The return of a very young child involves a right to have their custody and issues determined by the court of habitual residence and therefore it may not always place them in an intolerable situation to be returned without the mother, although in exceptional instances this could place the child in an intolerable situation,³⁷⁹ e.g. an infant.

[9] *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* although determining that the risk demonstrated must be grave,³⁸⁰ it also held that it is considered unhelpful to narrowly interpret the exception as no serious question of construction exists and this may imply that the Regulation is to be grudgingly applied.³⁸¹ The task of the decision maker is, however, to give effect to the Regulation according to its terms as the meaning of the Regulation is not difficult to understand but making the required decision is complex.³⁸² Suicide threats³⁸³ to the possible unfavourable outcome that the court in the states of the child's habitual residence might reach were not considered serious enough to satisfy the exception herein.³⁸⁴ However, the court did hold that in regards to a threat of direct or indirect harm to the child, by the person opposing the return, could be a source of harm which could defeat the Regulations objectives.³⁸⁵

³⁷⁸ *Department of Families, Youth and Community Care & Bennett* supra (n372) at paras [36]-[37]. *State Central Authority v Ardito* (Joske J, ML 1481 of 1987 unreported 29 October 1997), supported by *Director-General, DFYCC (Qld) v Hobbs* [1999] Fam CA 2059 agreed that this would not place the child in an intolerable situation just because the abducting parent could not return as this would unduly benefit the abducting parent and open the defence to abuse. *Department of Families, Youth and Community Care & Bennett* supra (n372) at paras [38]-[44];

³⁷⁹ *Department of Families, Youth and Community Care & Bennett* supra (n372) at para [49].

³⁸⁰ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) para [8] supported the view of *C v C (Abduction: Rights of Custody)* supra (n51) at 664 and supra at 473.

³⁸¹ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) para [9]; Bates op cit (n51) 261; F Bates ‘...From frost and foreign wind’ – some international aspects of Australian family law’ (2006) 39 (3) *CILSA* 412. The dissenting judgment of the case seemed however to agree more with the views of the dissenting judgment of *Davis* who indicated that the purpose of the Convention and the Regulations was to require that the authorities of the child's country of habitual residence should resolve the merits and disputes over custody and decide the best interests of the child. It was also clear that he was indicating that the regulations were not classified as laws searching for the child's best interests but rather as selecting the forum where that search was to be undertaken and concluded. However he did agree (at 413 of Bates) that a mechanical or narrow construction of Regulation 16(3)(b) was to be avoided.

³⁸² *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [9]

³⁸³ *Ibid* at para [18]; Bates op cit (n51) 260; Parkinson op cit (n40) 825; Young & Monahan (2009) op cit (n9) 349.

³⁸⁴ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [18]; Bates op cit (n51) 260.

³⁸⁵ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [19]; *C v C* supra (n51) at 661 & 471; Young & Monahan (2009) op cit (n9) 349-350.

[10] *DP and JLM* also provided that the narrow construction of this exception is also not self-evident³⁸⁶ because it is not ambiguous and poses no question of construction and the burden of proof is succinctly provided for.³⁸⁷ What is to be established is clear from the defence and this is that grave risk of harm exists and if the child was returned this would expose them to certain types of harm or place them in an intolerable situation.³⁸⁸ This therefore involves a prediction of what may happen if the child were to be returned.³⁸⁹ The best interests of the child is not used as the deciding principle, but their interests are to be considered in such cases where they may be returned to determine if a they would be exposed to grave risk or an intolerable situation.³⁹⁰ Certainty is thus not required but persuasion that there is a risk which is grave must exist and although the harm does not have to actually occur, it must potentially expose the child to such harm.³⁹¹ Thus clear and compelling evidence is required of the harm³⁹² and it was suggested that the court need not consider ‘intolerable situation’ and if this was accepted then the court could consider the exposure to harm as well as harm which had actually occurred.³⁹³ The aforementioned however does not warrant a conclusion that a narrow rather than broad interpretation should thus be adopted within Australia.³⁹⁴ The court held that the exception must be given the meaning the words required and thus a narrow construction should be rejected.³⁹⁵ It was also held that the Regulation was not to be given any special or specific interpretation other than that which was given by the meaning of the words which they required.³⁹⁶

³⁸⁶ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [41].

³⁸⁷ Loc cit.

³⁸⁸ Loc cit.

³⁸⁹ Loc cit; Bates op cit (n326) 48.

³⁹⁰ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [41]; Bates op cit (n51) 261.

³⁹¹ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at paras [42]-[43]; Bates op cit (n51) 261.

³⁹² *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [43]; Bates op cit (n51) 261 & 261 fn90; *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n50) at 78, 277. Nygh J stated the regulation had been drafted in such a way as to suggest that, ‘... the degree of harm must be substantial and, indeed, comparable to an intolerable situation.’ In England in the case of *C v C (Abduction: Rights of Custody)*, supra (n51) at 664, had Lord Donaldson comment that ‘... in a situation where it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is submitted as recognized by the words ‘or otherwise place the child in an intolerable situation’ which cast considerable light on severe degree of psychological harm which the Convention had in mind.’ Parkinson op cit (n40) 825; Young & Monahan (2009) 349; Bates op cit (n326) 49.

³⁹³ Bates op cit (n51) 261-262.

³⁹⁴ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [44]; Parkinson op cit (n40) 825; Kirby op cit (n22) 8; Bates op cit (n326) 49.

³⁹⁵ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [44].

³⁹⁶ Bates op cit (n51) 262; Parkinson op cit (n40) 825; Young & Monahan (2009) op cit (n9) 349; Bates op cit (n326) 49.

DP and JLM also held that the Regulations have been upheld as valid laws in terms of the Commonwealth³⁹⁷ and therefore the task of the Australian court is to give effect to these Regulations.³⁹⁸ If a provision is ambiguous or unclear, the usual sources of clarification are referred to.³⁹⁹ As the Regulations are so similar to the provisions of the Hague Convention, it is appropriate to construe some of the ambiguities and uncertainties in the Regulations as promoting the objects and achievements of the Hague Convention as long as they are not inconsistent herein.⁴⁰⁰ Thus the success of Regulation 16(3)(b) will be rare as a result of the language, and it is expressed in this manner in order that it does not undermine the achievements of the objectives of the Regulations and the Hague Convention.⁴⁰¹ Thus restrictive words are used and these are to be narrowly construed by the Australian courts when applying them to the specific facts of cases before them.⁴⁰²

[11] The word ‘grave’ clearly qualifies risk which indicates that such risk must be more than real and significant.⁴⁰³ ‘Otherwise’ also indicates that the physical or psychological types of harm must be those which would potentially place the child in an intolerable situation.⁴⁰⁴ The child must not only be exposed to harm by their return to the country of habitual residence but also whether the courts of the state of habitual residence are capable of lowering the risk through their own considerations of the issues before them and thus put in place conditions to protect the children.⁴⁰⁵ Aspects of Regulation 16(3)(d) can also bring the exception in Regulation 16(3)(c) into effect.⁴⁰⁶ The court further held that the strength of the words ‘grave’ and ‘intolerable’ as adjectives must permit no further approach than that which they describe.⁴⁰⁷ It may therefore not necessarily be a narrow interpretation, but the words must be interpreted and construed within their context in order to fulfill their functions because a departure from

³⁹⁷ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [119]; *De L v Director-General, NSW Department of Community Services* supra (n23) at 650; *McCall v State Central Authority* supra (n27).

³⁹⁸ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [119].

³⁹⁹ *Loc cit*; This includes the pre-existing law, the defects in the law and those that help to identify the mischief to which the law is addressed as well as the source within the international law aspect of the Australian law, to the extent that it is consistent herewith as well as any internal evidence which may be of assistance herein.

⁴⁰⁰ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [121].

⁴⁰¹ *Ibid* at para [130].

⁴⁰² *Loc cit*.

⁴⁰³ *Ibid* at para [132].

⁴⁰⁴ *Loc cit*.

⁴⁰⁵ *Ibid* at para [136].

⁴⁰⁶ *Ibid* at para [137].

⁴⁰⁷ *Ibid* at para [140].

this could undermine the purposes of the Regulations and the general rule to which they prescribe.⁴⁰⁸ As is evident in the cases of *Murray*, *Gsponer* and *Laing*, however, the situation is not as clear as Kirby J in *DP and JLM* suggests.⁴⁰⁹ The failure of considering the implications of *Laing* does furthermore weaken Kirby's dissent in *DP and JLM* in that a child may still be returned to an abusive environment.⁴¹⁰ Kirby J's final comment was that exceptions must remain exceptions as any other approach would effectively reward the abducting parent '... with the fruits of conduct which domestic and international law is designed to prevent and, where it occurs, to remedy promptly.'⁴¹¹ Thus it seems that Kirby J's view corresponds with that of Nygh J in the case of *Davis*.

[12] Furthermore the dissenting reasons provided by Kirby J and Chief Justice Gleeson were that it was unhelpful to talk in terms of 'narrow' and 'broad' constructions but that the task of the decision maker was to give effect to the regulations according to their terms and purposes and it was denied that the Full Court had misunderstood the governing law so that there was no error warranting intrusion by the High court.⁴¹²

'... To the extent that Australian court, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.'⁴¹³

Bates considers the state of law existent after *DP and JLM* as unfortunate because there still remains confusion around the appropriate attitude towards the relevance of the welfare of the child as the paramount principle herein.⁴¹⁴ The decision in *Laing* is somewhat mitigated by the decision in *JLM*.⁴¹⁵ The situation has, however, not improved in decisions by the Full Court of the Family court of Australia after the case of *DP and JLM*:⁴¹⁶

⁴⁰⁸ Ibid at para [142].

⁴⁰⁹ Bates op cit (n51) 263.

⁴¹⁰ Loc cit.

⁴¹¹ Bates op cit (n51) 264.

⁴¹² Kirby op cit (n22) 8.

⁴¹³ Loc cit; *DP v Commonwealth Central Authority and JLM v Director-General, NSW Department of Community Services* supra (n21) at [155]; Bowie op cit (n22) 4 referring to R Schuz *The Hague Child Abduction Convention* (1995) 774.

⁴¹⁴ Bates op cit (n51) 270.

⁴¹⁵ Bates op cit (n326) 56.

⁴¹⁶ Bates op cit (n51) 270.

‘The effect of all of this is that the position of the escaping carer – mother or not – is not especially happy or satisfactory under Australian case law. There, no coherent picture emerges of how an escaping carer can seek to alleviate his/her position under the Hague Convention on Civil Aspects of International Child Abduction. This is undesirable, not only for Australian individuals and organisations, but internationally.’

[13] The case of *Zafiropoulos and the Secretary of the Department of Human Services State Central Authority* (2006) 35 Fam LR 489 provides a recent and thorough discussion of the case law on how past family violence perpetrated in the child’s place of habitual residence relates to the assessment of ‘grave risk’ in terms of Regulation 16(3)(b).⁴¹⁷ It also presents a move away from the views expressed in *DP and JLM*. Where the court orders the return order where conditions are to be attached to avoid grave risk, then those conditions ‘need to be clearly defined and be capable of being objectively measured as to whether or not the conditions have been fulfilled.’⁴¹⁸

[14] The test applied in terms of *DP and JLM* was that of assessing risk at the time the order was made and then again when the foreign court made their order regarding custody and other issues.⁴¹⁹ However, due to factual differences this test was not applicable in the case of *Director-General, Department of Families & RSP* [2003] FamCA 623.⁴²⁰ The court also considered in light of *Gsponer v Director-General, Department of Community Services* that three questions needed to be assessed in order to determine if the exception was satisfied within Australia:⁴²¹

‘(a) Is there a grave risk that the mother will commit suicide if the order of the Court requires the return of the child to the USA? (b) If she were to commit suicide, is there a grave risk of psychological harm to the child in that event? (c) If there is a risk to the child, is the level of harm sufficiently grave to satisfy the Convention test of what might be an “otherwise intolerable situation”?’

It was held that little is to be gained by trying to establish whether statements concerning the application of Regulation 16(3)(b) pre-dating *DP* and *JLM* continue to have validity. In *RSP’s* opinion, the necessary guidance in relation to the application of Regulation 16(3)(b) is to be found in the paragraphs quoted from *DP* and *JLM* above.⁴²²

⁴¹⁷ Young & Monahan (2009) op cit (n9) 351.

⁴¹⁸ *McDonald & Director General, Department of Community Services, NSW* (2006) FLC 93-297 at para [29]; Young & Monahan (2009) op cit (n9) 351.

⁴¹⁹ *Director-General, Department of Families & RSP* [2003] FamCA 623 at para [20].

⁴²⁰ *Ibid* at para [21].

⁴²¹ *Ibid* at paras [30]-[31].

⁴²² *Ibid* at para [34]; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at paras [41]-[45].

[15] Bates therefore indicates that after case law it may be easier than it was for a parent to successfully oppose the return of the child using Regulation 16(3)(b),⁴²³ although clearly through case law it is evident that much depends on the facts of each case and that it should not be assumed that Regulation 16(3)(b) will be easy to activate successfully.⁴²⁴ It has also been submitted that ‘grave’ was considered to mean ‘exceptional’ and thus over and above the expected anxiety and distress which would normally be associated with the removal of a child from one country to another.⁴²⁵ It was also submitted that in light of the *Murray* and *Gsponer* cases that there was no difference between physical and psychological harm and thus it was necessary to determine if the court of habitual residence would fail to protect the child after the outcome of access and custody orders.⁴²⁶ Grave risk is also not necessarily determined on what has happened or will happen, but what the child may be exposed to⁴²⁷ and the words were to be given their necessary meaning which they intended and not a narrow or broad construction.⁴²⁸ It was also held that in determining grave risk of psychological harm, the evidence needs to be considered and as indicated in *DP and JLM*, but that the three prong test suggested herein was not to be considered.⁴²⁹ This was due to the fact that it would give the exception too narrow a construction and would not provide the exception with the meaning it required.⁴³⁰

[16] *HZ & State Central Authority* [2006] FamCA 466 (7 June 2006) also referred to the case of *DP and JLM*⁴³¹ and held that in determining risk, it was considered that unless the contrary is proven the administrative, judicial and social services authorities of the requesting state are equally able to protect children from harm or risk.⁴³²

⁴²³ Bates op cit (n381) 414.

⁴²⁴ Loc cit. The case of *JMB and Ors & Secretary, Attorney-General's Department* [2006] FamCA 59 at 15, referred to the judgment of *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* (supra (n21) and the trial judge considered ‘grave’ not to be satisfied if in the country of habitual residence there was no procedure to make appropriate orders to prevent such risk, that the respondent would be unlikely to seek such orders and the abducting parent probably would not abide by them at all (*Ors* at 17 & 27). This decision was appealed as it was felt that the trial judge had misdirected himself in determining what grave risk is (at 28)).

⁴²⁵ *JMB and Ors & Secretary, Attorney-General's Department* supra (n424) at para [32].

⁴²⁶ Ibid at para [39].

⁴²⁷ Ibid at para [43].

⁴²⁸ Ibid at para [44].

⁴²⁹ Ibid at para [43].

⁴³⁰ Ibid at para [45].

⁴³¹ *HZ & State Central Authority* [2006] FamCA 466 at para [19].

⁴³² *HZ & State Central Authority* supra (n431) at para [46]; N Lowe, M Everall & M Nicholls *International Movement of Children* (2004) at para [17.97].

[17] The Australian Law Commission report (ALRC) on *Equality before the Law* where the Commission said:

‘... Violence against the mother has significant effects on the child. This should be directly reflected in the regulations so that the child’s return should not be ordered if to do so is likely to endanger the safety of the parent in whose care the child is. Furthermore, to expose the mother to the trauma, difficulty and cost of returning to pursue custody litigation is not consistent with the purpose of the Convention when she is a survivor of her husband’s violence and took a reasonable course of action to protect herself.’⁴³³

The ALRC recommended that Regulation 16 should be amended to provide, in determining grave risk, that the child’s return would expose them to physical or psychological harm or place them in an intolerable situation and that regard should perhaps be had to the harmful effects of the child due to past violence or violence likely to occur in the future towards to the abductor by the other parent if the child was returned.⁴³⁴ The Central Authority should be requested to raise the problem of a women fleeing with their children from violent spouses with a view to amending the Hague Convention in order to make it clear that in deciding whether the child should be returned and in considering this, the court should take account of the likelihood that the child will be exposed to violence by one parent against the other.⁴³⁵ However, at this point none of the recommendations had been acted upon by the Australian Government.⁴³⁶ The case of *DP v Commonwealth Central Authority* held that the meaning of the Regulation is not difficult and the problem is more likely to be found in making required judgments and this is a problem of application, not construction.⁴³⁷ It is therefore submitted that conditions or undertakings should be attached to return orders in order to limit possible harm to the child.⁴³⁸

⁴³³ *HZ & State Central Authority* supra (n431) at para [48]; Australian Law Commission Report (ALRC) *Equality Before The Law: Justice for Women* (April 1994) 69 (Part I) at paras [9.39]–[9.46], available at http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt1.pdf, accessed on 12th October 2011.

⁴³⁴ *HZ & State Central Authority* supra (n431) at para [49]; ALRC op cit (n433) at para [9.5]; Young & Monahan (2009) op cit (n9) 350.

⁴³⁵ Loc cit.

⁴³⁶ *HZ & State Central Authority* supra (n431) at para [50].

⁴³⁷ *Ibid* at para [73]; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n21) at para [9]. Other cases which can be considered in regards to this defence are the following: *State Central Authority & Sigouras* [2007] FamCA 250 at para [64] which follows the test and views of *DP and JLM* as discussed previously; *Tarritt & Director-General, Department of Community Services* [2008] FamCAFC 34 and this also supports the views expressed in *DP and JLM; Northern Territory Central Authority & Gambini* supra (n134) at paras [121] & [137]. The case of *Director-General, Department of Community Services v M and C* supra (n220) also supported the aforementioned and determined that the exception is to be determined objectively; *Kilah & Director-General, Department of Community Services* supra (n163) also agreed with the case of *DP and JLM. State Central Authority & Daker* [2008] FamCA 1271 also supported this view. The case of *Department of Child Safety & Pelt* [2009] FamCA 412 referred to the cases of *Gsponer; Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* [1996] FamCA 25; *De L v Director-General, NSW Department of Community Services and Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* and thus did not consider the binding authority of *DP and JLM* which was an error herein. The

d) Regulation 16(3)(c): The child's objections

[1] This exception refers to the circumstances in which a child's return may be refused by the court considering the child's objections to being returned;⁴³⁹ this objection must show a strength of feeling beyond the mere expression of a preference or ordinary wish⁴⁴⁰ and the child must have attained an age and a degree of maturity at which it is appropriate to take account of their views.⁴⁴¹

[2] Initially the case of *Emmett v Perry* (dealt with before the Family Law Amendment Act of 1995) dealt with the weight which should be attached to a child's objection.⁴⁴² It is necessary to note that in ordering a child's return to the country of habitual residence, the nature of the proceedings is not the determination of competing claims for interim custody but what the Australian Government has taken to preserve international comity and in doing this they recognise the authority of systems of law in other Hague Convention countries, which therefore imposes a primary obligation on the court to ensure wrongfully removed and retained children are promptly returned.⁴⁴³ In regards to the issue of the child's wishes and the relevant time to consider these wishes, the case of *Emmett v Perry* held that this should occur at the time of wrongful retention because otherwise it would be dangerous and unsatisfactory to place any significant weight on the subsequent development of the child's wishes when they are under the care and influence of the abducting parent.⁴⁴⁴ This was subsequently accepted by the Judge in the case of *Thorpe*, which held that the court is called upon to exercise discretion at the time of the hearing

case of *Department of Community Services & Harris* [2010] FamCA 261 also agreed with the approach of *DP and JLM; State Central Authority & Hajjar* supra (n172) also stated this view was the correct approach; *State Central Authority & Perkis* [2010] FamCA 649 (23 June 2010) which also agreed that *DP and JLM* was the settled law. *Department of Communities (Child Safety Services) & Raleigh* supra (n322) also submitted this as the correct approach.

