

**INTERNATIONAL CHILD ABDUCTION: AN
EXAMINATION OF THE APPLICATION OF THE
HAGUE CONVENTION'S 'GRAVE RISK OF
HARM' EXCEPTION IN AUSTRALIA**

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I, Zoe Botica, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

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ABSTRACT

Grave Risk of Harm - Hague Convention- International Child Abduction- Comity- Domestic Violence- Non-Convention Countries- Australia

The rise in international parental child abductions can be attributed to the growing rate of inter-cultural marriages and divorces, the increasing ease of international travel, and cross-border communication via the use of technology. This has prompted the development of the *Hague Convention on the Civil Aspects of International Child Abduction* to provide a procedure for the prompt return of an abducted child to their 'habitual residence'.¹ The Convention aims to protect children from harm as well as to deter parents from crossing borders to find a more favourable court.

This dissertation provides a discussion as to how effectively and consistently the 'grave risk of harm' exception per Article 13(1)(b) of the *Hague Convention on the Civil Aspects of International Child Abduction* is applied by Australia's family courts.² Three main areas of: international comity, domestic violence and Non-Convention countries guide this discussion.

Firstly, it explores how in recent times Australian courts have been broadly interpreting the exception. It then makes comparisons with the stricter approaches taken by the USA and the UK. The preliminary chapter concludes that Australian courts need to balance protecting comity and upholding the interests of children when making decisions.

The second chapter focuses on the difficulty with applying the exception in Hague Convention cases concerning victims of domestic violence. A line of Australian cases and comparisons made with the USA and UK court's approaches reveals the tension courts face between promoting the quick return of an abducted child and adequately assessing evidence of domestic violence claims to protect the children concerned. This section also deals with suggestions from the recent Draft Guide to

¹ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13(1)(b).

² *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13(1)(b). Article 13(1)(b) provides that an abducted child can avoid return if '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'.

Good Practice, which has a significant focus on domestic violence cases.³ Overall, it advocates that there must be a balance between considering the wellbeing of the child but not too far so as to undermine the return mechanism of the Convention.

The final chapter concentrates on Non-Convention countries as a barrier for Convention countries to uphold the objectives of the Convention. It discusses ways in which Australia deals with these countries by comparing Australia's bilateral agreements with Lebanon and Egypt with the UK-Pakistan Protocol. It also stresses the difficulty with remedying child abductions to Islamic countries due to the influence of Shari'a law, and proposes that the 'Malta Process' is a beneficial international approach to assist Australia in dealing with Muslim Non-Convention countries.

This dissertation provides an analysis of how the Article 13(1)(b) exception is interpreted by Australian courts including in cases concerning domestic violence victims and Non-Convention countries. Overall, it suggests ways to make the domestic application of the Article 13(b) exception more coherent and in uniformity with international approaches to better fulfil the Convention's objectives.

³ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017).

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I INTRODUCTION

The prevalence of international child abduction continues to escalate. This can be attributed to the rise in intercultural marriages and divorces, the increasing ease of international travel, and cross border communication via the use of technology.¹ The *Hague Convention on the Civil Aspects of International Child Abduction* of 1980 (referred to as the ‘Hague Convention’ or ‘the Convention’) attempts to combat the increasing rates of abduction by providing a system of cooperation between Central Authorities to allow for the quick return of the abducted child to their place of habitual residence. The Convention requires each Contracting State to appoint a Central Authority to enforce its articles to achieve the Convention’s goals.

The Convention provides several exceptions to the general rule that an abducted child is to be returned to their place of habitual residence. The focus of this dissertation will be on the ‘grave risk of harm’ exception (referred to as ‘the exception’ and ‘Article 13(1)(b)’) which gives the requested State discretion to order the return of the abducted child if there is ‘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’.² The crucial terms ‘grave risk’ ‘physical or psychological harm’ and ‘intolerable situation’ are not defined within the Convention itself, which creates interpretational difficulties for courts worldwide.

This research asks the question; how effectively and consistently has Australia applied the grave risk of harm exception under the Hague Convention? It proposes to evaluate the consistency of Australia’s application of the exception by comparing Australia’s approach with that from the UK and the USA family courts. It then aims to propose the correct method for dealing with abduction cases generally and in cases concerning domestic violence victims or Non-Convention countries.

¹ Smita Aiyar, ‘International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach’ (2007) 21 *Emory International Law Review* 277, 277.

² *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13(1)(b).

This dissertation is structured into five main chapters. The preliminary section discusses the legal framework of the Hague Convention by providing an insight into the major Convention objectives and introducing the exceptions, particularly the Article 13(1)(b) exception.

The second chapter examines the need to balance comity and children's interests when applying the exception by outlining Australia's interpretation and application of Article 13(1)(b) in comparison to that from the UK and America.

The third chapter brings attention to the difficulty with applying the exception in cases concerning victims of domestic violence. It looks into the approaches from Australia, the UK and the USA to reveal the tension that exists between promoting the quick return of an abducted child, and adequately assessing evidence of domestic violence to protect the children concerned. It concludes by identifying the suggestions made in the Draft Guide to Good Practice 2017 (Draft Guide) to improve the operation of the Convention.³

The final chapter examines the struggle with upholding the Convention's objective— to provide for the quick return of an abducted child— in cases concerning Non-Convention countries, particularly countries whose laws are based upon Shari'a law. It assesses the effectiveness of Australia's bilateral agreements with Lebanon and Egypt compared to the UK-Pakistan Protocol. Additionally, it proposes that the 'Malta Process' is a step in the right direction to promote communication between Convention and Muslim Non-Convention countries. Overall, this paper asserts that Australia's approach to Article 13(1)(b) is satisfactory, but it needs to improve in order to better deal with Non-Convention Muslim countries, and to achieve a balance between protecting comity, upholding the Convention's objectives and protecting victims of domestic violence.

³ Ibid.

A Significance and Methodology

In October 2017, the Hague Conference on Private International Law released a preliminary Draft Guide on Article 13(1)(b) of the Hague Convention.⁴ This guide identified Article 13(1)(b) as being among the most commonly raised exceptions to the return of a child.⁵ Additionally, the document highlights the fact that case law from various jurisdictions indicates the provision may be applied differently among jurisdictions and among competent authorities. The guide's objective to address the need to 'promote consistency in the instrument's application at the global level,' is in line with the focus of this paper.⁶

Very few writers apart from the leading academics in this area (Frank Bates and Danielle Bozin) have taken an Australian perspective of the issues arising in this paper and addressed by the Draft Guide.⁷ By focusing on Australia's interpretation it is intended that decision-makers will benefit from a synthesis of how Australia fits in compared to other Contracting States, and as to whether Australia's approach to the grave risk of harm exception is consistent with the Convention's objectives and the reaffirmed intentions of the drafters as explained by the 2017 Draft Guide.

This dissertation predominantly uses doctrinal research methodology and comparative law to achieve its aims. Doctrinal research method uses cases, statutes and rules to make coherent or justify a segment of the law as part of a system of law.⁸ It has been classified as qualitative research because it involves a 'process of selecting and weighing materials taking into account hierarchy and

⁴ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017).

⁵ *Ibid* 1 [2].

⁶ *Ibid* 2 [5].

⁷ *See Generally*, Frank Bates, 'Grave Risk, Physical or Psychological Harm or Intolerable Situation: High Court of Australia's View' (2003) 11 *Asia Pacific Law Review* 43; Frank Bates, 'Undermining the Hague Child Abduction Convention: The Australian Way...?' (2001) 9 *Asia Pacific Law Review* 45; Frank Bates, 'More Abduction Cases from Australia: An Inevitable Development' 14 *Asia Pacific Law Review* 123; Danielle Bozin, 'The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance Between Comity and the Best Interests of the Child' (2016) 35 *University of Tasmania Law Review* 24.

⁸ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 84.

authority as well as understanding of social context and interpretation'.⁹

International interpretive documents, government explanatory notes and memoranda and legal commentary are used to define the correct approach to interpreting Article 13(1)(b). Law reform publications from Australia and other Contracting States as well as the International Hague Conference materials are used to assess the need for reform, especially in the area of protecting victims of domestic violence in these cases.

Comparative law methods are also used throughout in order to discover, explain and evaluate the similarities and differences between legal systems.¹⁰

Considering that all Convention countries have implemented uniform laws on the issue, this paper encourages uniformity when interpreting Article 13(1)(b) rather than suggesting a reform of the exception itself. The main comparisons are made between Australia, the UK and the USA. This is justified because of the level of commonality between jurisdictions. Each country uses: decision-making derived from the English system of common law, they rely on judicial opinion and precedent when deciding cases, and the accessibility of these judgments written in English avoids problems with misinterpreting the judge's opinion after translation.