⁴³⁸ Examples hereof are the cases of *McDonald & Director General, Department of Community Services, NSW* supra (n418) & *Director-General, Department of Community Services & Frampton* [2007] FamCA 1064; *Director-General, Department of Community Services & Frampton (No. 3)* [2008] FamCAFC 64.

⁴³⁹ Regulation 16(3)(c)(i) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁴⁴⁰ Regulation 16(3)(c)(ii) of the Family Law (Child Abduction Convention) Regulations, 1986; Young & Monahan (2009) op cit (n9) 352.

⁴⁴¹ Regulation 16(3)(c)(iii) of the Family Law (Child Abduction Convention) Regulations, 1986. Section 60CD of the Family Law Act, 1975 (Cth), see also *State Central Authority & Litchfield* [2009] FamCA 317 at para [70]. Sections 68L-M of the Family Law Act, 1975 (Cth) governs the rights of children to legal representation.

⁴⁴² *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [13].

⁴⁴³ *Ibid* at para [1].

⁴⁴⁴ *Ibid* at para [2]; Bates op cit (n144) 91. This was supported in the case of *Murray v Director of Family Services A.C.T* supra (n50) at 80, 253 although it was considered with Regulation 16(3)(a) of the Family Law (Child Abduction Convention) Regulations, 1986 and not Regulation 16(3)(c) of the Family Law (Child Abduction Convention) Regulations, 1986. Bates op cit (n139) 91; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.60]

and not at another time.⁴⁴⁵ The Judge also held herein that when exercising the discretion of whether to order or refuse to order the return, the policy of the Hague Convention requires the consideration of weighty factors and the weight to be attached to the objections of a child will depend on the child's age and maturity⁴⁴⁶ - the older the child, the more the weight and vice versa.⁴⁴⁷

[3] Children's wishes or objectives should be able to be described as 'clear', 'definite' and 'absolutely adamant',⁴⁴⁸ in order for the exception to be successful.⁴⁴⁹ In determining what weight should be placed upon a child's expression, the courts need to consider the age and maturity of the children in order to determine if their views can be taken into account.⁴⁵⁰ Objective evidence of the aforementioned must thus be considered.⁴⁵¹ Where only objective evidence is present, this may best be dealt with by the court of origin rather than a new court in order to adequately consider the child's wishes if they were to be returned.⁴⁵² The court further held that it is dangerous to place significant weight on the subsequent development of the children's wishes against the background of one parent having made a unilateral decision defying the existing custody order and them having been under the sole influence of the abducting parent who may have been engaged, actively or passively, in their manipulation while they were retained.⁴⁵³

[4] The case of *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* provided that in regards to this exception, the views of the child are able to be placed before the court and assessed by a professional or Judge hearing the evidence, and

⁴⁴⁵ Bates op cit (n139) 91-92. In light of the ordinary meaning of the Regulations, *Thorpe* holds that it refers to the time of the hearing and not the antecedent time and that it would be superficial for a party to be required to establish that at a 'period of time ago' in the past that the child objected to being returned which is an impossible interpretation: *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n220) at para [3.62].

⁴⁴⁶ Ibid at para [3.71].

⁴⁴⁷ Loc cit; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [46].

⁴⁴⁸ *Darryl Emmett And: Penelope Anne Perry And: Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority And: Attorney-General of the Commonwealth of Australia Intervener* supra (n38) at para [37].

⁴⁴⁹ Ibid at para [38].

⁴⁵⁰ Ibid at para [40].

⁴⁵¹ Ibid at para [41].

⁴⁵² Ibid at para [42].

⁴⁵³ Ibid at para [43]; Bates op cit (n139) 91. If a child merely objects on the basis of a desire to remain with the abducting parent and to avoid being placed in the care and custody of the left-behind parent, will not enliven the exception: Bowie op cit (n22) 21. The case of *Commissioner, Western Australia Police v Dormann* (1997) FLC 92-766 is illustrative of this point.

thus this evidence is not untested, however, a concern remains that the child may have been subjected to influence from the opposing party.⁴⁵⁴ Thus their testimony is not a true statement of their feelings.

[5] A two-fold test is therefore used to determine whether Regulation 16(3)(c) exists in Australia and this is identified as namely: 1) Does the child object to being returned to the place of habitual residence and 2) has the child obtained an age and maturity at which it is appropriate to take account of their views.⁴⁵⁵ When this has been determined, then on the evidence it needs to be considered whether or not the court ought to refuse the child's return in terms of the Hague Convention and Regulations.⁴⁵⁶ This has subsequently been replaced by the court in *Northern Territory Central Authority & Gambini* which suggested a four stage test:⁴⁵⁷ 1) Whether the child objects to their return; 2) whether the objection shows the requisite 'strength of feeling'; 3) whether the child has attained an age and degree of maturity for it to be appropriate for the court to take these wishes into account; and 4) the court must then exercise its discretion whether or not to order the return of the child.

[6] It is usually only the hearsay evidence of the parent who has removed the children that can actually be considered to establish the Regulation, however, the weight which is attached to the evidence of a parent in these circumstances is minimal.⁴⁵⁸ The courts can order that an individual report on the child's objections be submitted to court and this is desirable as it gives the child a chance to be sufficiently heard.⁴⁵⁹ It was held in *De L v Director-General, NSW Department of Community Services*⁴⁶⁰ that 'where there is a clear issue as to whether the child objects to being returned, there is a corresponding obligation upon the court to give the child an opportunity to be heard. This is a right particular to the child and independent of the person opposing the return.'⁴⁶¹

⁴⁵⁴ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [5].

⁴⁵⁵ *Ibid* at para [59]; *Kay* op cit (n179) 240; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [46]; *Bowie* op cit (n22) 20.

⁴⁵⁶ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [60].

⁴⁵⁷ *Northern Territory Central Authority & Gambini* supra (n134) at para [140].

⁴⁵⁸ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [7].

⁴⁵⁹ *Ibid* at para [8]; *De L v Director-General Department of Community Services (NSW)* supra (n23).

⁴⁶⁰ *Bates* op cit (n139) 90; See *Director-General, Director of Community Services v De Lewinski* (1996) FLC 92-674; *Director-General, Community Services v De Lewinski (No 2)* (1996) FLC 92-677; *De Lewinski v Director General, New South Wales Department of Community Services* (1996) FLC 92-678.

⁴⁶¹ *Bates* op cit (n139) 90; *Director-General, Community Services v De Lewinski* supra (n437) at 83, 016.

[7] The right of a child to express their views in matters that affect them is evident in the provision of Article 12 of the UNCRC.⁴⁶² An authoritative consideration of the UNCRC is found in the Australian High Court decision of *Minister of State for Immigration and Ethnic Affairs v Teoh*.⁴⁶³ *Teoh's* case is also authority for the proposition that in judicial decision-making:

'[T]he fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.'

[8] In Australia, the Regulations and Hague Convention both came into force on 1 January 1987, whereas the UNCRC came into force on 16 January 1991.⁴⁶⁴ What is important to consider is the following:

'It is accepted that a statute is to be interpreted and applied, as far as language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligation.'⁴⁶⁵

In regards to Article 12 of the UNCRC they complement the requirement that the court must consider the child's objections subject to their age and maturity and that this includes an application which is purely one of forum.⁴⁶⁶ This was held to be in accordance with procedural fairness as the obligation to

⁴⁶² *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [9].

⁴⁶³ *Ibid* at para [10]; *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1994-5) 183 CLR 273 at 287.

⁴⁶⁴ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [12]; *Minister of State for Immigration and Ethnic Affairs v Teoh* supra (n463) at 287-288.

⁴⁶⁵ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [12] referring to *Minister of State for Immigration and Ethnic Affairs v Teoh* supra (n463) at 287-288.

⁴⁶⁶ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [14]; *Murray* supra (n50) at 80,259.

provide a child with the opportunity to participate in decisions affecting them, does not determine the substantive outcome as the objections are subject to the court's evaluation and this process allows children to have a say rather than forces them and it also resists placing undue responsibility on them.⁴⁶⁷

[9] The court in *De Lewinski* considered the meaning of the word 'objection' and agreed with the view supplied in the English Court of Appeal case, *S v S (Child Abduction: Child's views)* (1992) 2 FLR 492.⁴⁶⁸ They held that the word 'objects' should be given its literal meaning and not subjected to any form of gloss.⁴⁶⁹ The court in *De Lewinski* rejected the finding of the trial court that the word 'objects' imports a strength of feeling which goes beyond the usual ascertainment of the child's wishes in a custody disputes.⁴⁷⁰ The reasons for the aforementioned are that firstly the '[c]ourt should not expect children to necessarily express their views within adult formulations',⁴⁷¹ as courts can appreciate the notions of forum, comity and jurisdiction, and that an objection must, as a matter of law, be with respect to the place of habitual residence rather than the person with rights of custody.⁴⁷² Children do not understand these concepts and thus it should not be expected that children will speak in such expert terms unless they have practiced and rehearsed this.⁴⁷³

The case of *De L v Director-General Department of Community Services* was decided after the amendments to the FLA in terms of the Family Law Amendment Act, and this case upheld the Full court's strict interpretation of Regulation 16(3)(c) that:

⁴⁶⁷ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [14].

⁴⁶⁸ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at paras [15]-[16]; *S v S (Child Abduction: Child's views)* (1992) 2 FLR 492 at 499 citing Sir Stephen Brown P in *Re M (Minors)* 25 July 1990, unreported; Young & Monahan (2009) op cit (n9) 352.

⁴⁶⁹ *Director-General, Department of Community Services & M & C & Child Representative* supra (n211) at para [30]; *De L v Director-General, New South Wales Department of Community Services* supra (n23) at 399; *Director-General, Department of Child Safety & Milson* supra (n313) at para [77]; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [20].

⁴⁷⁰ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [15]. This appeared in *Re R (A Minor: Abduction)* (1992) 1 FLR 105 at 107-108 and this interpretation appears to have been cited with approval by Murray J in *Police Commissioner of South Australia v Temple* supra (n139) at 79,830 however, it was rejected in the *De Lewinski* case supra (n437).

⁴⁷¹ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [17]; *De L v Director-General Department of Community Services (NSW)* supra (n23).

⁴⁷² *Director-General Department of Community Services and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [70]; Kay op cit (n179) 245; *Re R* supra (n289); *Director-General, Department of Child Safety & Milson* supra (n313) at para [85].

⁴⁷³ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [17].

‘In this setting there is no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as ‘the child objects to being returned.’ The term is ‘objects’. No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No ‘additional gloss’ is to be supplied.’⁴⁷⁴

This word describes the response of children of different ages and maturity and no particular form of words or assertiveness in their expression is required, as to do so would ignore the different capacities of the individual child as well as the different cultures in which the Hague Convention should operate.⁴⁷⁵

The child’s affiliation or loyalty to one parent makes it difficult for the child to have a strong and assertive objection although it may still be felt.⁴⁷⁶

[10] The court in *Crowe* held that in regards to the statement of principle expressed in *S v S* and applied in *Urness v Minto* that nothing in the provisions of Regulation 16(3) make it appropriate to consider whether the child objects to returning in any circumstances.⁴⁷⁷ The trial court held:

‘... It is not enough that the child merely has a preference, there must be an objection. To act on it, if the child has attained an age and degree of maturity which warrants taking its views into account, the objection must be a very substantial one in the circumstances.’⁴⁷⁸

However, it was also held that the reasons a child gives for their objections are material and do assist in determining whether the return they object to should be ordered or not in terms of the Regulations.⁴⁷⁹

[11] Children who are sufficiently mature may also not express their views with the required strength of feeling but this was held as inconsistent with the developmental understanding of the children as well as an appreciation that interview situations are intimidating despite efforts to combat this.⁴⁸⁰ The Hague

⁴⁷⁴ *De L v Director-General Department of Community Services (NSW)* supra (n23) at 655; *S v S (Child Abduction) (Child’s Views)* supra (n468) at 499; Parkinson op cit (n40) 824.

⁴⁷⁵ *De L v Director-General Department of Community Services (NSW)* supra (n23); *Turner v Turner*, unreported, Family Court of Australia, 27 June 1988 per Lambert J.

⁴⁷⁶ *De L v Director-General Department of Community Services* supra (n23).

⁴⁷⁷ *Director-General Department of Community Services and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* supra (n263) at para [61].

⁴⁷⁸ *Ibid* at para [67].

⁴⁷⁹ *Ibid* at para [68].

⁴⁸⁰ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [18]; *De L v Director-General Department of Community Services (NSW)* supra (n23). Bowie notes that merely because the case law of Australia has suggested that a child over the age of 12 and above is considered mature enough, does not mean a precedent for age has been set as well as the fact that the courts have refused to order a younger siblings return if they do not satisfy the defence and the older sibling does: Bowie op cit (n22) 21-22, e.g. *In the Marriage of Bassi* (1994) FLC 92-465. The case of *State Central Authority v Hotzner (No 2)* [2010] FamCA 1041 however provides an example where if younger sibling was granted a return order without that of the older sibling accompanying them

Convention's policy was not compromised by hearing what children had to say as well as considering the literal view of the term 'objection' because the court is able to make further critical assessments regarding the age and maturity of the child in determining if in the circumstances the discretion to refuse the child's return should be exercised.⁴⁸¹ Further it was also held that the word is a plain English word and thus the meaning is clear and should not be given any strained or unusual interpretation.⁴⁸² Thus the Australian courts should not adopt a too restrictive approach herein.⁴⁸³ It is difficult for a Judge to balance the attainment of the objectives of the Hague Convention against the child's objection as it is matter of comparing two considerations, one, that they can still order the return of the child if the requirements of the Regulation are satisfied⁴⁸⁴ and two, that it is ultimately up to the court to determine the strength and seriousness of the objection and the consequences which may follow if the objection is ignored.⁴⁸⁵ A child's objections must also show strength of feeling beyond that of the mere expression of preference or ordinary wishes of the child.⁴⁸⁶ If an objection is found, the court must still consider the child's age and maturity and whether it is appropriate to take account of their views and thus the court still retains a discretion herein to refuse to order the return and therefore the objection should not be narrowly construed.⁴⁸⁷ In light of the aforementioned it was held that the word 'objects' must be given a broad construction.⁴⁸⁸ The objection made must be to returning to the country of habitual residence, not against the return to the other parent.⁴⁸⁹

on the aforementioned grounds, this would constitute a grave risk of harm and thus the younger sibling would not be returned on this basis.

⁴⁸¹ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) at para [19].

⁴⁸² *Ibid* at para [20].

⁴⁸³ *Ibid* at para [21]; referring to a speech presented by Chief Justice of the High Court, Sir Anthony Mason AC KBE.

⁴⁸⁴ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n453) at para [22].

⁴⁸⁵ *Loc cit*.

⁴⁸⁶ *Director General, Department of Community Services as the New South Wales Central Authority & Gamble* [2007] FamCA 1061 at paras [36]; [141] & [122]; *Director-General, Department of Child Safety & Milson* supra (n313) at para [82]; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [20].

⁴⁸⁷ *De L v Director-General Department of Community Services (NSW)* supra (n23) referring to *Urness v Minto* [1994] SLT 988 at 998; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [20].

⁴⁸⁸ *De L v Director-General Department of Community Services (NSW)* supra (n23).

⁴⁸⁹ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n437) referring to *Re R (Child Abduction)* supra (n289) at 730; *Northern Territory Central Authority & Gambini* supra (n134) at para [141].

[12] Many reasons are advanced for considering that the meaning of ‘objects’ imports a strength of feeling which is far beyond that of the usual attainment of the child’s wishes in a custody dispute.⁴⁹⁰ These are that the words must be read in the context of the international treaty from where they are derived, which has the primary purpose of return to the state of habitual residence, to deter international abduction and deprive abducting parents of rewards for such conduct.⁴⁹¹ Any other construction would undermine the achievement of the purposes of the Hague Convention and the Regulations.⁴⁹² The preference of the child, who has reached a sufficient age and maturity, will be relevant to a custody decision, access or the equivalent but something more is needed to prevail legally over the child’s best interests.⁴⁹³ Therefore something more than preference, wishes, convenience or local opinion is required to defeat the policy.⁴⁹⁴

The case of *De L* rejected the proposed narrow interpretation.⁴⁹⁵ The High Court held that there is no particular reason why Regulation 16(3)(c) should be construed by any strict or narrow reading of the phrase expressed in broad English terms, such as the ‘child objects to being returned’.⁴⁹⁶ It was held in regards to the term ‘objects’, no form of words had been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition.⁴⁹⁷ Thus no additional gloss was to be added to the words.⁴⁹⁸ The narrow approach conforms to the meaning of the word ‘objects’ and is supported by the background material of the Hague Convention.⁴⁹⁹ If this narrow approach to the meaning is not used, the courts may deviate and evaluate the child’s best interests which would ‘drive a coach and horses through the primary scheme’.⁵⁰⁰ The High Court overruled the notion that there should

⁴⁹⁰ *De L v Director-General Department of Community Services (NSW)* supra (n23); *Re R (A Minor: Abduction)* supra (n470) at 107-108.

⁴⁹¹ *De L v Director-General Department of Community Services (NSW)* supra (n23).

⁴⁹² Loc cit.

⁴⁹³ Loc cit.

⁴⁹⁴ Loc cit.

⁴⁹⁵ Young & Monahan (2009) op cit (n9) 352; Kay op cit (n179) at para [241]; *Re R (A Minor: Abduction)* supra (n470) at 107-108.

⁴⁹⁶ Young & Monahan (2009) op cit (n9) 352.

⁴⁹⁷ *De L and Director General, NSW Department of Community Services* supra (n23) at 399; Young & Monahan (2009) op cit (n9) 352.

⁴⁹⁸ *S v S (Child Abduction) (Child’s View)* supra (n468) at 499; Young & Monahan (2009) op cit (n9) 352; Kay op cit (n179) at para [242]; *Tarritt & Director-General, Department of Community Services* supra (n437) at para [20]. The court agreed with the view of Balcombe LJ in *S v S (Child Abduction) (Child’s View)* supra (n468) that ‘no additional gloss’ is to be supplied.

⁴⁹⁹ *De L v Director-General Department of Community Services (NSW)* supra (n23); Perez-Vera op cit (n141) at para [34].

⁵⁰⁰ *De L v Director-General Department of Community Services (NSW)* supra (n23); referring to *S v S (Child Abduction)(Child’s Views)* supra (n468) at 501; *Police Commissioner of South Australia v Temple* supra (n139) at 79, 830.

be a strict and narrow reading of the Hague Convention exceptions in order to not undermine the attainment of the objects of the Convention.⁵⁰¹ As a result, section 111B of the FLA was amended to provide specifically that ‘an objection’ to return under the Australian law must import a strength of feeling which was beyond the mere expression of a preference of ordinary wishes.⁵⁰² In doing the aforementioned, the Parliament of Australia actually sought to achieve the narrow reading of the word ‘objection’.⁵⁰³

[13] The case of *De L v Director-General, NSW Department of Community Services* also held that in such cases, where the court must consider the child’s age and maturity, the children should be afforded separate legal representation.⁵⁰⁴ Section 68L of the FLA states that this section applies to proceedings in terms of the FLA in which a child’s best interests are paramount or are a relevant consideration⁵⁰⁵ and if it appears to the court that the child ought to be separately represented, then the court may order that the child be separately represented and may also make such other orders as it considers necessary to secure this.⁵⁰⁶ In regards to when a child’s objection has been raised and they are of sufficient age and maturity, the Judge hearing the application is able to exercise a discretion in order to determine whether or not the child’s return should be ordered and the court should take full account of the paramountcy of the child’s best interests principle.⁵⁰⁷ The Regulations are silent in regards to the factors which are to be taken into account when exercising the discretion and it is therefore unconfined except in so far as the subject matter, scope and purpose of the Regulations enable it to be said that a particular consideration is extraneous.⁵⁰⁸ This subject matter is such that the welfare of the child is properly taken into account in considering the exercise of their discretion.⁵⁰⁹ Thus in these circumstances the court can consider whether the return in light of the objection would be in the child’s best interests or not.

⁵⁰¹ Kirby op cit (n22) 7.

⁵⁰² Ibid at 7-8; *Director-General, Department of Child Safety & Milson* supra (n313) at para [78].