The relevant comparative law approaches used are: functional and the common core approach. The functional approach 'compares practical solutions to similar problems in the areas of different legal systems by looking at how the problem is solved across jurisdictions'.¹¹ This method was used when inquiring into domestic violence issues to compare Australia, the USA and the UK legal systems' means of dealing with domestic violence cases under the Hague Convention. The common core approach focuses on how 'different legal systems solve cases rather than on specific legal rules'.¹² Hoecke provides the example that in the European Union, common-core method would be used to look at

⁹ Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 22, 23.

¹⁰ Ralf Michaels, 'Comparative Law' in Jurgen Basedow, Klaus Hopt and Reinhard Zimmerman (eds), *Oxford Handbook of European Private Law* (Oxford: Oxford University Press, 2011); Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review*, 451, 455.

¹¹ Mark Van Hoecke, *Methodology of Comparative Law* (December 2015)

<<http://rem.tijdschriften.budh.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>>.

¹² *Ibid.*

commonalities to determine how a legal rule can be interpreted to suit the different nations.¹³ This paper takes a similar approach. It involves an assessment of the differences and commonalities in the interpretation of the exception across Australia, the UK and the USA. In doing so it will discuss how the Article 13(1)(b) exception should be interpreted to suit the needs of its signatories, as well as how Australia can interpret the exception in line with principles of comity whilst balancing the interests of children.

¹³ Ibid.

II LEGAL FRAMEWORK

This chapter will give an overview of the Hague Abduction Convention of 1980 and will introduce the ‘grave risk of harm’ exception per Article 13(1)(b) to provide essential background to the topic.

A The Hague Convention of 1980 on the Civil Aspects of International Child Abduction

The Hague Convention developed by the Hague Conference on Private International Law was adopted on 24 October 1980.¹ It was ratified by Australia on 25 October 1986 and came into force on 1 January 1987. There are currently 98 Contracting Parties to the Convention with the most recent being Tunisia.² It has two objectives, which are:

- (1) to secure the prompt return of children wrongfully removed or retained in any Contracting State and;
- (2) to ensure that rights of custody and access under the law of one Contracting State are respected in other Contracting States.³

The Convention seeks to ‘restore the pre-abduction status quo’ and to deter parents from crossing borders in search of a more sympathetic court.⁴ The return allows the relevant Contracting State to deal appropriately with any criminal penalties for abductors and custody implications for the abducted child.⁵

The Convention was drafted to provide a mechanism to promptly return an abducted child to their ‘habitual residence’ in order to protect children from the

¹ Elisa Pérez-Vera, ‘Explanatory Report on the Hague Child Abduction Convention 1980’, (Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law, Vol. III, April 1981), 426.

² HCCH, *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Status Table* (2 August 2017) < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> >.

³ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 1.

⁴ *Friedrich v Friedrich*, 78 F.3d 1060, 1064 (6th Cir.1996); *Maumousseau and Washington v France* (C-39388/05) [2007] ECHR [69].

⁵ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89.

harmful effects of wrongful removal or retention abroad.⁶ To secure the return of the child, the applicant must establish the requirements under Article 3:

- (1) the child must have been a habitual resident of another State;
- (2) the removal or retention has to have been in breach of custody rights under the laws of the other State and;
- (3) the person removing the child must have been exercising rights of custody at the time of the removal or retention.⁷

The Convention will apply if these requirements are met and the child is under 16-years-old.⁸

B Exceptions to a Return Order

The Australian regulations that give effect to the Hague Convention are a replica of the Convention itself and include certain exceptions to the prompt return mechanism.⁹ A court has the discretion to deny the return of an abducted child if one or more of the exceptions are substantiated. The exceptions include where: the child objects to being returned and is mature enough for their view to be considered,¹⁰ if over a year has passed since the wrongful removal or retention and the child has become settled in their new environment,¹¹ if the party seeking the return consented or acquiesced to the child's removal or retention,¹² if the return would violate fundamental principles of human rights and fundamental freedoms in the country where the child is held,¹³ and/or if the party seeking return was not exercising rights of custody and access at the time of wrongful removal or retention.¹⁴ The final exception and focus of this dissertation is the

⁶ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, Preamble.

⁷ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 3; Zadora Hightower, 'Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases' (2013) 22(2) *Michigan State International Law Review* 637, 643.

⁸ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 4.

⁹ *Family Law (Child Abduction Convention) Family Law Regulations* 1986 (Cth).

¹⁰ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13.

¹¹ *Ibid* art 12.

¹² *Ibid* art 13(a).

¹³ *Ibid* art 20.

¹⁴ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13(a).