⁵⁰³ Kirby op cit (n22) 8.

⁵⁰⁴ *De L v Director-General Department of Community Services (NSW)* supra (23).

⁵⁰⁵ Loc cit; Section 68L(1) of the Family Law Act, 1975 (Cth).

⁵⁰⁶ *De L v Director-General Department of Community Services (NSW)* supra (23); Section 68L(2) of the Family Law Act, 1975 (Cth); *Director General, Department of Community Services as the New South Wales Central Authority & Gamble* supra (n486) at paras [16]-[20].

⁵⁰⁷ *De L v Director-General Department of Community Services (NSW)* supra (n23); *Director-General, Department of Child Safety & Milson* supra (n313) at para [84].

⁵⁰⁸ *De L v Director-General Department of Community Services (NSW)* supra (n23) at 661; *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505; *Parkinson op cit* (n40) 824; *Director-General, Department of Child Safety & Milson* supra (n313) at para [6]; *State Central Authority & Litchfield* supra (n441) at para [70].

⁵⁰⁹ *De L v Director-General Department of Community Services (NSW)* supra (n23).

[14] In regards to the child's return, the court also needs to consider, in Hague Convention cases, policy considerations of speedy return, comity between states and respect for the other Hague Convention's judicial system in regards to the interests of the child and that the Hague Convention is there to promptly return abducted children and to deter potential abductors.⁵¹⁰ Therefore the court must balance the nature and strength of the child's objections against the Hague Convention principles in exercising the discretion.⁵¹¹

[15] The case of *Gamble* refers to the decision in regard to the subject matter, purpose and scope of the Regulations that the court must balance weighing the factors for return against the return and in doing so the purpose and intent of the Hague Convention is to be given significant weight.⁵¹² The court further held that the discretion is wide and should not be limited by fixed criteria as each case is determined and dependent on their own facts and circumstances.⁵¹³ The court in *Gamble* further referred to the case of *Ryan v Director-General, Department of Child Safety* [2007] FamCa 65 where the court specified that there need not be clear and compelling reasons which frustrate the Hague Convention's objectives as only in certain instances are certain exceptions permitted to prevent the child's return.⁵¹⁴

[16] In regards to the issue of age, this by itself is not an indicator of maturity⁵¹⁵ as there is no set age which is considered appropriate to take into account a child's views.⁵¹⁶ Kay J concluded that internationally, as well as domestically, there is no settled agreement regarding the age when a child's views should be taken into account.⁵¹⁷ It has been indicated in many cases that the courts have accepted a variety of views from children of many ages.⁵¹⁸ They will have to determine why the child objects to

⁵¹⁰ *Tarritt & Director-General, Department of Community Services* supra (n437) at para [42]; *Northern Territory Central Authority & Gambini* supra (n134) at para [161].

⁵¹¹ *Director-General, Department of Child Safety & Milson* supra (n313) at para [88].

⁵¹² *Director-General, Department of Community Services as the New South Wales Central Authority & Gamble* supra (n486) at para [38]; *Agee and Agee* [2000] FamCA 1251; (2000) FLC 93-055 at para [83].

⁵¹³ *Director-General, Department of Community Services as the New South Wales Central Authority & Gamble* supra (n486) at para [38]; *Agee and Agee* supra (n512) at para [84].

⁵¹⁴ *Director-General, Department of Community Services as the New South Wales Central Authority & Gamble* supra (n486) at para [39]; *Ryan v Director-General, Department of Child Safety* [2007] FamCa 65 at para [20].

⁵¹⁵ *Northern Territory Central Authority & Gambini* supra (n134) at para [149].

⁵¹⁶ *Loc cit*.

⁵¹⁷ *Kay op cit* (n179) at para [276].

⁵¹⁸ *Ibid* at para [254]; *Police Commissioner v Temple (No.1)* supra (n139) at 79,830, the courts accepted the views of a nine-year-old, see also *Northern Territory Central Authority & Gambini* supra (n134) at paras [152]-[153]. In *Director-General, Department of Families, Youth and Community Care v Thorpe* supra (n220), the courts also considered the objections of a nine-year-old; *Director General, Department of Community Services v M & C* supra (n211), the courts considered the views of an eleven- and nine-year-old; as well as in many other foreign jurisdictions e.g. Germany, Sweden and England. *Agee v*

the return because if the only reason is that they want to remain with the abducting parent, then this will be relevant in exercising the discretion.⁵¹⁹ It must also be remembered that the Hague Convention does not set down an age which is sufficient and thus neither should the courts.⁵²⁰

‘When Art 13 speaks of an age and maturity level at which it is appropriate to take account of a child’s views, the inquiry which it envisages is not restricted to a generalised appraisal of the child’s capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question ‘Do you object to a return to your home country?’ he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question’s implications for his or her own best interests in the long and short term. It seems to me to be entirely permissible, therefore, for a child to be questioned (even at the preliminary gateway stage) by a suitably skilled independent person with a view to finding out how far the child is capable of understanding – and does actually understand – those implications.’⁵²¹

The court in *Milson* referred to the English case of *Re M* which discussed, in regards to *Re T (Abduction: Child’s Objections to Return)* [2000] 2 FLR 192,⁵²² that when determining the strength and validity of a child’s views, it is necessary to examine what the child’s own perspective of their long-term, short-term and medium interests are;⁵²³ to what extent, if at all, the reasons for the objections are rooted in reality or might appear to the child to be grounded in it;⁵²⁴ to what extent their views have been influenced by undue influence and pressure which is directly or indirectly exerted by the abducting parent⁵²⁵ and to what extent the objections will be mollified on return.⁵²⁶ In regards to the concept of adding an additional gloss to the words ‘objects’, the court in *Milson* found that the requirement that a child understand the purpose of the return could amount to such a gloss.⁵²⁷ Furthermore it does not prevent this from being explained to a child, although there is no requirement to do so.⁵²⁸ Therefore the reasons why a child objects may be relevant for the purposes of the Regulation. However, it is not necessary that

Agee supra (n511) also considered the views of a nine-year-old. However *Thorpe* also indicated that the views are not decisive.

⁵¹⁹ *Northern Territory Central Authority & Gambini* supra (n134) at para [150]; *Kay* op cit (n179) 244; *Re M (A Minor)(Child Abduction)* [1994] 1 FLR 390.

⁵²⁰ *Northern Territory Central Authority & Gambini* supra (n134) at para [150].

⁵²¹ *Ibid* at para [151]; *Re S (Minors) (Abduction: Acquiescence)* supra (n298) at 827.

⁵²² *Director-General, Department of Child Safety & Milson* supra (n313) at para [90]; *Re M* supra (n518) at para [62]; *Re T (Abduction: Child’s Objections to Return)* [2000] 2 FLR 192 at 204.

⁵²³ *Loc cit*.

⁵²⁴ *Loc cit*.

⁵²⁵ *Loc cit*.

⁵²⁶ *Loc cit*.

⁵²⁷ *Director-General, Department of Child Safety & Milson* supra (n313) at para [102].

⁵²⁸ *Loc cit*.

the child articulate or demonstrate an understanding of the purpose of return in order to find that a valid objection exists.⁵²⁹

8.3 Exception three: Regulation 16(3)(d)

[1] This Regulation provides the following exception: ‘[T]he return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.’ This defence is also provided for in terms of Article 20 of the Hague Convention.

[2] This exception is very seldom raised as provided in the case of *McCall and McCall and the State Central Authority*.⁵³⁰ Since the operation of the Hague Convention, there has been no successful attempt at proving this exception.⁵³¹ Furthermore in terms of the Australian case law, the cases of *Director-General, Department of Families, Youth & Community Care v Bennett* and *A & GS & Others* [2004] FamCA 967 discuss this Regulation.⁵³²

This exception is only applicable in clearly exceptional cases and is not directed at the developments which have occurred on the international level but with the principles accepted by the law of the requested state, either through general international law and treaty or other internal legislation.⁵³³ Therefore in order to refuse a child’s return in terms of this Regulation, it is necessary to show that the fundamental principles of the requested state, regarding the Hague Convention’s subject matter, are violated as it is not considered sufficient to show that the child’s return would be even manifestly incompatible with these principles.⁵³⁴

⁵²⁹ Ibid at para [103]. The Family Law Amendment Act 2000, assented to on the 29 November 2000 and commencing in its most part on the 27 December 2000, suggests reforms to this defence/exception especially in regards to the separate legal representation of children in order to confine this to exceptional circumstances only: Bowie op cit (n22) 23. Thus this would overturn the decision in *De L v Director General, NSW Department of Community Services* supra (n23). This amendment to section 68L(2) of the Family Law Act, 1975 (Cth) has however been altered to reflect the amended position and has overturned the case of *De L* (Bowie at 24); Item 68 of Schedule 3 of the Family Law Amendment Act 2000.

⁵³⁰ *McCall and McCall and the State Central Authority* supra (n27) at para [108]. Bowie suggests that although it is extremely difficult to satisfy this defence, it has been included to ensure global support for the Hague Convention on the Civil Aspects of International Child Abduction, 1980: Bowie op cit (n22) 22.

⁵³¹ The Report of the Special Commission meeting reviewing the operation of the Hague Convention 18-21 January 1993 regarding Article 20 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 that it was inserted into the Hague Convention as otherwise the Hague Convention would never have adopted it: *McCall and McCall and the State Central Authority* supra (n27) at para [109].

⁵³² Regulation 16(3)(d) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth), Fehlberg & Behrens op cit (n7) 309.

⁵³³ *McCall and McCall and the State Central Authority* supra (n27) at para [110].

⁵³⁴ Ibid at para [111].

[3] In regards to this exception, in Australian law it was held that the approach in the case of *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* should be adopted:⁵³⁵

‘The inclusion of this ... regulation was part of the compromise reflected in the drafting of the Convention designed to avoid broad grounds of exception based on public policy and to confine exceptions to a limited number expressly enumerated. Regulation 16(3)(d) ... would apply where the person opposing the order established that, in the country of habitual residence, matters regarded in Australia as fundamental to the protection of human rights and freedoms would not be observed were the child returned. Amongst other things, this would include a case where it was demonstrated that, notwithstanding formal adherence to the Convention, this would include a case where the authorities and officials of the country of habitual residence were corrupt, that due process would be denied to the child or to the custodial parent or that, otherwise, basic human rights would not be respected.’

[4] The case of *Bennett* referred to the case of *De L*:⁵³⁶

‘... By repeated provisions, the Convention envisages a speedy process and a summary procedure. The same sense of urgency is reflected in the Regulations. It is reflected in judicial observations about the meaning and purposes of the Convention, and of municipal laws designed to give it effect [footnotes omitted].’

Bennett further provides that Regulations 16(3)(b) and (d) reflect the provisions of Article 13(b) and Article 20 of the Hague Convention and indicated that when these articles were drafted, a view to their narrow construction was emphasised so that the Hague Convention’s purpose would not be compromised.⁵³⁷ In regards to Regulation 16(3)(d), the Judge stated:⁵³⁸

‘The second ground of the wife’s case was based on Regulation 16(3)(d) of the Family Law (Child Abduction Convention) Regulations. For the medical reasons which I have previously referred to, it is stated that the wife will be unable to return to the United Kingdom. That is not strictly correct. She will be able to return to the United Kingdom, but I find on the evidence before me that due to her poor health, she should not return to the United

⁵³⁵ *A & GS & Others* [2004] FamCA 967 (22 October 2004) at paras [105]-[106]; *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* supra (n21) at 88, 399. The court rejected the views of the trial court that the successful invocation of this regulation involves a consideration of the child’s rights as a repatriation had a potentially adverse consequence to the child but not for the rights of the child (para [102]) as the Trial Judge had erroneously limited the discretion by referring to the child’s human rights which would be removed by the exclusion and the rights of the appellant (para [103]). In regards to *McCall* it was held that the Regulation would mean a provision that could be invoked in rare occasion and that the return would completely shock the conscience of the court or offend the notions of due process (para [104]). It was also indicated that the evidence of an intolerable situation would be capable of attracting the operation of the discretion in terms of Regulation 16(3)(d).

⁵³⁶ *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n372) at para [13]; *De L v The Director-General of New South Wales Department of Community Services* supra (n23) at 667.

⁵³⁷ *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n372) at para [25]; Hague International Child Abduction Convention; Text and Legal Analysis, Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, (March 26, 1986) prepared by the US State Department at 10,509.

⁵³⁸ *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n372) at para [50].

Kingdom. That being so, she would be unable to be present and participate in proceedings in relation to the custody/residence of the child. To that extent she would be denied natural justice, according to Mr Hamwood, as she would be denied the basic right to effectively participate in proceedings with respect to the welfare of the child. This submission is supported to some extent by Joske J.'s decision in the case of the *State Central Authority v. Ardito ...*'

[5] Thus this Regulation is extremely narrow and is limited to circumstances in which the child's return should not be ordered by the fundamental principles of Australia regarding the protection of human rights and fundamental freedoms.⁵³⁹ Regulation 16(3)(d) is derived from Article 20 of the Hague Convention as according to the Report of the Second Special Commission meeting to review the operation of the Hague Convention, 'Article 20 was inserted as the [Hague] Convention might never have been adopted without it, and it was intended as a provision which could be invoked on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process.'⁵⁴⁰ It was also declined in the case of *McCall and McCall; State Central Authority (Applicant); Attorney-General of the Commonwealth (Intervener)* that a return of a child to England without treating the child's individual welfare, or best interests, as paramount would therefore breach Regulation 16(3)(d).⁵⁴¹

'The point is made that to be able to refuse to return a child on the basis of this Article, it would be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible with these principles ... It is clear that the applicant in the present case could not satisfy these tests and indeed it is difficult to imagine a situation in which this test could be satisfied as a distinct test from that set out in Regulation 16(3)(b). However, that issue can no doubt be resolved in the future.'

It was held in this case that a removal of a child of Aboriginal or Torres Strait Islander to a foreign country is not per se a breach of any fundamental principle of Australia relating to the protection of human rights as well as fundamental freedoms.⁵⁴² It would also have to be established that the child was of this culture for it to be a consideration in regards to whether the exception existed or not.⁵⁴³

⁵³⁹ Ibid at para [56].

⁵⁴⁰ Loc cit.

⁵⁴¹ *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n372) at para [57]; *McCall and McCall; State Central Authority (Applicant); Attorney-General of the Commonwealth (Intervener)* supra (n27) at 81,519.

⁵⁴² *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n372) at para [63].

⁵⁴³ Loc cit.

9. Conclusion

[1] In conclusion of the Australian approach regarding international parental abduction, this chapter has briefly discussed the concept and approach of the Australian law as well as the place of the Hague Convention which was adopted into the Australian domestic law via the creation of the Family Law (Child Abduction Convention) Regulations, 1986. Therefore the Australian legislature and judiciary approach the concept of international parental child abduction from their domestic law and do not completely adopt the international Hague Convention, although this is referred to in Schedule one of the Regulations which assists in the interpretation where the Regulations are otherwise silent.

[2] The case of *McCall* was discussed which determined that the adoption of the Hague Convention through the Regulations was constitutional and this was confirmed by the judgments in *De L* and *Murray*.

[3] This chapter also briefly considered the objects and aims of the Hague Convention and the Australian Regulations and determined that they are identical to those provided in the Hague Convention as well as those adopted in terms of South Africa. In regards to the requisite requirements for a valid application in terms of Regulation 16(1A), the chapter briefly considered the concepts of wrongful removal and retention; custody rights and habitual residence in order to lay out the backdrop to that which an abducting parent or opposing party can raise an exception to the rule of peremptory return in terms of the Australian Regulations.

[4] The exceptions in terms of Regulation 16(3) were individually discussed in order to determine what requirements the Australian judiciary considers when determining whether or not the opposing party or abducting parent should be successful herein. These included the time frame of a year in which an application can be successfully launched and then when the courts can use the discretion provided in terms of the Regulations. The opposing parent is required on a balance of probabilities to prove the existence of any exception/defence that they raise.

Further discussion pertained to whether a child was considered as settled in their new environment, the actual exercise of custody rights, which is also considered as a prerequisite to the launching of a valid application for a child's return, the defences/exceptions of consent and acquiescence as well as whether

or not grave risk would exist if the child was to be returned to the country of habitual residence. The defence pertaining to the child's objections was also considered in terms of the international and domestic law to which Australia subscribes to.

[5] The final exception regarding human rights violations has been assessed by the Australian courts in regards to the cases of *Bennett* and *A v GS* and although the exception was not successful, it is submitted that the approach adopted in this regard, which involves a consideration of the domestic and international laws to which Australia subscribe, is of assistance to countries who have not had the opportunity to consider such exception.

[6] Therefore in light of the discussion of the Australian perspective and approach to this Study, the comparative between South Africa and Australia shall proceed in Chapter [4] below.

Chapter Four: Comparative

1. Introduction

[1] From the above discussions it is evident that international parental child abduction is a worldwide problem and one which is specific to this Study between South Africa and Australia.¹ The reasons for international parental child abduction were canvassed within Chapter [1] herein and thus shall not be repeated at this point. The purpose of this chapter is to compare the adequacy of the exceptions provided within the Hague Convention against the rule of peremptory return within South Africa and Australia. This shall be done in order to determine whether South Africa would benefit by applying the Australian approach herein, or whether the South African approach is currently sufficient. Australia was chosen because over the years the Australian authorities have had great opportunity to analyse case law in this regard and the Australian law and application thereof is similar to that of the South African legal system, values and approach. The focus of this chapter will be specifically on the exceptions/defences available in each of the above countries.

[2] South Africa and Australia have both signed and ratified the Hague Convention² and have legislatively incorporated the Hague Convention within their domestic law.³ South Africa and Australia

¹ PR Beaumont & PE McEleavy *The Hague Convention on International Child Abduction* (1999) 2; D Finkelhor, G Hotaling & A Sedlak 'Children abducted by family members: A national household survey of incidence and episode characteristics'. (August 1991) 53 (3) *Journal of Marriage and Family* 805, available at <http://www.jstor.org/stable/352753>, accessed on 19 July 2010; B Clark 'Division P: Child abduction' in B Clark 'Division P: Child Abduction' in B Clark (Ed) *Family Law Service* (2010) (Issue 54 October 2010) (Loose Leaf) at para [1]; 'Living in Limbo: The experience of International parental child abduction the call for a National support service' International Social Service Australian Branch (February 2005) 3, available at http://www.missingpersons.gov.au/Asset_s/Files/9bb6de98-a9ab-436f-8c08-cb63c21ff155.pdf, accessed on 19 April 2011.

² South Africa became a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, 1980 on the 6th November 1996: JMT Labuschagne 'International parental abduction of children: remarks on the overriding status of the best interests of the child in international law' (2000) 33 *Comparative and International Law Journal (CILSA)* 334–335. Australia ratified the Hague Convention on the Civil Aspects of International Child Abduction, 1980 on the 29th October 1986 and it entered force and effect on the 1st January 1987: M Kirby 'Children caught in conflict – the Child Abduction Convention and Australia' (Autumn 2010) 21(1) *Australian Family Lawyer* 3; M Nicholls QC 'International Child Abduction: Australian Law, Practice and procedure' (July 2010) 2, see Australian Government Attorney-General's Department *International Child Abduction*, available at <http://www.ag.gov.au/childabduction>, accessed on 31st March 2011; Australian Central Authority, Australia Attorney-General's Department, Canberra 'Hague Child Abduction Convention: Information for Parents of Abducted Children' (November 2001) 1, available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(C99C9C662AE008709B6A1B06BCF8E5CF\)~parentsofabducted+childrenNov01.pdf/\\$file/parentsofabducted+childrenNov01.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(C99C9C662AE008709B6A1B06BCF8E5CF)~parentsofabducted+childrenNov01.pdf/$file/parentsofabducted+childrenNov01.pdf), accessed on 8th July 2011; L Curtis 'The Hague Convention on the Civil Aspects of International Child Abduction: the Australian experience' (April 1989) 15 *Commonwealth Law Bulletin* 627; L Young & G Monahan *Family Law in Australia* (7th ed) (2009) 344; *De L v Director-General, NSW Department of Community Services* [1996] 187 CLR 640 at 673; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* [2001] 206 CLR 401 at para [23].

have been Hague Convention countries since the 1st January 1998.⁴ The incorporation of the Hague Convention within the Australian law is different to South Africa, who enacted the Hague Convention through the creation of their own statute and incorporated it fully within their domestic law.⁵ Australia, however, did not directly incorporate it but created statutes to allow for its enactment.⁶ South Africa and Australia both maintain a discretion to regulate the implementation of the Hague Convention within their borders.⁷ As Australia ratified the Hague Convention a few years prior to South Africa, this time frame makes them a suitable country to compare South Africa with.⁸ Thus it is submitted that a comparative difference exists between South Africa and Australia in regards to the manner in which they incorporate the Hague Convention within their domestic law.

[3] The objects of the Hague Convention in both Australia and South Africa are the same as provided for in terms of the Preamble, Article 1 and 2 of the Hague Convention. These objectives are to secure the

³ South Africa legislatively implemented the Hague Convention within its borders through the now repealed Act 72 of 1996 on the 1st October 1997: CMA Nicholson ‘The Hague Convention on the Civil Aspects of International Child Abduction, pill or placebo?’ (1999) 32 *CILSA* 230; Labuschagne op cit (n2) 334-335; Clark op cit (n1) at para [2]; Section 313 and Schedule 4 of the Children’s Act 38 of 2005 repealed Act 72 of 1996. Schedule 2 of the Children’s Act 38 of 2005 incorporates the Hague Convention in full within the domestic law of South Africa, see also section 275 of the Children’s Act 38 of 2005; J Weideman & JA Robinson ‘The interpretation and application of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction’ (2011) 1 *Stellenbosch Law Review* 72. See also JM Hlopho ‘The judicial approach to “Summary applications for the child’s return”: A move away from “Best interests’ principles?”’ (1998) 115 *SALJ* 439. Australia gave effect to its ratification through the incorporation of section 111B within the Family Law Act, 1975 (Cth) which made provision for the Family Law (Child Abduction Convention) Regulations, 1986 which came into force and effect on the 1st January 1987: Regulation 1 of the Family Law (Child Abduction Convention) Regulations, 1986; Schedule One of the Family Law (Child Abduction Convention) Regulations, 1986; Kirby op cit (n2) 4. The Hague Convention on the Civil Aspects of International Child Abduction, 1980 is however not in force between all signatory countries as there are sub-requirements which need to be satisfied in order to bring it into force between them. Regulation 10 of the Family Law (Child Abduction Convention) Regulations, 1986; kindly also refer to Articles 35, 37-40 and 43 & 44 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 for further information and understanding herein. See also Living in Limbo op cit (n1) 17.

⁴ Article 24 and 26 (3rd paragraph) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 provisions apply.

⁵ Living in Limbo op cit (n1) 17.

⁶ Loc cit.

⁷ Section 280 of the Children’s Act 38 of 2005. Within Australia, Regulations have been manufactured and implemented in order to ensure the applicability of the Hague Convention within its domestic law however, these Regulations, subject to section 111B of the FLA, ensure that the Hague Convention is not incorporated in full without the Australian Legislature and Government is able to regulate its aspects herein: Living in Limbo op cit (n1) 17.

⁸ The reason South Africa only became a signatory after Australia seems to point towards the old Regime System of Apartheid which used to dominate our law as well as our international reputation. As a result of the formation of the Constitution of the Republic of South Africa, 1996 and the abolishment of the Apartheid system and laws, South Africa was able to begin to interact fully and completely on the international field.

return of the child to its home jurisdiction and the best interests of the child are not considered to be the paramount consideration herein in either country.⁹

2. Constitutionality of the Hague Convention and Regulations within South Africa and Australia respectively

[1] The Hague Convention and its subsequent incorporation into the domestic law of South Africa is constitutional as a result of the decision in the case of *Sonderup v Tondelli*.¹⁰ However, a challenge to the Constitutional Court decision in *Sonderup v Tondelli* is possible based on the recent decision of the North Gauteng High Court in the case of *Central Authority v MV (LS Intervening)* in regards to the consideration of the concept of the best interests of the child principle.¹¹ Within Australia the cases of *McCall and State Central Authority* and *De L v Director-General, NSW Department of Community Services* determined that the Hague Convention and its incorporation within its domestic law was constitutional despite major challenges the courts herein faced.¹² It is submitted that South Africa's constitutional adoption of the Hague Convention is sufficient to combat the problem of international parental abduction, however the case of *Central Authority of the Republic of South Africa and Another v LG*, if constitutionally decided, could place South Africa on a similar level to the approach Australian herein.

2.1 The Best interests of the child principle

[1] In South Africa, the best interests of the child principle is considered of paramount importance and application¹³ in all matters which affect a child. This principle is located within the Constitution of the

⁹ *McCall and State Central Authority* (1995) FLC 92-55 at paras [26] & [28]; see also *Murray v Director of Family Services A.C.T* (1993) FLC 92-416 at 80, 258-9; *Brown v Director General* (Nicholson CJ 6 September 1988, unreported); *Gsponer v Director General Dept. Community Services, Victoria* (1989) FLC 92-001; *Director General of the Department of Family and Community Services v Davis* (1990) FLC 92-318; *Living in Limbo* op cit (n1) 17. This view is consistent with the approach of the English courts in the cases of *Re A (A minor)* 1988 1 Fam LR (Eng) 365 and *C v C* (1989) 1 WLR 654; [1989] 2 All ER 465 Kirby op cit (n2) 11; Section 275 and Schedule 2 of the Children's Act 38 of 2005.

¹⁰ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) at paras [31] & [23]; C Du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezaart (Ed) *Child Law in South Africa* (2009) 369; C Woodrow in CJ Davel & AM Skelton *Commentary on the Children's Act* (2007) at [17-24]; J Heaton *South African Family Law* (3rd ed) (2010) 319; JMT Labuschagne 'The constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction in terms of section 28 (2) of the South African Constitution' (2001) 26 *South African Yearbook of International Law* 244.

¹¹ Kindly refer to Chapter [2], point [3] at paragraph [6] for further detail herein.

¹² P Parkinson *Australian Family Law in Context: Commentary and Materials* (4th ed) (2009) 822; *McCall and State Central Authority* supra (n9) at para [113]; G Monahan & L Young (Eds) *Children and the law in Australia* (2008) 365; Section 60CA of the Family Law Act, 1975 (Cth). Kindly refer to Chapter [3] at point [3] for further discussion herein.

¹³ Section 28(2) of the Constitution of the Republic of South Africa, 1996 and section 7 of the Children's Act 38 of 2005.

Republic of South Africa and the Children's Act. In regards to the South African position herein, the court in *Sonderup v Tondelli* concluded that the limitation of the child's best interests was constitutional in regards to applications in terms of the Hague Convention which prevents the consideration of the child's best interests unless exceptional circumstances exist or a defence/exception is raised.¹⁴ In Australia, the best interests of a child are provided for in terms of the FLA¹⁵ and although the welfare jurisdiction is broad and unlimited, it provides no ground for the conclusion that an application under the Regulations must be regarded as an application in terms of the welfare provisions and jurisdictions of the court.¹⁶ Thus it is submitted that in both Australia and South Africa, this principle is generally not applicable within Hague Convention applications.

[2] The starting point for dealing with parental child abduction within both Australia and South Africa is that the Hague Convention and its principles have been specifically incorporated within each country's domestic law and each country subscribes to the best interests of the child principle.¹⁷ The Hague Convention provides that the child's best interests are paramount in importance in matters regarding custody, however, this principle may only be considered by the court of the requested country in exceptional circumstances.¹⁸ Therefore it is submitted that Australia and South Africa can be compared within this Study with specific reference to the exceptions to the rule of preemptory return provided for in Articles 12, 13 and 20 of the Hague Convention and Regulations 16(2) and (3) of the Family Law (Child Abduction Convention) Regulations, 1986 respectively.

3. Wrongful removal and retention

[1] In chapters [2] and [3] it was noted that both countries follow the same concept and requirements in terms of wrongful removal and retention. However, in terms of South Africa, Article 3 of the Hague Convention provides for the instances of wrongful removal and retention and in Australian law, Regulation 2(2) provides that removal or retention is considered wrongful in the circumstances provided

¹⁴ *Sonderup v Tondelli* supra (n10) at paras [26]-[37].

¹⁵ Section 60CC of the Family Law Act, 1975 (Cth).

¹⁶ *McCall and State Central Authority* supra (n9) at para [63]; Parkinson op cit (n12) 633. Thus the proceedings under the Regulations should not be characterized as falling under section 63 and 64 of the FLA, but should be treated as a separate head of jurisdiction under section 111B of the FLA: *McCall and State Central Authority* supra (n9) at para [64].

¹⁷ Section 28(2) of the Constitution of the Republic of South Africa, 1996; Sections 7 and 9 of the Children's Act 38 of 2005; Section 60CA of the Family Law Act, 1975 (Cth) (Australia).

¹⁸ Curtis op cit (n2) 627.

within Article 3 of the Hague Convention.¹⁹ The approach in both countries is the same and South Africa's approach is submitted as sufficient.

[2] In both countries in order for an application to be launched and concluded the respective child must be below the age of 16-years-old.²⁰

4. Rights of custody

[1] A large number of cases exist regarding the concept of custody and parental rights and their subsequent determination in both Australia and South Africa. Suffice it to say that in terms of South African law, the concepts of custody and access (now referred to as 'care' and 'contact')²¹ in regards to the Hague Convention are interpreted according to their conventional meaning.²² Access rights and custody rights are dealt with separately under the Hague Convention nevertheless it must be remembered that a breach of access does not trigger a remedy for the child's return.²³ This is true for both Australia and South Africa.

[2] In chapters [2] and [3] at point [5] respectively, rights of custody and parental responsibilities are discussed. It was noted that Article 5(a) of the Hague Convention was adopted by Regulation 4 of the Australian Regulations²⁴ and that the notion of 'rights of custody' must be broadly interpreted and are to be determined with reference to the statutory definition provided in terms of Regulation 4 and not

¹⁹ This is supported by Regulation 2(1B) of the Family Law (Child Abduction Convention) Regulations, 1986 which states: 'Unless the contrary intention appears, an expression that is used in these Regulations and in the [Hague] Convention has the same meaning in these regulations as in the [Hague] Convention.' Young & Monahan (2009) op cit (n2) 345; *Marriage Of: Hanbury-Brown and Hanbury-Brown and Director General of Community Services (Central Authority)* [1996] FamCA 23 at para [5.3].

²⁰ Article 4 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and Regulation 16(1A)(a) of the Family Law (Child Abduction Convention) Regulations, 1986.

²¹ Section 1 of the Children's Act 38 of 2005.

²² Du Toit op cit (n10) 357; The South African case of *Chief Family Advocate v G* 2003 (2) SA 599 (W), at 606I-608B, set out the content and meaning of parental rights and responsibilities and determined that the Hague Convention was flexible enough to accommodate the relatively new concept of 'rights and responsibilities' in terms of South African law.

²³ L Silberman 'Hague International Child Abduction Convention: A progress report' (1994) 57 (3) *Law and Contemporary Problems* 215. The Hague Convention does not seek to regulate access rights exhaustively as this would go beyond the scope of the Hague Convention's objectives: E Pérez-Vera *Explanatory Report on the Hague Convention* (1982) at para [125], available at <http://hcch.e-vision.inl/upload/exp128.pdf>, accessed on 12 June 2010. Access rights are governed in terms of Article 21 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and Regulations 23, 24 and 25 of the Family Law (Child Abduction Convention) Regulations, 1986.

²⁴ *Department of Community Services & Raddison* [2007] FamCA 1702 at para [34].

determined with reference to the Australian domestic law.²⁵ Within South Africa, custody rights and parental responsibilities are determined with reference to the Children's Act.²⁶ In both Australia and South Africa, whether the applicant has the necessary custody rights must be determined in light of the law of the child's state of habitual residence. Therefore Australia makes no reference to domestic law in such decisions, whereas in South Africa reference to domestic law is allowed.

[3] Thus although the Hague Convention does not specifically define its terms, it is evident how rights of custody are determined within South Africa and Australia. Within both South Africa and Australia, the right of a parent to determine where a child should live provides a custody right for the purposes of the application of the Hague Convention and Australian Regulations.²⁷ This is discussed in Chapters [2] and [3] at points [5.2(3)] and [5.1(4)] respectively.

5. Habitual residence

[1] In Chapters [2] & [3] at point [6] it was noted that in order for an application to be successfully lodged in terms of the Hague Convention and the Australian Regulations, the child must have been habitually resident in the country from which they were wrongfully removed and from where the application for return is launched. Although the concept is not defined in either country, its application is similarly applied in both countries. Therefore in order for an application for the child's return to be successfully launched in both countries, the child must have been habitually resident in the requesting state at the time of the removal or retention.

²⁵ Ibid at paras [35] & [37]; *MW v Director-General, Department of Community Services* [2008] HCA 12 at para [86]; *Re B (A Minor)(Abduction)* (1994) 2 FLR 249 at 260. This was cited with approval by Kay J in *Department of Health and Community Services, State Central Authority and Casse* [1995] FamCA 71; (1995) 19 Fam LR 474 at 482. Custody rights in terms of Australian law are also now considered in terms of the concept of responsibilities: Young & Monahan (2009) op cit (n2) 345. The Hague Conference on Private International Law (HCCH) 'Special Commission on the practical operation of the 1980 and 1996 Hague Conventions' (1-10 June 2011) at para [44], available at www.hcch.net/upload/wop/concl28sc6_e.pdf, accessed on 4th October 2011, confirms that the term 'rights of custody' should be interpreted in regards to the autonomous nature of the Hague Convention and its objectives.

²⁶ Section 1 and 18 of the Children's Act 38 of 2005. Custody rights are also determined in regards to Article 3 and 5 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 as well as the domestic law of South Africa; *Sonderup v Tondelli* supra (n10) at paras [21]-[25].

²⁷ *Department of Community Services & Raddison* supra (n24) at paras [109]-[110] & [113]; *Jiang and Director-General Department of Community Services* [2003] FamCA 929; *Wenceslas and Director-General, Department of Community Services* [2007] FamCA 398; (2007) FLC 93-321 at paras [165] - [167]; *Chief Family Advocate and Another v G* supra (n22) at 608H-J & 609F-G; *Sonderup v Tondelli* supra (n10) at para [21]; Du Toit op cit (n10) 358.

6. Process in terms of the Hague Convention and the Australian Regulations

[1] In chapters [2] and [3] at point [7], the process for launching an application within both Australia and South Africa was discussed and it was noted that a similar process is followed in both countries and that the Central Authority in each country is obliged to undertake almost identical duties and obligations.

[2] This chapter shall now focus specifically on the exceptions/defences which are available to an opposing party in order to combat the peremptory rule of mandatory return in terms of Article 12 of the Hague Convention and Regulation 16(1)(b) and (c) of the Australian Regulations and how these exceptions/defences are applied within South Africa and Australia.

7. Exceptions to the rule of peremptory return in terms of the Hague Convention and the Australian Regulations

[1] In both South Africa and Australia, five exceptions/defences are available to the opposing parent²⁸ against the rule of peremptory return. It is necessary that the interpretations of the exceptions/defences should be consistent with the Hague Convention and the Regulations because if they are not then the Hague Convention's value as a mechanism for ensuring that a wrongfully removed or retained child is returned, will be undermined.²⁹ In both countries, the onus of proof regarding an exception to the child's return is placed on the opposing parent to prove its existence and the burden of proof is on a balance of probabilities.³⁰ If an exception is raised, it allows the courts in either country to conduct a limited investigation into the best interests of the child in order to determine whether or not the child should be

²⁸ D Hodson *A Practical Guide to International Family Law* (2008) 259; Articles 12, 13 and 20 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and B Fehlberg & J Behrens *Australian Family Law: The Contemporary Context* (2008) 309; Regulation 16(2)(a)-(c) & 16(3)(a)-(d) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth). Each of the Articles or Regulations contains at least one or more exceptions/defences which the opposing party can raise against the rule of peremptory return. Silberman op cit (n23) at 213: Most of these exceptions are also considered unique to the Hague Convention itself and many judicial interpretations exist regarding their meaning.

²⁹ Silberman op cit (n23) 213.

³⁰ *De L v Director-General, NSW Department of Community Services* supra (n2) at 680-681; *State Central Authority & Wattey* [2008] FamCA 1108 at para [18]; *Smith v Smith* 2001 (1) SA 845 (SCA) at para [11]; *Senior Family Advocate, Cape Town, And Another v Houtman* 2004 (6) SA 274 (C) at paras [7] & [15]; *Pennello v Pennello* 2004 (3) SA 100 (N) at 103B-C. It is evident from the case of *Pennello v Pennello* supra that there is no reason why the person who is opposing a court order in this regard does not bear 'the usual civil onus of proof as it is understood in [South African] law.' *Du Toit op cit* (n10) 360; *SCA & CR* [2005] FamCA 1050 at para [39]; *Secretary, Attorney-General's Department v TS* [2000] FamCA 1692; (2001) FLC 93-063 at 110; *Director-General, Department of Community Services & M & C & Child Representative* [1998] FamCA 1518 at para [10]. This is the same as the defence provided for in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 which South Africa subscribes to; *Northern Territory Central Authority & Gambini* [2008] FamCA 544 at para [92]; *SCA & CR* supra at para [39]; *State Central Authority & Hajjar* [2010] FamCA 648 at para [25]-[26] & [155].

ordered to return.³¹ This is due to the fact that if an exception/defence is not raised or proven, then it is in the child's best interests to be returned to their country of habitual residence so that those courts may decide upon any outstanding issues e.g. custody.³²

7.1 Exception one: Article 12 of the Hague Convention and Regulation 16(2) of the Australian Regulations: Settled in a new environment

[1] Article 12 and Regulation 16(1)(b) and (c) provide the rule of peremptory return in South Africa and Australia respectively. This rule provides that if an application for the child's return is launched within a year of the child's wrongful removal or retention, the court, judicial or administrative body of the requested country is to order the child's return unless one of the available exceptions/defences is raised and proven. However, if the application is launched more than one year after the child's wrongful removal or retention, the court must then consider whether the child is settled in their new environment³³ prior to ordering their return. If the aforementioned is satisfied, the court then maintains a discretionary power in terms of Article 18 of the Hague Convention and Regulation 16(5) of the Australian Regulations, even if an exception is proven, to refuse to order the child's return or to order the return of the child subject to conditions and undertakings being imposed on the return order.³⁴ In both countries the return is, however, not to the left-behind parent but to the state of the child's habitual residence.³⁵ Thus in both countries an opposing parent or party can raise the exception/defence that the application is outside the stipulated time period and that the child is now settled in their new environment.

³¹ Du Toit op cit (n10) 360; Article 16 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 prevents courts from determining issues of custody on the merits until it has been determined that the child is not to be returned under the Hague Convention, or if an application has not been lodged within a reasonable period of time. Regulation 18(1)(c) and 19 of the Family Law (Child Abduction Convention) Regulations, 1986 provides the same. Articles 17 and 19 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 also apply here; Curtis op cit (n2) 631.

³² Curtis op cit (n2) 631; Article 1 and the Preamble of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

³³ Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Regulation 16(2)(b)-(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

³⁴ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* [1997] FamCA 45 at para [3.32]; *State Central Authority v Ayob* (1997) FLC 92-746 at para [80]. The cases of *Ayob* (supra), *SCA & CR* supra (n30) and *State Central Authority & Hajjar* supra (n30) at paras [200]-[205], were the only cases which found that the court's did not maintain a discretion to order the return, however these shall not be considered as no further case law supports their expressed views and the Regulations and Hague Convention specifically provide for the courts discretion.

³⁵ T Buck *International Child Law* (2005) 135; Heaton (2010) op cit (n10) 314; see generally *Brown v Abrahams* [2004] 1 All SA 401 (C), 2004 (4) BCLR 349 (C); *Carmel Faye Gsponer and Peter Johnstone Appeal* [1988] FamCA 21 at para [59]; F Bates "Escaping mothers" and the Hague Convention – the Australian experience' (2008) 41(2) *CILSA* 253-254; This view was also supported in the case of *Murray v Director of Family Services, ACT* [1993] FamCA 103; (1993) FLC 92-416; 16 Fam LR 982; *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) at para [53] as the return of a child would be unlikely to be into the same situation from that which they were initially removed.