‘grave risk of harm’ exception found under Article 13(1)(b). The exception reads that: the requested State is not bound to order the return of that child if it is established that ‘there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’.¹⁵

According to the Explanatory Report, the exceptions to the rule concerning the return of the child are to be applied ‘only so far as they go and no further’.¹⁶ It emphasized that the exceptions are to be interpreted in a ‘restrictive fashion if the Convention is not to become a dead letter’.¹⁷ However, there is an absence of any further guidance as to what is meant by a narrow interpretation of the exceptions, nor was there any indication as to the meaning of the terms ‘grave risk of harm’, ‘physical or psychological harm’ and ‘intolerable situation’. This has created interpretive issues for Contracting States internationally and has resulted in conflicting approaches to the interpretation of the ‘grave risk of harm’ exception.

¹⁵ Ibid art 13(b).

¹⁶ Pérez-Vera, above n 1, 434 [34].

¹⁷ Ibid.

III INTERNATIONAL COMITY AND BALANCING CHILDREN'S INTERESTS WHEN APPLYING THE 'GRAVE RISK OF HARM' EXCEPTION

This chapter discusses the necessary balance between comity and protecting the interests of children in Hague Convention cases. Australia's interpretation of Article 13(1)(b) was historically strict, however recent cases adopt a liberal view placing more emphasis on the impact of the return order on the child. Comparisons are made between the United Kingdom and America to conclude that the best method of interpretation should be one that considers the impact of the child post-return, but not so extensively that the court undermines comity and begins to consider custody questions— as Australia has done.

A Comity

'Comity' is a fundamental principle in private international law whereby 'the courts of one state respect the rules, customs and laws of another state whether by acts of restraint or by acts of cooperation'.¹ Globalization has resulted in the movement of persons, which creates the need for comity and the respect for decisions of foreign courts.² Comity, or the notion of judicial courtesy is at the heart of the Convention. The Hague Convention requires each Contracting State to choose a Central Authority to enforce its articles and to cooperate with other Contracting States to achieve the Convention's goals.³ The Australian Central Authority is the Commonwealth Attorney General's Department, but each State and Territory has its own organ with the responsibility of administering the Convention.⁴ In the spirit of comity, when considering the risk to a child upon return, it is assumed that authorities from the requesting state are capable of protecting children.⁵

¹ LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (at 21 September 2017) 'Comity'.

² Elizabeth Buckel, 'Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 *Georgetown Journal of International Law* 1281; Rhona Schuz, 'The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency' (2014) 40 *Brooklyn Journal of International Law* 32, 33.

³ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 6.

⁴ *Eg.* The Commissioner for Police in WA.

⁵ *Re H* [2003] 2 FLR 141.

B *The Best Interests of the Child*

The Convention was drafted prior to the *Convention on the Rights of the Child*,⁶ which means that the ‘best interests of the child’ is not a recognized standard within the Hague Convention. Rather, it serves the interests of children collectively by ‘detering international abduction’, ‘promoting comity’ and establishing procedures for the ‘prompt return’ of an abducted child to their habitual residence.⁷

In Australia, the *Family Law Act 1975* (Cth) in Part VII continually emphasizes the ‘Paramountcy principle’, which is the requirement for courts to regard the best interests of the child as paramount when making any order relating to a child.⁸ Despite being a significant feature of Australia’s system, the Paramountcy principle is not relevant to abduction proceedings. The Convention’s function is to first locate the correct forum, then to ‘have faith [that] the domestic law of the other Contracting States will deal properly with matters relating to the custody of children’.⁹ This proves difficult for Australian courts as they face tensions between upholding comity and quickly returning an abducted child, and protecting the interests of children, which is at the core of Australia’s family law system.

The intention of the drafters of the Hague Convention was to promote comity by leaving custody considerations to the court of the child’s habitual residence—the more appropriate jurisdiction to solve these questions.¹⁰ The Special Commission argued that Article 13(1)(b) is to be interpreted in a ‘restrictive way’ but also stressed that

⁶ United Nations Convention On The Rights Of The Child (Entered Into Force 20 November 1989), art 3.

⁷ *De L v Director General, NSW Department of Community Services and De L* (1996) 187 CLR 640; Jodi Anne Gray, ‘Respecting Human Rights In the Drafting and Interpretive Stages of the Hague Convention On The Civil Aspects of International Child Abduction’ (2002) 17 *Australian Journal of Family Law* 270, 3; Gina Masterton, ‘Australia’s Embrace of the 1980 Hague Abduction Convention: How the Judiciary’s Narrow Interpretation of the ‘Grave Risk of Harm’ Exception Harms Abused Taking Mothers and Their Children,’ (LLM Thesis, Queensland University of Technology, 2016) 24; See, eg, *W* [1993] 2 FLR 211, 220; *S v S* [1999] NZFLR 625, 631; *Re P* [1998] 2 FLR 825.