[2] In South Africa a two-step enquiry is followed.³⁶ If both steps are satisfied then the court maintains a discretion to order or refuse the child's return.³⁷ In both countries the period of a year runs from the date on which the child was wrongfully removed and retained and not from the date judicial proceedings began.³⁸ The enquiry regarding whether a child is in fact settled in their new environment is a factual one³⁹ and the South African court should exercise its discretion in each case in light of the objectives of the Hague Convention in determining whether or not the child is settled.⁴⁰ The courts must consider whether the child is physically and emotionally settled (e.g. established in the community as well as in their emotional environment which constitutes security and stability in a permanent manner for the child)⁴¹ and whether the child is socially integrated.⁴² It was considered that the settlement must be more than mere adjustment to the surroundings⁴³ and the term 'new', in regards to the new environment, pertains to the moment at which the court considers the application, and not to the date of abduction.⁴⁴ It subsequently refers to the child's home, friends, school, activities and people and not to the relationship between the child and the abducting parent.⁴⁵

[3] In terms of the Australian law, the case of *Marriage of Graziano v Daniels* (1991) 14 Fam LR, FLC 92 – 212 proposed the test that settlement should be more than a determination of whether the child was

³⁶ *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* [2006] NZSC 97 at para [45]; *Re N (Minors)(Abduction)* [1991] 1 FLR 413; Nicholson op cit (n3) 234 & 242; Silberman op cit (n23) 246-247; JMT Labuschagne "'Human rights' status of a court order, in terms of the Hague Convention, that a child, abducted by a parent and taken from one country to another, has to be returned" (1998) 23 *South African Yearbook of International Law* 281; CMA Nicholson 'Can South Africa follow England's example and apply a strict interpretation of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction?' (1999) 32(2) *De Jure* 250; *Central Authority v B* 2009 (1) SA 624 (W), at paras [7]–[8], followed this two-step enquiry: Hodson op cit (n28) 259.

³⁷ Du Toit op cit (n10) 361.

³⁸ *State Central Authority v Ayob* supra (n34); *Central Authority v B* supra (n36) at 632A-C.

³⁹ Du Toit op cit (n10) 361.

⁴⁰ Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Clark op cit (n1) at para [19].

⁴¹ Hodson op cit (n28) 264.

⁴² *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* supra (n36) at para [55] – the reason the South African court may consider this foreign law is provided for in terms of section 39 of the Constitution of the Republic of South Africa, 1996 which allows the court's in interpreting matters to consider foreign law herein; Du Toit op cit (n10) 361; *Director-General Department of Families, Youth and Community Care & Moore* [1999] FamCA 284 at para [61].

⁴³ *Re N* supra (n36); Section 39 of the Constitution of the Republic of South Africa, 1996 allows, when interpreting South African law, the consideration of foreign case decisions to assist herewith.

⁴⁴ Hodson op cit (n28) 264-265; *Director-General Department of Families, Youth and Community Care & Moore* supra (n42) at para [64].

⁴⁵ Loc cit.

considered as happy, secure and adjusted to their surrounding circumstances.⁴⁶ This case held that the word ‘settled’ meant that of a physical element relating to or being established within a community and environment.⁴⁷ This also denoted an emotional element of security and stability.⁴⁸ It was also held by the court that the relevant environment was not made up of or constituted only by the mother but the relevant environment was considered to be a community in a geographically defined place and in order for the child to be considered as settled there, it must have significance for the child.⁴⁹ The court must thus look beyond how the child is fitting into the society in general as well as outside of the home, including the making of friends; the development of ties with school and other matters of that kind.⁵⁰ ‘Settling’ was regarded as a matter of degree.⁵¹ This is thus similar to the test adopted by the South African courts.

However, the Australian case of *Director-General, Department of Community Services v M and C*⁵² refers to the case of *De L v Director-General, New South Wales Department of Community Services* where it was decided that, although in relation to a different Regulation, that no additional gloss was to be applied to the phrase.⁵³ The court in the case of *M and C* held that ‘[t]he test, and the only test to be applied, is whether the children have settled in their new environment.’⁵⁴ This was confirmed in

⁴⁶ Young & Monahan (2009) op cit (n2) 346; F Bates ‘Undermining the Hague Child Abduction Convention: The Australian way ...?’ (2001) 9(1) *Asia Pacific Law Review* 47. The view is similar to that expressed in the case of *Re N* supra (n36) at 417 where the Judge said that the abducting parent was required to establish the degree of settlement as more than that of a mere adjustment to the surroundings: Bates op cit at 51. This view is confirmed by the cases of *Director-General of Community Services v M and C* supra (n30) at paras [11] & [15] and *De L v Director-General, New South Wales Department of Community Services* supra (n2). This view was also supported by the case of *State Central Authority and Ayob* supra (n34); *Director-General Department of Families, Youth and Community Care & Moore* supra (n42) at paras [64] & [66].

⁴⁷ Young & Monahan (2009) op cit (n2) 346-347; *Department of Child Safety & Kells* [2009] FamCA 452 at paras [18].

⁴⁸ Young & Monahan (2009) op cit (n2) 347; *State Central Authority & Hajjar* supra (n30) at para [168].

⁴⁹ Young & Monahan (2009) op cit (n2) 347.

⁵⁰ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at paras [3.24] & [3.25] - [3.27] which considered the evidence regarding the child’s settlement into the environment and their inclusion in extra mural activities, friends, schooling etc: F Bates ‘Child abduction, the Hague Convention and Australian law – a specific overview’ (1999) 32 *CILSA* 79.

⁵¹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.24]; Bates op cit (n46) 48.

⁵² *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [91]; see also *Director-General, Department of Families, Youth and Community Care v Moore* (supra (n42)); *Townsend & Director-General, Department of Families, Youth and Community* [1999] FamCA 285 at paras [30] & [33]-[35].

⁵³ Young & Monahan (2009) op cit (n2) 347; *Department of Child Safety & Kells* supra (n47) at para [18]; *Townsend & Director-General, Department of Families, Youth and Community* supra (n52) at paras [28]-[29].

⁵⁴ *Director-General, Department of Community Services v M and C* supra (n30) at 192; Young & Monahan (2009) op cit (n2) 347; *Northern Territory Central Authority & Gambini* supra (n30) at para [95]; *Department of Child Safety & Kells* supra (n47) at paras [18]; *Townsend & Director-General, Department of Families, Youth and Community* supra (n52) at paras [28]-[29]; *State Central Authority & Hajjar* supra (n30) at para [156].

Townsend v Director-General, Department of Families, Youth and Community Care (1999) 24 Fam LR 495⁵⁵ which also rejected the test in *Graziano*. Therefore the test is different to that used in South Africa. *Townsend* also agreed that the word ‘settled’ should be given its ordinary and natural meaning and not a restrictive meaning.⁵⁶ In terms of *Townsend* the test is:

‘[T]he test for whether a child is “settled in his or her new environment” requires a degree of settlement which is more than mere adjustment to surroundings, or that the word “settled” has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law. We agree with the Full Court in *M and C* (the correctness of which was not challenged before us) that “The test, and the only test to be applied, is whether the children have settled in their new environment”.’⁵⁷

In the case of *Moore* it was also held that whether children are settled within the meaning of the Regulations, it is necessary to look not only at the past and present situation, but also into the future.⁵⁸ The case of *SCA v CR* held that in order for the child to be settled in the new environment, they must be ‘adjusted’ to the new environment and appear to be happy and content.⁵⁹

⁵⁵ Young & Monahan (2009) op cit (n2) 347; *Townsend & Director-General, Department of Families, Youth and Community Care* supra (n52) at paras [30] & [33]-[35]; Bates op cit (n46) 51; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at 84, 669; *Northern Territory Central Authority & Gambini* supra (n30) at para [93].

⁵⁶ *Townsend v Director-General, Department of Families, Youth and Community Care* supra (n52) at paras [28]-[31]; Young & Monahan (2009) op cit (n2) 347; *Northern Territory Central Authority & Gambini* supra (n30) at para [95]; see also *Secretary, Attorney-General’s Department v TS* supra (n30) as per Nicholson CJ, at para [106], and *SCA v CR* supra (n30) at paras [36]-[37]; Bates op cit (n46) 51; *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [52]; See also *De L v Director General NSW Department of Community Services* supra (n2) at 655-657; *Director General, Dept of Families, Youth and Community Care v Moore* supra (n42) at paras [68]-[69]; *State Central Authority & Hajjar* supra (n30) at para [156].

⁵⁷ *Northern Territory Central Authority & Gambini* supra (n30) at para [94]; see also *Director General, Department of Community Services v M and C & Child Representative* supra (n30) & *Secretary, Attorney General’s Department v TS* supra (n30); *Townsend & Director-General, Department of Families, Youth and Community Care* supra (n52) at paras [30] & [33]-[35]. The emphasis has been removed from the quote. *Director-General Department of Families, Youth and Community Care & Moore* supra (n42) at paras [68] & [70].

⁵⁸ *Director-General Department of Families, Youth and Community Care & Moore* supra (n42) at para [67]; *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [88], referring *Re N* supra (n36) at 417-418 Here ‘her Ladyship said that the word ‘settled’ should be given its ordinary natural meaning. She said that it involved both a physical element of being established in a community and an environment and also an emotional constituent denoting security and stability ...’ [*M & C* at para [89]] This was also cited with approval in the case of *Director General of the Department of Community Services (Central Authority) and Apostolakis* 21 Fam LR 1 at para [90]. However at para [91] it was held that ‘this statement does not represent the law so far as the Australian Regulations are concerned. As the majority of the High Court pointed out in *De L v Director-General, NSW Department of Community Services* (supra (n2)), it is the Regulations that must be applied. Nowhere in the Regulations are the words ‘long term’ to be found and there is in our view no warrant for importing them. The test, and the only test to be applied, is whether the children have settled in their new environment. That test is to be applied either at the time of the application being made or at the time of trial. It is unnecessary to consider which date is the relevant one in the context of this case, given the short period between the two dates.’”

⁵⁹ *Northern Territory Central Authority & Gambini* supra (n30) at para [95]; *SCA v CR* supra (n30) at para [52].

[4] In regards to the concept of a ‘new environment’ in terms of Australian law, it was held that the simple and ordinary meaning of the words should be employed and thus it is ‘an environment which is new to the child, meaning not the same as the previous environment.’⁶⁰ It was held, however, that a new environment was not that from which the child was removed and that placing additional glosses on the meaning of those words in the Regulation would do them a disservice.⁶¹ However, in regards to a younger child, the paradox is that they may be easily shown as having been settled and that the needs to be in a settled lifestyle are firmly entwined around the principal caregiver.⁶² It was further suggested that in regards to a very young child that the corresponding home environment is of great importance to them and if they are settled, it would then appear that the situation which the Hague Convention foresees, occurs where the child should not be returned as having regard to the passage of time and thus the theoretical environment of the child must not be considered.⁶³

[5] Although the Australian law proposes a different concept for determining whether a child is settled in their new environment, it is submitted that as there has been little opportunity for the courts to consider and interpret this defence due to the few issues it presents, that they continue to apply the established test in the South African borders as it is settled. Adopting the Australian approach could address the identified shortcoming of the South African approach discussed in Chapter [2]; at point [8.1(7)]. The South African courts can benefit from considering the methods of the Australian courts. The Australian method should definitely be considered in regards to very young children as the South African courts have not had to consider such a situation in too much detail as yet. Despite the aforementioned it is submitted that the South African courts should continue to apply the test as it stands despite the fact that in terms of the Australian law it seems to add an additional unacceptable gloss to the

⁶⁰ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.19]. The judge in this case did not accept the view of the case of *Director-General, Department of Community Services v Apostolakis* supra (n58) which referred to the case of *Re N* supra (n36) at para [26] which considered the view ‘... that the word ‘new’ is significant in this context. Where a relevant child merely exchanges one environment for a similar one, as will often be the case where all that happens is that the child moves from one modern city to another, particularly if the language spoken remains the same, the fact that it can be demonstrated that the child is managing quite well in the more recent environment, may amount to no more than establishing that the child has adjusted to different but similar surroundings.’ Bates op cit (n50) 75. This case indicated that the word ‘new’ was significant and must include place, home, school, people, friends, activities and opportunities: *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [13]. The aforementioned is similar to the view adopted by the South African courts.

⁶¹ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.20]. The meaning of the word ‘new’ in the case of *Director-General, Department of Community Services v Apostolakis* supra (n58) was considered unjustified. See Bates op cit (n50) 75 and this was supported by *De L v Director-General, New South Wales Department of Community Services* supra (n2); Bates op cit (n46) 51.

⁶² *SCA & CR* supra (n30) at para [3].

⁶³ *Secretary, Attorney-General's Department and TS* supra (n30) at para [116].

meaning of the words. The defence has so far been adequately dealt with in terms of the South African law and it is submitted that deviating from this steady approach could have unpleasant and unjust consequences.

7.2 Exception two: Article 13(a) of the Hague Convention and Regulation 16(3)(a)(i) of the Australian Regulations: Custody rights

a) Exercise of custody rights

[1] South Africa follows the exception/defence provided for in terms of Article 13(a) of the Hague Convention which states:

‘Notwithstanding the provisions of the preceding Article [Article 12], the judicial or administrative authority of the requested [s]tate 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 ...’

Australia follows Regulation 16(3)(a)(i) of the Regulations which provides:

‘If a person opposing the return established that: (i) the person, institution or other body seeking the child’s return was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained ...’

[2] As noted in chapters [2] and [3] at point [5], no specific definition is provided for the concept of rights of custody and thus there is also no definition of the concept of ‘actual exercise’ of such rights. In South African law, in order to determine whether or not these rights were actually exercised, it is necessary to compare Article 13(a) with Article 5 of the Hague Convention, which attempts to define the concept.⁶⁴ Within this exception, the left-behind parent must have failed to exercise such rights and not merely been unable to exercise them due to the child’s unlawful removal.⁶⁵

[3] The problem with this exception/defence is that a requirement for launching a successful application in terms of either the Hague Convention or the Regulations is that rights of custody in regards to the left-behind parent need to exist otherwise an application cannot be launched as the removal or retention will

⁶⁴ Pérez-Vera op cit (n23) at para [115].

⁶⁵ Loc cit.

not be considered wrongful.⁶⁶ Thus few South African cases exist surrounding this exception as there can be no wrongful removal or retention without rights of custody existing.⁶⁷ Thus the South African position herein is not easily determined. It must also be remembered that whether or not rights of custody exist will depend upon the law of the country from which the child was wrongfully removed or retained, thus their country of habitual residence.⁶⁸

[4] In terms of the Australian law, as discussed in chapter [3] at point [5.1(4)], a right to determine where a child may live is regarded as a right of custody in both South African and Australian law.⁶⁹ Therefore unless the left-behind parent has no rights of guardianship, care or parental responsibilities in terms of the law of either country,⁷⁰ they are considered to have a right of veto over where the child may reside and therefore could be considered to be exercising this right. Evidence can be lead, however, to disprove the exercise of such a right.

[5] *Raddison* held that Regulation 16(3)(a)(i) requires more than the mere exercise of rights of custody because the left-behind parent must have actually been exercising those rights at the relevant time and would have also done so but for the removal or retention of the child.⁷¹ This is to be determined as a matter of fact.⁷² It was held that the significance of the word ‘actually’ is:

‘... [T]hat a distinction must be drawn between the actual exercise of rights of custody, and the active exercise of them. It would seem that there is no requirement that rights of custody had been actively exercised at the relevant time, because some particular rights which fall into this category are not capable of active exercise, at least on a regular basis ([e.g.] those which involve no more than a right of veto.’⁷³

It was further held that this exception:

⁶⁶ Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Regulation 16(1A)(c) of the Family Law (Child Abduction Convention) Regulations, 1986.

⁶⁷ It can be drawn from the case law that clear and unequivocal evidence should be presented in order to provide evidence that there was a failure to exercise custody rights. An example where custody rights have not been nullified is indicated where due to a parent’s disability or incapacity, due to accident, illness or a demanding job, there is a low level of input into the child’s routine care. Buck (2005) op cit (n35) 141-142.

⁶⁸ *Director-General Department of Community Services Appellant/Central Authority and Jocelyn Yvonne Crowe and John Alexander Crowe and Terence Alexander Crowe* [1996] FamCA 123 at paras [39]; *Police Commissioner of South Australia v Temple* [1993] FamCA 63; (1993) FLC 92-365 at 79,827.

⁶⁹ Loc cit.

⁷⁰ Chapter 3 of the Children’s Act 38 of 2005; Article 3 and 5 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Regulation 4 and 18 of the Family Law (Child Abduction Convention) Regulations, 1986.

⁷¹ *Department of Community Services & Raddison* supra (n24) at para [125].

⁷² Loc cit; *Re F (Minor: Abduction: Rights of Custody Abroad)* [1995] 3 All ER 641 (CA); [1995] Fam 224 at 235.

⁷³ *Department of Community Services & Raddison* supra (n24) at para [126]; *Re Bassi; Bassi and Director-General, Department of Community Services* (1994) FLC 92-465 at 80,825.

‘must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the non-custodial parent. That, it seems to me, cannot be right.’⁷⁴

The requirement is that those rights would not have been exercised if the child had not been removed or retained and is relevant where the child or children are removed without the knowledge or consent of the other parent.⁷⁵

[6] It is submitted that South Africa would benefit from adopting the Australian approach herein by adopting a broad interpretation of this exception and not considering their domestic law approach hereto.

b) Article 13(a) of the Hague Convention and Regulation 16(3)(a)(ii) of the Australian Regulations: Consent or acquiescence

[1] South Africa subscribes to the exception in Article 13(a) of the Hague Convention which provides:

‘Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested [s]tate is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – the person, institution or other body having the care of the person of the child ... had consented to or subsequently acquiesced in the removal or retention.’

Australia subscribes to Regulation 16(3)(a)(ii) which provides:

‘[I]f a person opposing return establishes that: the person, institution or other body seeking the child’s return: (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia ...’

The approach adopted within South Africa and that within Australia are considerably the same herein as noted in chapters [2] and [3] at point [8.2(b)] respectively.

[2] In both countries the following are adhered to: the concept of ‘consent’ precedes that of acquiescence⁷⁶ and both concepts can be either active or passive.⁷⁷ Consent is able, in both countries, to

⁷⁴ *Department of Community Services & Raddison* supra (n24) at para [127], referring to *Re H; Re S (Abduction: Custody Rights)* [1991] 2 AC 476 ; [1991] 2 FLR 266.

⁷⁵ *Department of Community Services & Raddison* supra (n24) at para [128].

⁷⁶ Hodson op cit (n28) 259; Hague Convention Chapter Advisory Committee ‘The Hague Convention on International Child Abduction: A Child’s Return and the Presence of Domestic Violence’ (September 2005) 13, available at <http://www.haguedv.org/articles/Washington%20State%20Bench%20Guide%20dvAndTheHagueConvention.pdf>, accessed on 24 February 2011; N Lowe, M Overall & M Nicholls *International Movement of Children, Law Practice and Procedure* (2004) 315; Kay, J ‘The Hague Convention – Order or Chaos?’ (2005) 19 *AJFL* at para [145]; *Re A & Anor (Minors)*

be inferred from both words and conduct. The evidence for both consent and acquiescence in each country must be clear, cogent and unqualified.⁷⁸ Consent must also be real and positive.⁷⁹ The consent must also relate either to the child's permanent removal or retention.⁸⁰ The issue of consent and acquiescence must also be determined according to the facts of each case.⁸¹ This concept is also not concerned with the issue of wrongfulness and is able to be established on a balance of probabilities and the evidence produced must suggest a positive consent to the child's removal.⁸² Conduct of the consenting parent also needs to be clear and unequivocal in this regard, although it can be inferred.⁸³ In regards to acquiescence, the evidence must be clear, compelling as well as unequivocal and should also normally be in writing or in documentary form.⁸⁴ Consent for a holiday or temporary absence is not the same as consent to the child's permanent removal or retention and thus this needs to be distinguished if consent has been given by determining what it expressly was given for?⁸⁵

Where consent of the left-behind parent is obtained in a fraudulent manner, or where there is a misunderstanding, the abducting parent deceives the left-behind parent or fails to disclose important information regarding the departure, this will seldom result in a valid consent having been obtained from

(*Abduction: Acquiescence*) [1992] 1 All ER 929; [1992] Fam 106 at 123; *Wenceslas & Director-General, Department of Community Services* supra (n27) at para [27]; *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171 at 173.