⁸ *Family Law Act 1975* (Cth) s 60CA, 65AA, 67L.

⁹ *De L v Director General, NSW Department of Community Services and De L* (1996) 187 CLR 640; Andrew Davies, *Australia’s Approach to International Child Abduction: Practical Experiences & Lessons Learnt*, O’Sullivan Davies Lawyers (8 May 2009) <<https://www.osullivandavies.com.au/images/pdf/Hague%20Convention%20Paper%20Lawasia%20Seminar.pdf>>.

¹⁰ Elisa Pérez-Vera, ‘Explanatory Report On The 1980 Hague Child Abduction Convention, 1980’ (Hague Conference On Private International Law, Acts And Documents Of The Fourteenth Session of the Conference on Private International Law, Vol. III, April 1981) 429; *C v C* [1989] 2 All ER 465, 471; HCCH, *Outline of the Hague Child Abduction Convention* (May 2014) HCCH <<https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf>>; *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 16.

‘courts should show greater sensitivity to the dangers a child may face upon return’.¹¹ In addition, they asserted that the ‘child’s habitual residence is the most appropriate to adjudicate custody and related claims’.¹² The Commission drew attention to this balancing act– between comity and considering children’s interests– that courts face when ‘grave risk of harm’ cases arise, so the next consideration is whether Australian courts effectively strike this balance.

C Australia’s Interpretation of Article 13(1)(b)

In order to foster comity, Australian courts must trust the ability of other Requesting State’s courts to impose appropriate measures regarding custody proceedings. The respect and reciprocity of the Convention will only work if countries conform to ‘both its letter and its spirit’.¹³ Justice Kirby cautioned that if Australian courts do not fulfill the expectations of the Convention ‘[Other countries may] decline to extend to our courts the kind of reciprocity and mutual respect, which the Convention puts in place’.¹⁴ When applying Article 13(1)(b), there must be a balance between respecting other legal systems by adopting a restrictive interpretation, and not being too restrictive in a way that jeopardizes the purpose and potential application of the ‘grave risk of harm’ exception to future cases.

In Australia, earlier case law reveals a strict approach when considering non-return exceptions, resulting in many return orders. Australian courts relied upon the ability of other courts to resolve disputes and protect the child.¹⁵ In fact, in *Murray v Director, Family Services ACT* the court found it to be ‘presumptuous and offensive in the extreme’ for a court to conclude the child is incapable of being protected by the

¹¹ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017) 7 [25].

¹² *Ibid.*

¹³ Michael Kirby, ‘Children Caught in Conflict- The Child Abduction Convention and Australia’ (2010) 21 *Australian Family Lawyer* 1, 1, 7.

¹⁴ Kirby, above n 13, 8; Danielle Bozin, ‘The Hague Child Abduction Convention’s Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance Between Comity and the Best Interests of the Child’ (2016) 35(1) *The University of Tasmania Law Review* 24, 34.

¹⁵ Sally Nicholes, ‘Life After “DP and JLM”’: How Have Australian Courts Approached Hague Matters After the High Court’s Majority Judgment in 2001’ (Paper presented at The 5th Australian Central Authorities Conference 2004, Canberra, 27-28 May 2004) 10.

requesting country.¹⁶ *Director-General of the Department of Family and Community Services v Davis* concerned the removal from the United Kingdom to Australia of two young children by their mother.¹⁷ Justice Nygh approved the reasoning of Justice Lawrie and decided that upon return the children would be highly anxious and would seek security from their mother, as would any child after a marital breakdown.¹⁸ However, His Honour concluded that the exception should be read ‘disjunctively’; therefore it is insufficient to establish a degree of psychological harm, it must be ‘substantial, severe and be comparable to an intolerable situation’.¹⁹ There was absence of evidence to constitute any more psychological impact on the children other than short-term separation anxiety, so they were returned. Accordingly, the severity of risk to the child must be ‘worse than is inherent in the inevitable disruption, uncertainty, and anxiety which follows an unwelcome return’.²⁰

In *Director-General Department of Families, Youth and Community Care v Hobbs*, the 5-year-old child was brought to Australia from South Africa by her mother whom was divorced and had custody; the father had access.²¹ The mother submitted that the exception would be satisfied because she did not wish to return to live in South Africa, because she was breastfeeding her newborn, and because the infant’s father did not consent to that child returning to South Africa.²² This case was distinguished from *State Central Authority of Victoria v Ardito*, which involved a taking mother who consented to escort her 2-year-old child to the USA. However, she was legally unable to obtain a visa to do so.²³ The court found that the child would be in an ‘intolerable situation’ if sent alone. In contrast to *Hobbs*, there was no legal impediment to the

¹⁶ *Murray v Director, Family Services ACT* (1993) FLC 92-416; *See also Gsponer v Director General Department of Community Services, Victoria* (1989) FLC 92-001; *De L v Director-General NSW Department of Human Services and De L* (1996) 187 CLR 640; Nicholes, above n 15, 11.

¹⁷ *Director-General of the Department of Family and Community Services v Davis* (1990) FLC 92-182.

¹⁸ *Ibid* [16].

¹⁹ *Ibid* [20].

²⁰ *Re C* [1999] 1 FLR 1145, 1154, Ward J; *See also, DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services* (2001) 206 CLR 401.

²¹ *Director-General Department of Families, Youth and Community Care v Hobbs* (2000) FLC 93-007.

²² *Ibid* [82].

²³ *State Central Authority of Victoria v Ardito* (Unreported, Family Court of Australia, Joske J, 29 October 1997).

mother, apart from that of her own doing.²⁴ The fact that she was in a dilemma did not satisfy the Article 13(1)(b) threshold.²⁵

Since then, Australian courts have adopted a slightly more liberal view by placing greater consideration on the impact of the return on the child. In the High Court case of *DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services*, the court looked to the ‘ordinary meaning’ of the Convention rather than considering the importance of comity, which promotes the narrow construction of the exceptions.²⁶ In *DP* the mother brought her 4-year-old to Australia from Greece without the father’s consent. After arriving, the child was diagnosed as being autistic.²⁷ To justify a non-return order the mother showed evidence that Greece would not have the same Autism support facilities as Australia. The primary judge and Full Court found that she had not adequately demonstrated the lack of support services in Greece. *JLM* was heard concurrently.²⁸ In this case both parents brought the child to Australia from Mexico in 1998. One month later, the father returned to Mexico but the mother and child remained in Australia. When the mother was due to return with the child she refused, so the father applied for a return order. The mother asserted Article 13(1)(b) on the basis that she would commit suicide if the child were returned which would cause the child psychological harm, but the Full Court believed that this claim was not sufficiently supported by evidence.

Rather than drawing interpretation from the Convention, the majority of the High Court concluded that in deciding return cases there should be ‘some hearing into what will be the child’s best interests’.²⁹ The majority acknowledged the need for a quick return but also that the exceptions extend to matters touching the ‘welfare of the child.’³⁰ The court assessed the existence of risk to the children and gravity of that

²⁴ *Director-General Department of Families, Youth and Community Care v Hobbs* (2000) FLC 93-007 [98]; *State Central Authority of Victoria v Ardito* (Unreported, Family Court of Australia, Joske J, 29 October 1997).

²⁵ *Director-General Department of Families, Youth and Community Care v Hobbs* (2000) FLC 93-007 [104].

²⁶ *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* (2001) 206 CLR 401; Nicholes, above n 15, 1.

²⁷ *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* (2001) 206 CLR 401.

²⁸ *Ibid.*

²⁹ *Ibid* 412, Gaudron, Gummow, Hayne JJ and Callinan J.

³⁰ *Ibid* [20].

risk.³¹ In both decisions the exception was not upheld but considerable emphasis was placed on the child's position post-return which defeats the Convention's purpose to quickly return abducted children. This opened the floodgates for Family Courts to consider underlying custody disputes of each return proceeding. This compromises the speed of resolving Hague Convention cases and causes scope for delay.³² There must be a delicate balance between considering the position of the child post-return, and being restrictive enough to respect the ability of other Contracting States to make custody and welfare determinations upon the child's return.

D UK and USA Approaches to Article 13(1)(b)

Compared to Australia, other Contracting States such as the USA and UK have taken a strict approach to prevent the application of Article 13(1)(b) except for in exceptional circumstances. This section discusses these approaches.

1 United States of America

Federal Courts in the USA agree that the obligations under the Convention should be treated with a high degree of seriousness and must be upheld and 'interpreted strictly, narrowly and uniformly'.³³ This emphasizes the importance US courts place on maintaining the goal of the Convention– to deter future abductions.