⁷⁷ *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.40]; *Re A* supra (n76) at 119 & 120; Clark op cit (n1) para [18]. *Re AZ (A Minor)(CA)* [1993] 1 FLR 682 at 685, referred to in *Central Authority (South Africa) v A* 2007 (5) SA 501 (W) at para [26]; *Wenceslas & Director-General, Department of Community Services* supra (n27) at paras [254] & [256]; *Director General, Department of Families, Youth and Community Care v Thorpe* supra (n34) at para [3.38]; *Director-General, Department of Community Services New South Wales & Eager* [2007] FamCA 1269 at para [45]; *State Central Authority v Ayob* supra (n34) at 84,074-84,076.

⁷⁸ *Wenceslas & Director-General, Department of Community Services* supra (n27) at para [264]; *Family Advocate, Cape Town, and Another v EM* 2009 (5) SA 420 (C) at para [36]; *Central Authority v H* 2008 (1) SA 49 (SCA), *Central Authority v B* supra (n36), Du Toit op cit (n10) 363; Heaton (2010) op cit (n10) 315; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n30) at para [17]; *Police Commissioner of South Australia v Temple (No 1)* supra (n68) quoted in JD Morley 'Acquiescence or consent: Hague Convention on International Child Abduction, acquiescence and consent' The Law Office of JD Morley: International Family Law (New York), available at <http://www.international-divorce.com/Acquiescence-or-Consent.htm>, accessed on 7th October 2011; Hodson op cit (n28) 259-260.

⁷⁹ *Director-General, Department of Child Safety & Milson* [2008] FamCA 872 at para [30].

⁸⁰ Lowe, Everall & Nicholls op cit (n76) 309.

⁸¹ *Ibid* at 30; *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 831; *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n33) at para [3.42]; Bates op cit (n50) 82.

⁸² Hodson op cit (n28) 260.

⁸³ *Loc cit*; Lowe, Everall & Nicholls op cit (n76) 310.

⁸⁴ Hodson op cit (n28) 259-260; *Central Authority v B* supra (n36), this case was not decided on the basis of Article 13(a) as the application had been launched outside of the one year period and thus was decided in terms of the Article 12 defence (at paras [7]-[9]) however it is still of reference herein.

⁸⁵ *K v K (Abduction (No 1))* [2010] 1 FLR 1295 (FD) at para [69]; Section 39 of the Constitution of the Republic of South Africa, 1996; Clark op cit (n1) para [18].

the left-behind parent.⁸⁶ Courts also require that there should be a positive element to the consent e.g. written evidence of consent may be required, although consent may also be inferred from conduct.⁸⁷

[3] In order to determine acquiescence, the subjective intention of the left-behind parent must be considered and whether or not any positive action had been taken by the parent and this must be determined as a question of fact to be ascertained in all the circumstances of the specific case, ignoring outside perspectives.⁸⁸ This approach is followed in South Africa.⁸⁹ The question which the court must ask in order to determine the aforementioned is whether the left-behind had consented or acquiesced to the child's continued presence in the jurisdiction to which they were removed to and retained in.⁹⁰ It was held in the case of *Senior Family Advocate, Cape Town v Houtman* that the court should also examine the 'outward conduct' of the wronged parent.⁹¹ Acquiescence also involves an informed acceptance by the left-behind parent of the infringement of their rights.⁹² They do not need to have a full knowledge of the precise nature of their rights but they must at least know that the removal or retention of the child was wrongful and that a remedy is available to them.⁹³ The fact that there is a subsequent change of mind does not alter the situation.⁹⁴ The conduct or words of the left-behind parent must also be such that

⁸⁶ Hodson op cit (n28) 260; Lowe, Everall & Nicholls op cit (n76) 309.

⁸⁷ Buck (2005) op cit (n35) 142.

⁸⁸ *Senior Family Advocate, Cape Town v Houtman* supra (n30) at paras [17]-[18]; Du Toit op cit (n10) 362-363; Hodson op cit (n28) 259, Buck (2005) op cit (n35) 142; Clark op cit (n1) at para [18]; *Family Advocate, Cape Town, and Another v EM* supra (n78) at para [38]; *Re S (Minors) (Abduction: Acquiescence)* supra (n81) at 831; *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.42]; Bates op cit (n50) 82; *Department of Communities & Clementine* [2010] FamCA 746 at para [69]; *Senior Family Advocate, Cape Town v Houtman* supra (n30) at paras [17]-[18].

⁸⁹ *Family Advocate, Cape Town and Another v EM* supra (n78) at para [36] in which the court followed the dicta in *Re H (Minors) (Abduction: Acquiescence)* [1997] 1 FLR 872.

⁹⁰ Hodson op cit (n28) 259; *Re H and Others (Minors)(Abduction: Acquiescence)* [1997] 2 All ER 225 (HL) at 236 f; *Smith v Smith* supra (n30) at para [18]; Kay op cit (n76) at para [150].

⁹¹ *Senior Family Advocate, Cape Town v Houtman* supra (n30) at paras [17]-[18]; Du Toit op cit (n10) 363.

⁹² Du Toit op cit (n10) 363; Heaton (2010) op cit (n10) 315; *Smith v Smith* supra (n30) at paras [15]-[17]; Clark op cit (n1) at para [18] referring to *Re A and Another (Minors) (Abduction: Acquiescence)* supra (n76) at 940,

⁹³ Heaton (2010) op cit (n10) 315; Hodson op cit (n28) 259; *Smith v Smith* supra (n30) at paras [15]-[17]; Clark op cit (n1) at para [18] referring to *Re A and Another (Minors) (Abduction: Acquiescence)* supra (n76) at 940; Du Toit op cit (n10) 363; Kay op cit (n76) at para [147]; *Police Commissioner of South Australia v Temple (No.1)* supra (n68); *Emmett and Perry* [1995] FamCA 77 at para [19].

⁹⁴ Clark op cit (n1) para [18]; Du Toit op cit (n10) 363. In Australia it was stated that there must be 'clear and unequivocal words or conduct' which will indicate acquiescence and there cannot be acquiescence if the parties are in a state of chaos or confusion: *John Pryde Paterson Department of Health and Community Services, State Central Authority v Casse* supra (n25); Bates op cit (n46) 72 & 82; *General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.47]; *Police Commissioner of South Australia v Temple (No.1)* supra (n68) at 79, 828; *Emmett and Perry* supra (n93) at para [16].

it leads the abducting parent unequivocally to believe that the left-behind parent was not going to demand the summary return of the child through any assertion of their rights.⁹⁵

Consent or acquiescence cannot be assumed when the left-behind parent was in a state of emotional chaos as well as confusion and was thus unaware of any remedies available to them.⁹⁶ It has been indicated that the fact that there was a failure by the left-behind parent to look for the child expeditiously does suggest acquiescence.⁹⁷ Judges should not infer acquiescence immediately where parents have made attempts at reconciliation or where they have agreed to a voluntary return.⁹⁸ Once acquiescence has occurred, a change of heart or mind becomes irrelevant.⁹⁹ Negotiations surrounding where a child should reside are not considered as acquiescence as it is a subjective exercise.¹⁰⁰ A failure to act as a result of being given the incorrect legal advice, which is then followed by immediate action on receiving the correct advice, may not be seen as acquiescence.¹⁰¹ If a left-behind parent acquiesces and quickly withdraws this acquiescence, this shall affect the weight which the courts give to it.¹⁰²

[4] This exception is similarly applied in Australia and South Africa. Thus it is submitted that South Africa should continue with its approach herein.

c) Article 13(b) of the Hague Convention and Regulation 16(3)(b) of the Australian Regulations: Grave risk of harm

[1] Article 13(b) of the Hague Convention provides:

‘Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested [s]tate is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

⁹⁵ *Smith v Smith* supra (n30) at paras [18]-[19]; Clark op cit (n1) para [18]; Hodson op cit (n28) 260; *Re R (Child Abduction)* 1995 1 FLR 716 at 727; *John Pryde Paterson Department of Health and Community Services State Central Authority and Marie Lorna Casse* supra (n25) at para [43]; *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at paras [3.37]-[3.38]; *Emmett and Perry* supra (n93) at para [20]; Bates op cit (n50) 82; *Wenceslas & Director-General, Department of Community Services* supra (n27) at para [252].

⁹⁶ Du Toit op cit (n10) 363.

⁹⁷ *Smith v Smith* supra (n30); *Senior Family Advocate, Cape Town v Houtman* supra (n30); *Central Authority (South Africa) v A* supra (n77); Heaton (2010) op cit (n10) 315.

⁹⁸ Hodson op cit (n28) 260.

⁹⁹ Heaton (2010) op cit (n10) 315.

¹⁰⁰ Buck (2005) op cit (n35) 142.

¹⁰¹ See for example *Smith v Smith* op cit (n30).

¹⁰² Hodson op cit (n28) 260.

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.’

Regulation 16(3)(b) states:

‘A court may refuse to make an order under subregulation (1) ... [I]f a person opposing return establishes that: there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation ...’

Within this exception, in both countries, three different defences are raised.¹⁰³ Each are to be read disjunctively as a result of the words ‘or otherwise’.¹⁰⁴ The abducting parent merely has to prove any one of these three available exceptions¹⁰⁵ in an attempt to prevent the child being ordered to return. No definition of the concept of ‘grave risk’ is provided in either the Hague Convention or Australian Regulations and therefore it has been presumed that the Hague Convention drafters actually intended for the courts to be able to interpret and develop the term when determining such matters.¹⁰⁶ Different jurisdictions have interpreted this defence in many ways in order to conform to the laws and principles which govern the respective states.¹⁰⁷

[2] Article 13(b) of the Hague Convention is focused specifically on the child concerned and the risk of harm that specific child may be exposed to if they were ordered to return.¹⁰⁸ General harm is therefore not considered in either country under discussion.¹⁰⁹ The failure or success of the defence depends on the facts of each case¹¹⁰ and there has to be ‘an objective basis for holding that there is a grave risk of intolerability’.¹¹¹ A grave risk of harm in terms of South African law requires something more than an ordinary risk of physical or psychological harm, or something greater than that which would normally be

¹⁰³ Du Toit op cit (n10) 363; Nicholson op cit (n2) 250; Kay op cit (n76) 56 at para [163]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n35) at para [50]; Bates op cit (n35) 254; Bates op cit (n50) 84 & 86; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at 407 supported the view of *C v C (Abduction: Rights of Custody)* supra (n9) at 664; supra (n9) at 473.

¹⁰⁴ Kay op cit (n76) 56 at para [163]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n35) at para [50]; Bates op cit (n35) 254; Bates op cit (n50) 84 & 86; *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at 407 supported the view of *C v C (Abduction: Rights of Custody)* supra (n9) at 664; supra (n9) at 473.

¹⁰⁵ Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980; Du Toit op cit (n10) 363-364; *Secretary of Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* supra (n36) at para [39] confirmed that each aspect of the Article 13(b) defence is a separate exception/defence from the others.

¹⁰⁶ Weideman & Robinson op cit (n3) 75.

¹⁰⁷ Loc cit.

¹⁰⁸ Clark op cit (n1) at para [20]; Hodson op cit (n28) 261; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [50]; Weideman & Robinson op cit (n3) 82.

¹⁰⁹ Hodson op cit (n28) 261.

¹¹⁰ Nicholson op cit (n36) 250; Weideman & Robinson op cit (n3) 75.

¹¹¹ *WS v LS* 2000 (4) SA 104 (C) at 115E-F; Weideman & Robinson op cit (n3) 75.

expected when removing a child from one parent and passing them to another.¹¹² In order to justify refusing the order of return, the risk must be weighty and of substantial harm¹¹³ and the evidence must be obvious and incontrovertible.¹¹⁴ There are also many factors which can be used in order to determine the existence and extent of the gravity of the risk of harm.¹¹⁵ However, it is important to understand that the court, in an attempt to prevent any harm to the child when ordering a return, may include certain undertakings or conditions in order to eliminate any potential risk the child may be exposed to on their return.¹¹⁶ This is the same for both South Africa and Australia.

[3] In South Africa the child's interests; the appropriate court retaining its jurisdiction and the likelihood of the child's best interests being undermined by the return order when determining whether or not to order the child's return must be placed in balance.¹¹⁷ In summary the nature of the enquiry in terms of Article 13 of the Hague Convention in South Africa has been described by the Constitutional Court as:

'An art 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.'¹¹⁸

[4] 'Grave risk' pertains to the harm a child would suffer if they were to be returned to the requesting state and it is not determined in regards to that of return to the requesting parent.¹¹⁹ This is the same for both countries under discussion. The requirement of 'grave risk' was deliberately incorporated in order to increase the level of satisfaction of harm from that of substantial harm to that of intensive harm.¹²⁰

¹¹² Weideman & Robinson op cit (n3) 75.

¹¹³ Ibid at 75-76.

¹¹⁴ Ibid at 76; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [17]; Clark op cit (n1) at para [20]; HCCH op cit (n25) at para [36], determined that in regards to the Consideration of the Article 13(b) exception in regards to the issue of domestic violence that the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.

¹¹⁵ Heaton (2010) op cit (n10) 316.

¹¹⁶ Manches 'International Child Abduction – Hague Convention' (2010), available at <http://www.manches.com/Practices/family/service.php?id=140>, accessed on 12 June 2010. For further discussion kindly see Weideman & Robinson op cit (n3) 86 & 89-90.

¹¹⁷ *Sonderup v Tondelli* supra (n10) at para [35]; Labuschagne op cit (n10) 244.

¹¹⁸ *Sonderup v Tondelli* supra (n10) at para [44].

¹¹⁹ Labuschagne op cit (n36) 283. South Africa has in certain instances been considered as this type of state: RJ Levy 'Memoir of an academic lawyer: Hague Convention theory confronts practice' (1995) 29 (1) *Family Law Quarterly* 180–182.

¹²⁰ Pérez-Vera op cit (n23) at para [116]; *WS v LS* supra (n111) at 112I-113A.

The concept of ‘grave’ classifies the risk and not the harm which is suffered¹²¹ and with regards to an intolerable situation, the level of intolerability which the child may suffer as a result of being returned must also be very high and result in extreme reactions on behalf of the child.¹²² There must be a heavy weight of risk of substantial, not trivial, harm as well as a high level of severity, as the type of harm considered is to be that which is more than the mere uncertainty, anxiety and disruption which the return order would cause if a child were returned to a requesting state.¹²³

[5] The South African case of *WS v LS*¹²⁴ held that an objective basis must exist on which a grave risk of intolerance must be determined¹²⁵ and the judicial authorities of the contracting states have provided Article 13(b) with a restrictive interpretation and have thus attempted to prevent an Article 13(b) enquiry from becoming a substitution for the determination of a child’s best interests.¹²⁶ This is due to the fact that it was not intended that this exception be available as a vehicle for defendants to litigate or re-litigate a child’s best interests once abduction occurred.¹²⁷ A strict interpretation of the Article is thus employed.¹²⁸ Therefore the exception/defence, in terms of the Hague Convention and the South African approach, should be narrowly interpreted in order to prevent the undermining of the Hague Convention’s objective of ensuring a child’s prompt return.¹²⁹

¹²¹ Lowe, Everall & Nicholls op cit (n76) 329.

¹²² Nicholson op cit (n3) 250-251; *B v B (Abduction)* [1993] FAM 32, [1993] 1 FLR 238; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n30) at para [22]; *Re F (Minor: Abduction: Rights of Custody Abroad)* [1995] 3 All ER 641 (CA) also supports this view.

¹²³ Hodson op cit (n28) 261. According to Hodson, the types of risks which may result in a successful Article 13(b) defence are those which relate to political persecution or terrorist attacks (according to Buck (2005) op cit (n35) 143, the level of harm of such situations should be assessed initially in order to determine whether the requirements of Article 13(b) would be satisfied, prior to the refusal of the order to return being made. This however has not been raised as a defence in terms of the present South African case law and is discussed under the Australian in Chapter [3] herein). The probable arrest or implementation of criminal proceedings against the abducting party, if they were to return to the requesting state, are not likely to amount to what is considered a grave risk of harm as a safe harbour order may be sought in this regard (see also *K v K* 1999 (4) SA 691 (C) at 712E-F). In instances where the physical or psychological harm are weighted with the risk of the psychological harm of no return and both the risks are substantial then the court should give due weight to the primary purpose of the child’s swift return in terms of the Hague Convention: *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [32]; *Re A (A Minor) (Abduction)* supra (n9); *Thomson v Thomson* (1994) 119 DLR (4th) 253 (SCC).

¹²⁴ *WS v LS* supra (n111).

¹²⁵ *WS v LS* supra (n111) at 115E-F; Du Toit op cit (n10) 364.

¹²⁶ Nicholson op cit (n3) 235; Silberman op cit (n23) 9; *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [31].

¹²⁷ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [31].

¹²⁸ *K v K* supra (n123) at 707C; *Pennello v Pennello* supra (n30) at 105D; *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n30) at para [22]; *C v C (Minor: Abduction: Rights of Custody Abroad)* supra (n9) & *B v B (Abduction: Custody Rights)* supra (n122).

¹²⁹ Nicholson op cit (n3) 235.

The South African case of *Chief Family Advocate and Another v G*¹³⁰ enforced the views of *Sonderup v Tondelli* and reiterated the Constitutional Court's view that when considering this exception the court should consider the best interests of the child principle as this should inform the courts understanding of the exemptions to the compulsory rule of return, however, this should occur without undermining the Hague Convention's integrity.¹³¹ Therefore the South African court implemented the Constitutional court's requirement that they place in balance the desirability of whether it is in the interests of the child for the requesting state to retain its jurisdiction, or whether they would be undermined by the order of the return to the jurisdiction of the requesting state.

[6] When evaluating the risk to which a child may be exposed, in the case of an abducting mother or parent, they cannot rely on their own unwillingness to take reasonable steps to protect themselves and the child as a relevant factor to the risk.¹³² The fact that the mother or parent refuses to return should not be considered (due to the fact that the court cannot order the abducting parent to return)¹³³ as a basis for determining whether a child should be returned or not because the emphasis is to prevent the mother or parent from relying on a situation which they created.¹³⁴ The South African unreported case of *Family Advocate, Cape Town and another v Chirume aka Munyuki*¹³⁵ suggests that the intolerability of the situation should be considered from the view point of the child.¹³⁶ However, where there is an established pattern of domestic violence, even if not directed at the child specifically, a return order may place the child at the risk of harm as provided for in terms of Article 13.¹³⁷ It has thus been held in South

¹³⁰ *Chief Family Advocate and Another v G* supra (n22).

¹³¹ *Ibid* at 611I-612A; *Sonderup v Tondelli* supra (n10) at para [32].

¹³² *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [54]; Weideman & Robinson op cit (n3) 82.

¹³³ *Manches* op cit (n116); *Hodson* op cit (n28) 261 indicates that if inadequate measures were put in place in the return order and as a result of this the abducting parent would be subjected to a substantial risk if parted from the child, then this may justify the test required regarding the level of harm. In the Netherlands it was held that a grave risk to a child would arise if the abducting parent could not return with the child, as the child may be placed in a position where they have no other means of support, see *De directive Preventie, optredend voor zichzelf en namens Y (de vader/the father) against X (de moeder/the mother)* (2001) (7 February 2001, ELRO nr AA9851: 813-H-00); *Buck* (2005) op cit (n35) 143. It was however argued that this principle should not be liberally extended as then it would allow parents to have a greater control over the proceedings as the focus may be shifted to the damage that the separation from the abducting parent would cause; *Buck* (2005) op cit (n35) 143; *Re C (Minors) (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145. This is exactly what the courts in South Africa are trying to avoid.