The most significant precedent in the US is the opinion from *Friedrich* as to the scope of the exception, which has dominated discussion in cases since.³⁴ *Friedrich* suggested that grave risk of harm only exists in two situations:

- (1) Where return of the child puts the child in imminent danger...[for example] a zone of war, famine or disease or;
- (2) In cases of serious abuse or neglect, or extraordinary emotional dependence, where the court...may be incapable or unwilling to give the child adequate protection.³⁵

The burden is on the Plaintiff to show by 'clear and convincing' evidence that the defence is proper.³⁶ This case essentially recognized that the success of the

³¹ *JMB and Ors & Secretary, Attorney-General's Department* [2006] FamCA 59.

³² *See Genish-Grant v Director-General, Department of Community services* (2002) 29 Fam LR 51; *Director General, Department of Families v RSP* (2003) 30 Fam LR 566.

³³ *Friedrich v Friedrich* 78 F 3d 1060, 1068 (6th Cir, 1996).

³⁴ *Ibid.*

³⁵ *Ibid.*

Convention requires a strict application of its provisions. By comparison to the USA, rather than trying to extract principles to apply when considering Article 13(1)(b), Australian courts tend to make decisions case-by-case. It is unlikely that Australia will adopt a similar test given that the majority in *Director General, Department of Families v RSP* condoned the test stating that it would cause ‘further unnecessary complexity and confusion in this area of law’.³⁷

Additionally, in the US there is a large amount of unanimity on what should *not* determine whether grave risk exists, including: the child’s happiness,³⁸ the best interests of the child,³⁹ the US court’s competence to determine custody compared to a foreign court,⁴⁰ the fitness of the parents, the US court’s disapproval of a foreign court’s custody decisions, the child’s economic wellbeing and rising violence (less than war) in the child’s habitual residence.⁴¹ Particular focus in the US has been on preventing the exception from becoming a means to ‘litigate or re-litigate the child’s best interests’.⁴² The Australian approach is more relaxed with the majority in *DP* accepting that these cases will involve some consideration of the child’s best interests.⁴³

In the US, courts tend to reserve most inquiries of psychological evidence for custody cases instead of abduction proceedings.⁴⁴ By example, in *Re Walsh*, to decide whether the nine-year-old daughter suffered sufficient stress to justify non-return, the court considered verbal and physical abuse by the father to the mother.⁴⁵ However, it was decided that upon return to Ireland with her mother the child would not be subjected

³⁶ *Ibid.*

³⁷ *Director General, Department of Families v RSP* (2003) 30 Fam LR 566 [28].

³⁸ *Friedrich v Friedrich* 78 F 3d 1060, 1068 (6th Cir, 1996).

³⁹ *Whallon v Lynn* 230 F 3d 450 (1st Cir 2000); *Lozano v Alvarez* 697 F 3d 41 (2d Cir 2012); Pérez-Vera, above n 10, 429 [23, 25].

⁴⁰ *Ryder v Ryder* 49 F 3d 369 (8th Cir, 1995); *Danaipour v McLarey* 386 F 3d 289 (1st Cir, 2004); *Baran v Beaty*, 526 F 3d 1340 (11th Cir, 2004); *Khan v Fatima* 680 F 3d 781 (7th Cir 2012);

⁴¹ *Freier v Freier* 969 F Supp 436 (ED Mich, 1996); *Silverman v Silverman* 338 F 3d 886 (8th Cir, 2003); *Cuellar v Joyce* 596 F 3d 505 (9th Cir, 2010); Shani King, ‘The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence’ (2013) 47(2) *Family Law Quarterly* 299, 304.

⁴² *Friedrich v Friedrich* 78 F 3d 1060, 1068 (6th Cir, 1996); Christine, Sutherland, ‘The Balancing Act of the Grave Risk of Harm Exception under the Hague Convention of Civil Aspects of International Child Abuse’ (2015) 38(1) *Suffolk Transnational Law Review* 267, 274.

⁴³ *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* (2001) 206 CLR 401, 412, Gaudron, Gummow, Hayne JJ and Callinan J.

⁴⁴ *Rodriguez v Rodriguez* 33 F Supp 2d 456 (MY, 1999).