¹³⁴ *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* supra (n35) at para [33]. Thus the threshold which needs to be crossed is raised in terms of Article 13(b) to that of a high and difficult level to satisfy and therefore the risk must be a grave and serious one.

¹³⁵ *Family Advocate, Cape Town & another v Chirume aka Munyuki* [2006] JOL 17112 (C).

¹³⁶ *Ibid* at para [36].

¹³⁷ *Sonderup v Tondelli* supra (n10) at para [34].

Africa that the mere fact that the other party's conduct constitutes domestic violence will not itself be a sufficient reason to justify refusal of the child's return.¹³⁸ To rely on domestic violence, an established pattern of such conduct must be shown to exist.¹³⁹

[7] *WS v LS* also considered the meaning of the word 'otherwise' in the exception, in that a child could be placed in an intolerable situation, which subsequently means that the intolerability of the situation does not have to be based on the proof of physical or psychological harm in order for the exception/defence to be satisfied.¹⁴⁰ An intolerable situation would arise if the child were to suffer grave risk of physical or psychological harm if they were returned and therefore it is submitted that this is why there is no specific definition of what an intolerable situation is. The aforementioned is the South African approach herein.

[8] Regulation 16(3)(b) of the Australian Regulations mirrors what is provided for in terms of Article 13(b) of the Hague Convention.¹⁴¹ The content hereof is also clearly related to the best interests of the child in a limited sense¹⁴² as is the case in the South African law.

[9] The Australian case of *Gsponer v Director General, Department of Services, Victoria* provided that the physical or psychological harm that the child would be exposed to must be substantial and weighty to be successful¹⁴³ and to a level comparable with an intolerable situation.¹⁴⁴ This is similar to the South African approach. This case provided that the Australian Regulation had a narrow interpretation¹⁴⁵ as the grave risk of harm must arise as a result of the child being returned to the country of habitual residence,

¹³⁸ Ibid at para [38].

¹³⁹ Loc cit.

¹⁴⁰ *WS v LS* op cit (n111) at 109F-G.

¹⁴¹ Kay op cit (n76) 55 at para [161]; *Cooper v Casey* [1995] FamCA 2; (1995) FLC 92-575 F (16 January 1995) at para [17].

¹⁴² Kay op cit (n76) 55 at para [161].

¹⁴³ Ibid at para [163]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n35) at para [50]. The court in this case found support for this view in the English case of *Re A (A Minor)* supra (n9) at 372; Bates op cit (n35) 254-255; *Director General of the Department of Family and Community Services and Beverley Ann Davis* [1990] FamCA 119 at para [20]; Bates op cit (n50) 84 & 86; *Cooper v Casey* supra (n141) at para [21]; Kay op cit (n76) 56 at para [164]; *Laing v The Central Authority* [1999] FamCA 100; Bates op cit (n50) 88; *Re Bassi; Bassi and Director General of Community Services* supra (n73) at 80; *Emmett v Perry* supra (n93) at para [28]; *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n35) at para [40]; *Re Corrie* (Lately, J., High Court of Justice, 14 October 1988; Court of Appeal, 14 December 1988, unreported) at 177; F Bates "...From frost and foreign wind" – some international aspects of Australian family law' (2006) 39 (3) *CILSA* 414.

¹⁴⁴ F Bates 'Grave Risk, Physical or Psychological Harm or Intolerable Situation: The High Court of Australia's View' (2003) 11 *Asia Pacific Law Review* 45.

¹⁴⁵ *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n35) at para [60]; Kay op cit (n76) 56 at para [162]; Bates op cit (n35) 255; *Cooper v Casey* supra (n141) at para [21].

a signatory to the Hague Convention.¹⁴⁶ This court also stated that once a child has been ordered to return, that it is up to the appropriate court in the country of return to make the necessary orders regarding the child's future custody and general welfare and thus there is no reason for the court hearing the application to assume that such a court is not properly equipped or capable of making suitable arrangements for the child's welfare.¹⁴⁷

[10] The above interpretation was rejected in the case of *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* which provides that the risk which is demonstrated must be grave but the nature and degree of the physical or psychological harm remains unspecified.¹⁴⁸ However, it was held herein that the words 'or otherwise place the child in an intolerable situation' give guidance as to what is contemplated.¹⁴⁹ Thus it is evident that it is insufficient for the abducting parent to merely show that some degree of psychological harm may be suffered.¹⁵⁰ Thus they must show that the degree of harm which may be suffered is substantial and comparable to an intolerable situation.¹⁵¹ The word 'grave' therefore qualifies the risk which indicates that it must be more than a real and significant risk.¹⁵² The term 'otherwise' also indicates that the physical or psychological types of harm must be those which would potentially place the child in an intolerable situation.¹⁵³ This is similar to the approach adopted by the South African courts.

The Australian court further held that the strength of the words 'grave' and 'intolerable' as adjectives permit nothing more than what they describe.¹⁵⁴ Thus it is not necessarily a narrow interpretation which is adopted but the words are interpreted and construed within their context in order to fulfil their

¹⁴⁶ Bates op cit (n50) 85; Regulation 10 of the Family Law (Child Abduction Convention) Regulations, 1986; *Laing & The Central Authority* supra (n143) at para [29].

¹⁴⁷ *Carmel Faye Gsponer and Peter Johnstone Appeal* supra (n34) at para [59]; Bates op cit (n35) 253-254; This view was also supported in the case of *Murray v Director of Family Services, A.C.T* supra (n35).

¹⁴⁸ Kay op cit (n76) at para [164]; *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* supra (n2) at para [8] referring to *C v C (Abduction: Rights of Custody)* supra (n9) at 664; supra (n9) at 473.

¹⁴⁹ Kay op cit (n76) 56 at para [164]; *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* supra (n2) at para [8] referring to *C v C (Abduction: Rights of Custody)* supra (n9) at 664; supra (n9) at 473; Young & Monahan (2009) op cit (n2) 348.

¹⁵⁰ *Director General of the Department of Family and Community Services and Beverley Ann Davis* supra (n143) at para [20]; Bates op cit (n35) 257.

¹⁵¹ Loc cit.

¹⁵² *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at para [132].

¹⁵³ Loc cit.

¹⁵⁴ *Ibid* at para [140].

functions because a departure from the aforementioned may undermine the purposes of the Regulations and the general rule to which they prescribe.¹⁵⁵ The case of *DP* subsequently held that it was unhelpful to construe the exception narrowly as there is no serious question of construction and the courts are to avoid grudgingly applying the exception.¹⁵⁶ This court confirmed the approach that the exception is to be given the meaning provided by the words and the narrow construction was thus rejected.¹⁵⁷ This is due to the fact that the narrow construction is also not self-evident¹⁵⁸ as no ambiguity exists on the face of the wording and thus no question of construction arises.¹⁵⁹

What is to be established is that grave risk of harm exists and if the child was returned, this would expose the child to certain types of harm or place them in an intolerable situation¹⁶⁰ and this requires a prediction of what may happen if the child were to be returned.¹⁶¹ The best interests of the child are not a deciding principle but their interests can be considered in such cases.¹⁶² Certainty in such cases is also not required; however, persuasion that there is a grave risk must exist although the harm does not have to actually have occurred as its potential must expose the child to such harm.¹⁶³ Thus clear and compelling evidence is required of the harm.¹⁶⁴ The aforementioned, however, does not warrant a conclusion that a narrow rather than a broad interpretation is to be adopted.¹⁶⁵ Restrictive words are used and these are to be narrowly construed by the courts when applying them to the specific facts of cases

¹⁵⁵ *Ibid* at para [142].

¹⁵⁶ *Ibid* at para [9]; Bates op cit (n35) 261; Bates op cit (n143) 412.

¹⁵⁷ *DP and Commonwealth Central Authority; JLM and Director-General N Department of Community Services* supra (n2) at para [44].

¹⁵⁸ *Ibid* at para [41].

¹⁵⁹ *Loc cit*.

¹⁶⁰ *Loc cit*.

¹⁶¹ *Loc cit*; Bates op cit (n144) 48.

¹⁶² *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at para [41]; Bates op cit (n35) 261.

¹⁶³ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at paras [42]-[43]; Bates op cit (n35) 261.

¹⁶⁴ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at para [43]; Bates op cit (n35) 261 & 261 fn90; *Director General of the Department of Family and Community Services v Davis* supra (n2) at 78, 277; Parkinson op cit (n12) 825; Young & Monahan (2009) op cit (n2) 349; Bates op cit (n144) 49.

¹⁶⁵ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at para [44]; Parkinson op cit (n12) 825; Kirby op cit (n2) 8; Bates op cit (n144) 49.

before them.¹⁶⁶ Thus this exception is successful only in very rare circumstances.¹⁶⁷ The Australian High court therefore placed a more liberal interpretation on Regulation 16(3)(b).¹⁶⁸

[11] It is submitted, however, that South Africa, unlike Australia, has a settled approach towards this exception/defence and thus should maintain their current approach.

d) Article 13 of the Hague Convention and Regulation 16(3)(c) of the Australian Regulations: The child's objections

[1] Article 13 also provides:

‘The judicial and 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.’

Regulation 16(3)(c) provides:

‘A court may refuse to make an order under subregulation ... if a person opposing return establishes that: each of the following applies: (i) the child objects to being returned; (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views ...’

This Regulation thus provides the requirements for establishing this exception whereas Article 13 of the Hague Convention for South Africa does not. Both countries, however, subscribe to the fact that the child must be of a sufficient age and maturity for their views and objections to be considered by the court.

[2] In South Africa, in terms of the Children's Act and the Constitution, the right of a child to be represented and heard in all matters affecting them is provided for.¹⁶⁹ The child's right to a legal

¹⁶⁶ *DP and Commonwealth Central Authority; JLM and Director-General New South Wales Department of Community Services* supra (n2) at para [130].

¹⁶⁷ *Loc cit.*

¹⁶⁸ Bates op cit (n144) 56; Sections 278(3) & 279 of the Children's Act 38 of 2005.

¹⁶⁹ C Du Toit 'Legal representation of children' in T Boezaart *Child Law in South Africa* (2009) 93; Section 10 of the Children's Act 38 of 2005; D Kassan 'Children's right to legal representation in divorce proceedings' in J Sloth-Nielsen & Z Du Toit (Eds) *Trials and Tribulations and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 229; Section 278(3) of the Children's Act 38 of 2005 provides that the court must provide the child with an opportunity to raise an objection to the return and must also give weight to such objections: Du Toit op cit (n10) 366; Woodrow & Du Toit op cit (n10) at [17-19]-[17-21]; A Skelton & M Carnelley (Eds) *Family Law in South Africa* (2010) 280; Section 279 of the Children's Act 38 of 2005 provides a mechanism which ensures that the child's views are placed before the court and it does this through stating that a legal representative must be appointed for the child in all Hague

practitioner has been interpreted by the Constitutional Court in conjunction with the international law to give effect to the child's right to participate in matters concerning them.¹⁷⁰ The child's right to legal representation is thus separate from that of their parents.¹⁷¹ Sections 28(2) and 28(1)(h) of the Constitution and section 278(3) of the Children's Act provide that the court's must also consider the child's views and objections in light of these principles prior to those of the Hague Convention's in exceptional circumstances.¹⁷²

In terms of the international law, the child's right to participate in matters affecting them is provided in the UNCRC and the African Charter on the Rights and Welfare of the Child.¹⁷³ This right has been recognized by the UNCRC as a key principle which recognizes that children are capable of possessing fundamental human rights, views and feelings regarding situations pertaining to them.¹⁷⁴

[3] In terms of South African case law, three reported cases, dealing specifically with principles of the Hague Convention, exist in which this exception has been considered: *Chief Family Advocate and Another v G*;¹⁷⁵ *Central Authority v B*¹⁷⁶ and *Central Authority v MV (LS Intervening)*.¹⁷⁷ Despite the minimal amount of South African case law herein, guidelines have been created regarding the respect of

Convention applications. Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996; Du Toit (2009) op cit (n169) (2009) 96; Du Toit op cit (n10) 367.

¹⁷⁰ Du Toit (2009) op cit (n169) 96; The Constitutional Court in *Du Toit and Another v Minister of Welfare and Population Development and Others (Gay and Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) saw the court appoint a curator *ad litem* in order to protect the interests of the child. Protecting a child's interests in matters concerning the child is of paramount importance and is evident in further cases before the courts.

¹⁷¹ Du Toit op cit (n10) 366. See for example *Soller NO v G and Another* 2003 (5) SA 430 (W); *Central Authority v De Wet and Another* case number 2028/2006 (WLD) (unreported to date).

¹⁷² Du Toit op cit (n10) 367.

¹⁷³ Du Toit (2009) op cit (n169) 94; Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996 has as a requirement when interpreting the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, 1996) that a court should consider international law and in terms of section 233, when interpreting legislation, that a court must prefer any reasonable interpretation of the legislation which is considered to be consistent with international law; Article 12 of the UNCRC; *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1994-5) 183 CLR 273.

¹⁷⁴ Du Toit (2009) op cit (n169) 94-95; Article 12 of the UNCRC entrenches the child's right to express their views in matters which affect them and in terms of Article 12(2) there is an obligation on the States to provide the child to participate in the formal proceedings and express their views. See also A Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 219-220; G Van Bueren *The International Law on the Rights of the Child* (1995) 137; Article 4(2) of the African Charter on the Rights and Welfare of the Child guarantees the right of children to be heard in all judicial and administrative proceedings; *Minister of State for Immigration and Ethnic Affairs v Teoh* supra (n173).

¹⁷⁵ *Chief Family Advocate v G* supra (n22).

¹⁷⁶ *Family Advocate v B* 2007 (1) All SA 602 (SE) at para [14]; Du Toit op cit (n10) 364.

¹⁷⁷ *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP).

the child's view in divorce, care and contact matters.¹⁷⁸ International case law has also established several principles regarding the child's objections and these have been consistently applied in foreign jurisdictions.¹⁷⁹ *Family Advocate v B* held that although the child was seven-years-of-age at the time the application was heard, a fundamental reason for not ordering the child's return was based on the consideration that the child was sufficiently mature to make an informed decision.¹⁸⁰

In terms of the South African law, the word 'objects' is given a literal meaning which does not provide any further strength of feeling beyond that of the usual ascertainment of the child's wishes in a dispute regarding custody.¹⁸¹ The questions of the child's age and maturity are questions of fact to be determined by the presiding officer where the application is launched.¹⁸² They must determine the reasons why the child objects¹⁸³ as the court cannot refuse to order the child's return on the grounds that the child merely refuses to return to the left-behind parent.¹⁸⁴ This is due to the fact that the child is not returned to the left-behind parent, but to the state from which they were removed. The weight attached to views which have been potentially influenced by the abducting parent will vary¹⁸⁵ because the child's views must be determined as being made out of free will and choice in order for the defence to have a higher chance of success.¹⁸⁶ The younger the child is, the more likely it will be found that they will lack the requisite degree of maturity despite instances existing where children, as young as seven-years-of-age, have been found to have satisfied this level.¹⁸⁷ The case of *Central Authority v MV (LS Intervening)* supports that return applications pertaining to a child's views should be considered and the court must place due weight on such views and objections according to the age, maturity and level of development of the child concerned.¹⁸⁸

¹⁷⁸ Du Toit op cit (n10) 364.

¹⁷⁹ Loc cit. For further examples kindly refer to *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390; *Urness v Minto* 1994 SC 249; *N v N (Abduction: Article 13 Defence)* [1995] 1 FLR 107; *Re K (Abduction: Child's Objections)* [1995] 1 FLR 977; *Singh v Singh* 1998 SLT 1084; *The Ontario Court v M and M* [1997] 1 FLR 475, *Secretary for Justice v P, Ex Parte C* [1995] NZFLR 827, *De L v Director-General, NSW Department of Community Services* supra (n2).

¹⁸⁰ *Family Advocate v B* supra (n176) at paras [13]-[14].

¹⁸¹ Du Toit op cit (n10) 365; Lowe, Everall & Nicholls op cit (n76) 354; *Re R (A Minor: Abduction)* [1992] 1 FLR 105 at 107.

¹⁸² Du Toit op cit (n10) 365.

¹⁸³ Loc cit.

¹⁸⁴ Lowe, Everall and Nicholls op cit (n76) 355.

¹⁸⁵ Du Toit op cit (n10) 365, see *Re S (A Minor) (Abduction: Custody Rights)* [1993] 2 All ER 682, *sub nom S v S (Child Abduction) (Child's Views)* [1992] Fam 242; Clark op cit (n1) at para [22].

¹⁸⁶ Hodson op cit (n28) 263.

¹⁸⁷ Loc cit.

¹⁸⁸ *Central Authority v MV (LS Intervening)* supra (n177) at para [26.4].

This defence is thus a question of fact and degree determined on the evidence placed before the court.¹⁸⁹ No age is specified at which the child may be considered as not having reached the required degree of maturity in order for their views to be considered by the court because the authorities could not agree on a specific age and therefore discretion was left to the competent authorities to determine each case.¹⁹⁰ The court therefore needs to assess whether or not the child is sufficiently mature to form a view which the court should consider.¹⁹¹

[4] In South Africa a two-stage enquiry is used.¹⁹² The court must determine the validity and strength of the views which involves an examination of the following:¹⁹³

(a) What is in the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?¹⁹⁴

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?¹⁹⁵

All evidence must be obtained from the child using sensitivity and it should be obtained without bias.¹⁹⁶ The court may determine the weight which should be applied to such objections.¹⁹⁷ It has been indicated that with the increase in age, along with an increase in mental and emotional maturity, this may allow the child's opinion to be given more weight.¹⁹⁸

[5] In terms of Australian law, the case of *Emmett v Perry* held that the relevant time for determining a child's wishes was at the time of wrongful detention as it could possibly prove to be unsatisfactory to

¹⁸⁹ Hodson op cit (n28) 263; Buck (2005) op cit (n35) 144.

¹⁹⁰ Du Toit op cit (n10) 365, Pérez-Vera op cit (n23) at para [30]; Clark op cit (n1) at para [22]; Hlophe op cit (n3) 256.

¹⁹¹ Clark op cit (n1) at para [22].

¹⁹² *Re T (Children)* [2000] EWCA Civ 133 (18 April 2000); Du Toit op cit (n10) 365-366; Clark op cit (n1) at para [22]; Hodson op cit (n28) 263; Nicholson op cit (n3) 236.

¹⁹³ Du Toit op cit (n10) 366.

¹⁹⁴ *Beatty v Schatz* 2009 BCCA 310; Du Toit op cit (n10) 366.

¹⁹⁵ *Re T (Children)* supra (n192); Du Toit op cit (n10) 366.

¹⁹⁶ Hlophe op cit (n3) 255.

¹⁹⁷ Clark op cit (n1) at para [22]. See for example: *Re J and K (Abduction: Objections of the Child)* [2004] EWHC 198 (Fam), [2005] 1 FLR 273.

¹⁹⁸ Labuschagne op cit (n2) 336; ML Allen 'Visitation rights of a grandparent over the objection of a parent: the best interests of the child' (1976-1977) 15 *Journal of Family Law* 54.

place any significant weight on the subsequent development of the child's wishes when they are under the care and influence of the abducting parent.¹⁹⁹ Children's wishes or objections should be able to be described as 'clear', 'definite' and 'absolutely adamant'.²⁰⁰ Objective evidence of the aforementioned must be considered.²⁰¹ A two-fold test was previously used to determine whether Regulation 16(3)(c) existed,²⁰² however, this has been replaced by *Northern Territory Central Authority & Gambini* [2008] FamCA 544 (9 May 2008) which suggests a four-stage test:²⁰³

'Whether the child objects to their return;

Whether the objection shows the requisite "strength of feeling";

Whether the child has attained an age and degree of maturity for it to be appropriate for the court to take these wishes into account; and

The Court must then exercise its discretion whether or not to order the return of the child.'

*De L v Director-General, NSW Department of Community Services*²⁰⁴ held that 'where there is a clear issue as to whether the child objects to being returned, there is a corresponding obligation upon the court to give the child an opportunity to be heard. This is a right particular to the child and independent of the person opposing the return.'²⁰⁵

[6] The court in *De Lewinski* considered the meaning of the word 'objection' and agreed with the view supplied in the English Court of Appeal case *S v S (Child Abduction: Child's views)* (1992) 2 FLR 492²⁰⁶ which held that the word 'objects' should be given its literal meaning and not subjected to any form of gloss.²⁰⁷ The court in *De Lewinski* thus rejected that the word 'objects' imports a strength of

¹⁹⁹ *Emmett and Perry* supra (n93) at para [2]; Bates op cit (n50) 91-92. This was supported in the case of *Murray v Director of Family Services (ACT)* supra (n9) at 80, 253 although it was considered in terms of Regulation 16(3)(a) and not 16(3)(c); *Director-General, Department of Families, Youth and Community Care And: Timothy Joseph Thorpe* supra (n34) at para [3.60].

²⁰⁰ *Emmett and Perry* supra (n93) at paras [37]-[38].

²⁰¹ *Ibid* at para [41].

²⁰² *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* [1996] FamCA 25 at para [59]; Kay op cit (n76) at para [240]; *Tarritt & Director-General, Department of Community Services* [2008] FamCAFC 34 at para [46].

²⁰³ *Northern Territory Central Authority & Gambini* supra (n30) at para [140].

²⁰⁴ Bates op cit (n50) 90; see *Director-General, Director of Community Services v De Lewinski* (1996) FLC 92-674; *Director-General, Community Services v De Lewinski (No 2)* (1996) FLC 92-677; *De Lewinski v Director General, New South Wales Department of Community Services* (1996) FLC 92-678.

²⁰⁵ Bates op cit (n50) 90; *Director-General, Community Services v De Lewinski* supra (n204) at 83, 016.

²⁰⁶ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n202) at paras [15] - [16]; *S v S (Child Abduction: Child's views)* supra (n185) at 499 citing Sir Stephen Brown P in *Re M (Minors)* 25 July 1990, unreported; Young & Monahan (2009) op cit (n2) 352.

²⁰⁷ *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [30]; *De L v Director-General, New South Wales Department of Community Services* supra (n2) at 399; *Director-General, Department*

feeling which goes beyond the usual ascertainment of the child's wishes in a custody dispute.²⁰⁸ It was also argued in the case of *De L v Director-General, NSW Department of Community Services* that the word 'objects' in its context meant no more than exhibiting an expression or feeling of disapproval, however, a number of arguments exist in support of the adoption of a broad interpretation of the words.²⁰⁹ If an objection is found, the court must still consider the child's age and maturity and whether it is appropriate to take account of their views and thus the court still retains discretion to refuse the child's return and therefore the objection should not be narrowly construed,²¹⁰ but that the word 'objects' should be broadly constructed.²¹¹ Thus something more than preference, wishes, convenience or local opinion is required to defeat the Hague Convention's policy.²¹²

In terms of the Australian law it was further held that no particular reason existed as to why Regulation 16(3)(c) should be construed by any strict or narrow reading of the phrase expressed in broad English terms, such as the 'child objects to being returned'.²¹³ It was held in regards to the term 'objects' that no form of words had been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition.²¹⁴ The narrow approach conforms to the meaning of the word 'objects' and is supported by the background material of the Hague Convention.²¹⁵ The High Court, however, overruled this in order not to undermine the attainment of the objects of the Hague Convention.²¹⁶ Section 111B of the FLA was amended to provide specifically that 'an objection' to return under the Australian law must import a strength of feeling which was beyond the mere expression

of Child Safety & Milson supra (n79) at paras [77] & [102]; *Tarritt & Director-General, Department of Community Services* supra (n202) at para [20]; *De L v Director-General Department of Community Services (NSW)* supra (n2) at 655; *S v S (Child Abduction) (Child's Views)* supra (n185) at 499; Parkinson op cit (n12) 824.

²⁰⁸ *Director General NSW Department of Community Services Appellant/State Central Authority and Faye Barlin De Lewinski* supra (n202) at para [15]. This appeared in *Re R (A Minor: Abduction)* supra (n181) at 107-108 and this interpretation appears to have been cited with approval by Murray J in *Police Commissioner of South Australia v Temple* supra (n68) at 79,830 however, it was rejected in the *De Lewinski* case.

²⁰⁹ *De L v Director-General Department of Community Services (NSW)* supra (n2).

²¹⁰ Ibid referring to *Urness v Minto* supra (n179) at 998; *Tarritt & Director-General, Department of Community Services* supra (n202) at para [20].

²¹¹ *De L v Director-General Department of Community Services (NSW)* supra (n2).

²¹² Loc cit.

²¹³ Young & Monahan (2009) op cit (n2) 352.

²¹⁴ *De L and Director General, NSW Department of Community Services* supra (n2) at 399; Young & Monahan (2009) op cit (n2) 352.

²¹⁵ *De L v Director-General Department of Community Services (NSW)* supra (n2); Perez-Vera op cit (n23) at para [34].

²¹⁶ Kirby op cit (n2) 7.

of a preference of ordinary wishes.²¹⁷ Thus the Parliament of Australia sought to achieve the narrow reading of the word ‘objection’.²¹⁸

[7] The case of *De L* held that in cases where the court must consider the child’s age and maturity, children should be afforded separate legal representation.²¹⁹ Therefore the court must balance the nature and strength of the child’s objections against the Hague Convention’s principles in exercising their discretion.²²⁰ In order for a child’s objections to be considered they must also be independent, knowledgeable and understand the effects and consequences of expressing their objections.²²¹ Age is not itself an indicator of maturity²²² and there is no set age which is considered appropriate to take account of a child’s views.²²³ The case law varies and evidences that the courts have accepted a variety of views from children of many ages.²²⁴

[8] In light of the Australian law, it is suggested that South Africa should adopt the Australian approach to this exception/defence as discussed in the aforementioned paragraphs. This is submitted as a result of the fact that the Australian courts have had a greater opportunity to consider cases surrounding the issue of child participation and their approach is steady and maintained and the South African courts would benefit from the adoption of this approach.

7.3 Exception three: Article 20 of the Hague Convention and Regulation 16(3)(d) of the Australian Regulations: Human rights violations

[1] Article 20 of the Hague Convention provides the final exception and states:

²¹⁷ Ibid at 7-8; *Director-General, Department of Child Safety & Milson* supra (n79) at para [78].

²¹⁸ Kirby op cit (n2) 8.

²¹⁹ *De L v Director-General Department of Community Services (NSW)* supra (n2).

²²⁰ *Director-General, Department of Child Safety & Milson* supra (n79) at para [88].

²²¹ *Director-General, Department of Community Services & M & C & Child Representative* supra (n30) at para [108].

²²² *Northern Territory Central Authority & Gambini* supra (n30) at para [149].

²²³ Loc cit.

²²⁴ Kay op cit (n746) at para [254]: *Police Commissioner v Temple (No.1)* supra (n68) at 79,830 herein the courts accepted the views of a nine-year-old; see also *Northern Territory Central Authority & Gambini* supra (n30) at paras [152]-[153]. In *Director-General, Department of Families, Youth and Community Care v Thorpe* supra (n34) the courts also considered the objections of a nine-year-old; In *Director General, Department of Community Services v M & C* supra (n30), the courts considered the views of an eleven- and nine-year-old; and many other foreign jurisdictions have considered young children’s views e.g. Germany, Sweden and England this has occurred. *Agee v Agee* [2000] FamCA 1251; (2000) FLC 93-055 also considered the views of a nine-year-old. However *Thorpe* (supra (n34)) also indicated that their views are not decisive. HCCH op cit (n25) at para [50] indicated that the support for the fact that the child’s opportunity to be heard despite whether the exception is satisfied or not is a major benefit to both the 1980 and 1996 Conventions as the national law of most signatory countries is being considered in this regard.

‘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 [s]tate relating to the protection of human rights and fundamental freedoms.’

Regulation 16(3)(d) provides:

‘[T]he return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.’

[2] As the South African courts have not at this point had the opportunity to consider a case in which an Article 20 exception/defence is raised, it is submitted that the South African courts could benefit through the consideration of the Australian approach to the interpretation and application of their Regulation 16(3)(d) if faced with such a case. In South Africa it is assumed that the abducting parent will need to show that one or more of the child’s fundamental rights in terms of the Bill of Rights²²⁵ would be violated if the child’s return was ordered.²²⁶ A strict interpretation must therefore be applied²²⁷ and the defence will only succeed in exceptional circumstances.²²⁸ The Hague Convention’s interpretation has allowed courts faced with such an exception to consider their own independent law in this specific regard.²²⁹

[3] In terms of the Australian law the cases of *Director-General, Department of Families, Youth & Community Care v Bennett* [2000] FamCA 253 and *A & GS & Others* [2004] FamCA 967 discuss the Regulations which provide that the return of the child will also not be granted by the fundamental principles of Australia in regards to human rights and fundamental freedoms.²³⁰ It is clear that this exception is only applicable in exceptional cases and is not directed at the developments which have occurred on an international level but is rather concerned with the principles accepted by the law of the requested state, either through general international law, treaty law or other internal legislation.²³¹ Therefore in order to refuse a child’s return in terms of this exception, it is necessary to show that the

²²⁵ Chapter 2 of The Constitution of the Republic of South Africa Act, 1996; Clark op cit (n1) at para [23] which indicates that if the rights to dignity (section 10 of the Constitution), freedom and security of the person (Section 12 of the Constitution), Privacy (section 14 of the Constitution) and children’s rights (section 28 of the Constitution) would be infringed by the child’s return, then the court should not order the return of the child; Heaton (2010) op cit (n10) 317.

²²⁶ Du Toit op cit (n10) 367; Skelton & Carnelley op cit (n169) 281.

²²⁷ Clark op cit (n1) at para [23].

²²⁸ C Nicholson ‘Introduction to the Hague Convention on the Civil Aspects of International Child Abduction’ in CJ Davel (Ed) *Introduction to Child Law in South Africa* (2000) 240; Nicholson op cit (n3) 236-237.

²²⁹ *Central Authority of the Republic of South Africa and Another v LG* 2011 (2) SA 386 (GNP) at ‘Flynote’ and 392C-F, referring to *Senior Family Advocate, Cape Town, and Another v Houtman* supra (n30) at para [23].

²³⁰ Regulation 16(3)(d) of the Family Law (Child Abduction Convention) Regulations, 1986; Fehlberg & Behrens op cit (n28) 309.

²³¹ *McCall and McCall and the State Central Authority* supra (n9) at para [110].

fundamental principles of the requested state, regarding the Hague Convention's subject matter, would be violated and it is thus not sufficient to show that the child's return would merely be incompatible with these principles.²³²

[4] *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* provides the following:²³³

'The inclusion of this ... regulation was part of the compromise reflected in the drafting of the Convention designed to avoid broad grounds of exception based on public policy and to confine exceptions to a limited number expressly enumerated. Regulation 16(3)(d) ... would apply where the person opposing the order established that, in the country of habitual residence, matters regarded in Australia as fundamental to the protection of human rights and freedoms would not be observed were the child returned. Amongst other things, this would include a case where it was demonstrated that, notwithstanding formal adherence to the Convention, the authorities and officials of the country of habitual residence were corrupt, that due process would be denied to the child or to the custodial parent or that, otherwise, basic human rights would not be respected.'

Bennett further provides that Regulations 16(3)(b) and (d) reflect the provisions of Article 13(b) and 20 of the Hague Convention and that these articles must be narrowly construed so that the Hague Convention's purpose is not compromised.²³⁴ It was further held that this Regulation is extremely narrow and is limited to circumstances in which the child's return should not be ordered by the fundamental principles of Australia regarding the protection of human rights and fundamental freedoms.²³⁵

²³² *Ibid* at para [111].

²³³ *A & GS & Others* [2004] FamCA 967 at paras [105] & [106]; *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* supra (n2) at 88, 399. The court rejected the views of the trial court that the successful invocation of this Regulation involves a consideration of the child's rights as a repatriation had a potentially adverse consequence to the child but not for the rights of the child (para [102]) as the Trial Judge had erroneously limited the discretion by referring to the child's human rights which would be removed by the exclusion and the rights of the appellant (para [103]). In regards to *McCall* the Regulation regarding it meant a provision that could be invoked in rare occasion that the return would completely shock the conscience of the court or offend the notions of due process (para [104]). It was also indicated that the evidence of an intolerable situation would be capable of attracting the operation of the discretion in terms of Regulation 16(3)(d).

²³⁴ *Director-General, Department of Families, Youth and Community Care & Bennett* [2000] FamCA 253 at para [25]; Hague International Child Abduction Convention; Text and Legal Analysis, Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10, 509 (March 26, 1986) prepared by the US State Department.

²³⁵ *Director-General, Department of Families, Youth and Community Care & Bennett* supra (n234) at para [56].

[5] *McCall and McCall* stated that a return without treating the child's individual welfare or best interests as paramount would not breach Regulation 16(3)(d).²³⁶

'The point is made that to be able to refuse to return a child on the basis of this Article, it would be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible with these principles ... It is clear that the applicant in the present case could not satisfy these tests and indeed it is difficult to imagine a situation in which this test could be satisfied as a distinct test from that set out in Regulation 16(3)(b). However, that issue can no doubt be resolved in the future.'

[6] It is submitted that South Africa should adopt the approach of the Australian courts if ever faced with a case of such a nature. In regards to the Australian approach in terms of *McCall* regarding welfare, South Africa should avoid the adoption of this approach as it may undermine a so far effective use of the Hague Convention as a mechanism for return. The approach in *DP and JLM* and *Bennett* are of assistance to South Africa in regards to this exception.

8. Conclusion

[1] In conclusion this chapter has discussed the adoption of the Hague Convention in both South Africa and Australia and has determined that the incorporation of the objectives and principles within each country respectively is constitutional. It is submitted that the approaches adopted in both countries in regards to the requirements of wrongful removal, custody rights and habitual residence for the launching of a successful application for a child's return are similar if not identical in nature.

[2] The rule of preemptory return operates the same in both countries in regards to the consideration of the time period of a year. The approach adopted by South Africa in regards to the exception provided for in terms of Article 12 of the Hague Convention is submitted as adequate and thus that the Australian approach herein need not be adopted. In regards to the exception provided in terms of Article 13(a) of the Hague Convention in South Africa and Regulation 16(2)(a)(i) of the Australian Regulations, it is submitted that the approach in each country is adequate as this exception actually forms a part of the primary requirements for a successful application to be launched in either country. Thus South Africa

²³⁶ Ibid at para [57]; *McCall and McCall*; *State Central Authority (Applicant)*; *Attorney-General of the Commonwealth (Intervener)* supra (n9) at 81,519.

should not adopt the Australian approach herein as each country approached custody rights in a separate and domestically legislative manner.

[3] The exception provided for in terms of Article 13(a) of the Hague Convention, in regards to consent and acquiescence and that provided for in terms of the Australian Regulation 16(3)(a)(ii), is adequately interpreted and applied within South Africa and thus although the Australian perspective provides insight, it is submitted that South Africa should not adopt Australia's interpretation and application of the defence herein.

[4] In regards to the concept of grave risk of harm in terms of Article 13(b) and Regulations 16(3)(b) it is submitted that South Africa should not adopt the Australian approach herein. This is due to the fact that even though Australia has had many more years experience and opportunity to discuss and interpret this exception, they have still not entirely settled on an approach herein. South Africa has, through the circumstances placed before the courts, adequately interpreted such an exception and thus should not delve into adopting the Australian approach which remains unsettled.

[5] The exception surrounding the child's objections in both Australia and South Africa is based on similar legislative and statutory understandings. However, in this regard it is submitted that South Africa would benefit from considering the Australian approach hereto in cases placed before it for reasons previously discussed.

[6] The final exception regarding human rights violations has not yet been interpreted sufficiently by the South African courts as no case has raised such an exception. Therefore evidently the approach of the Australian courts, which have had an opportunity - although a limited one - to consider the approach required herein, should be adopted. It is, however, submitted that human rights violations may be of relevance to those non-convention countries a child may have been returned to, however, this is not the domain of the Hague Convention's application.

[7] Therefore in conclusion it is further submitted that South Africa's approach in terms of the Hague Convention is academically, internationally and practical sound through its comparison to the first world country of Australia.

Chapter Five: Conclusion

[1] This Study between Australia and South Africa was introduced in Chapter [1] with a brief discussion of the formation of the basic Convention under discussion, the Hague Convention on the Civil Aspects of International Child Abduction, 1980. The Hague Convention's purposes and objectives were then discussed as well as its place amongst other international treaties and conventions in regards to the world wide phenomenon referred to as international parental child abduction.

The application and interpretation of the Hague Convention within South Africa and its incorporation within the Australian domestic law through the creation of the Family Law (Child Abduction Convention) Regulations, 1986 was also discussed. This involved the brief discussion and comparison of the requirements in each country for a valid application to be launched within them.¹ Australia was chosen as the country of comparison as has been previously indicated because it bases its law on the topic on the same Convention which South Africa incorporates within their domestic law, however, Australia accomplished this through its incorporation in terms of Regulations. Furthermore, South Africa and Australia are both premised on the concept of the best interests of the child principle in all matters affecting a child. This was therefore an adequate starting point for the comparison of the application and the interpretation of the exceptions/defences against the rule of preemptory return in both countries herein.

[2] Chapter [2] discussed the South African application and interpretation of the Hague Convention with specific emphasis on the five separate exceptions available to the rule of preemptory return in terms of Article 12 of the Hague Convention. Chapter [3] considered the Australian approach to the interpretation and implementation of the Regulations which pertain to the Hague Convention, with specific focus on the five individual exceptions/defences to the rule of preemptory return. Chapter [4] involved a comparative discussion focused mainly on each countries interpretation and application of the exceptions/defences in terms of the Hague Convention and the Australian Regulations.

¹ Article 3, 4 and 5 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and Regulation 16 (1A) of the Family Law (Child Abduction Convention) Regulations, 1986.

[3] Although Australia has ensured that the Hague Convention has been regulated and enforced within its borders since 1986 and South Africa, since 1997, it is submitted that despite Australia having a few more legislative years of interpretation and application of the concepts and requirements surrounding a parental abduction, South Africa has basically reached the same conclusions and interpretations and habitually applied them in such matters whereas the Australians still grapple with interpretative issues in a vast majority of case law.

[4] It is therefore submitted that South Africa's approach to the implementation and application of the five exceptions available to the rule of return peremptory return are of an internationally comparative and competitive level. This is submitted as South Africa, although a democracy only since 1994 has developed and interpreted the application and enforcement of each exception/defence along the same lines and developments as that of Australia. The two exceptions, however, where it is submitted that South Africa should draw from the approach adopted by the Australian authorities, pertain to the exception of the child's objections within Article 13 of the Hague Convention as well as the approach to the Article 20 regarding human rights violations. In regards to Article 20, this is because South Africa has not had an opportunity to discuss an Article 20 exception/defence as it is yet to be raised in a Hague Convention application within its borders.

[5] Therefore it is submitted in conclusion that the position in regards to the Hague Convention and its application and interpretation within South Africa is internationally sound in comparison to the learned country of Australia which still grapples with detailed case law in assessing its position and regulation of such abductions. It is not denied that there are cases involving non-convention countries which do not allow for the application of this major Convention nevertheless, its application in cases involving signatory states and international parental abduction has been of assistance to many left-behind parents in retrieving their child or children. However, it is necessary to point out that the Hague Convention cannot easily assist in cases where abducting parents use underhand methods to hide the child and it is to be recognized that the abducting parent often has many fears and worries which result in an abduction occurring so as to fulfil their parental instinct of protection.

[6] Thus in conclusion, South Africa's application and interpretation is submitted as internationally competitive and legislatively sound in regards to its adoption and application of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

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For further general information regarding international parental child abduction kindly see the following websites:

South Africa: The Department of Justice and Constitutional Development available at
www.justice.gov.za.

Australia: Child Recovery Australia, available at <http://www.childrecoveryaustralia.com>;
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