⁴⁵ *Re Walsh* 31 F Supp 2d 200, 206 (D. Mass, 1998).

to abuse, so she was returned.⁴⁶ *Walsh* confirmed the strict test employed by US courts that grave risk of harm must be directed at children, and that they are not to make custody orders because ‘allegations of physical and psychological harm should be considered in the children’s home jurisdiction; Ireland.’⁴⁷

The US courts have also placed significant weight on decisions from other jurisdictions to allow for global uniformity of the Convention’s application. For example, in *Ermini v Vittori*, the court decided that severe forms of physical and psychological harm arising from separating a child from autism treatment would trigger the exception.⁴⁸ The eldest child sought autism therapy in New York, as there was no equivalent program in Italy (habitual residence).⁴⁹ With the goal of creating uniformity across jurisdictions, the court accounted for decisions from other Convention countries whereby the risk of harm in removing an autistic child was also sufficiently grave; so the child was not returned.⁵⁰ This is in line with the Convention’s goal of judicial respect and comity so Australian courts should favour this approach.

Overall, the US approach is strict and has not gone as far as Australia has into considering custody determinations and the child’s position post-return. The courts have recognized that implicit in the success of the Convention is a strict application of its provisions.

2 *United Kingdom*

The United Kingdom courts rarely refuse a return based on Article 13(1)(b). In *TB v JB*, Baroness Hale stated that a strict interpretation of this exception must be adopted so it does not become a ‘substitute for the welfare test, usurping the function of the courts of the home country’.⁵¹ Additionally, there is a high standard of proof required of this exception. There must be ‘clear and compelling evidence of grave risk of harm or other intolerability’, which must be ‘substantial not trivial’.⁵² According to *Re D*,

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ermini v Vittori* 758 F.3d 153,158 (2d Cir, 2014).

⁴⁹ *Ibid.*

⁵⁰ *Ermini v Vittori* 758 F.3d 153,166 (2d Cir, 2014); *JMH v AS* [2010] NBR2D 2000; *DP v Commonwealth Central Authority* (2001) 206 CLR 401.

⁵¹ *TB v JB* [2001] 2 FLR 515 [525] (dissenting); *See also, Re H* [2003] 2 FLR141 [29].

⁵² *Re C* [1999] 1 FLR 1145.

although the judge can exercise discretion to refuse a return even if the exception is made out, the threshold should be so high that it need not be necessary to exercise such discretion.⁵³ In the view of Baroness Hale, it was not necessary or desirable to import an ‘additional gloss’ of discretion into the Convention.⁵⁴

Article 13(1)(b) only stands up in exceptional cases.⁵⁵ By example, in *Re F*, it was not enough that the child witnessed violence by his father and was also subjected to violence.⁵⁶ The standard was only reached because of the child’s reaction to the prospect of returning to Colorado: bedwetting, nightmares and aggressive behaviour.⁵⁷ In the unique case *Re D*, the danger of physical injury alone was enough to activate the exception.⁵⁸ This case concerned the abduction of two sisters from Venezuela to the UK by their mother. The father applied for their return but it was denied. Despite the availability for 24-hour protection of the children in Venezuela, both parents were victims of targeted shooting attacks so return was not ordered, as it would place the children in extreme danger.⁵⁹ This narrow interpretation respects the primary aim of the Convention to secure the prompt return of abducted children. It also promotes consistency, fairness and certainty. However, this approach can have harsh impacts on domestic violence victims as will be discussed in the next chapter.

Overall, there should be a balance between protecting victims and ensuring that the Convention’s objectives are not overlooked. By adopting a severely strict approach as in the USA and UK, the essence of the grave risk exception and its purpose— to protect children when the return would expose them to physical or psychological harm— becomes lost. It is important though that Australian courts refrain from delving too far into custody considerations to avoid undermining the principle of comity and judicial reciprocity.

⁵³ *Re D* [2007] 1 AC 619 [55]; *See also, Re M* [2008] 1 AC 1288 at [45]; *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 [52].

⁵⁴ *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55.

⁵⁵ *See Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] 3 WLR 339; *Re M (Abduction: Psychological Harm)* [1997] 2 FLR 690; *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550, *Re D (Article 13B: Non-return)* [2006] EWCA Civ 146; *Klentzeris v Klentzeris* [2007] EWCA Civ 533.

⁵⁶ *Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] 3 WLR 339.

⁵⁷ *Ibid.*

⁵⁸ *Re D (Article 13B: Non-return)* [2006] EWCA Civ 146.

⁵⁹ *Ibid.*

III APPLYING THE ‘GRAVE RISK OF HARM’ EXCEPTION IN DOMESTIC VIOLENCE CASES

This Chapter highlights the difficulty with applying Article 13(1)(b) in Hague Convention cases concerning victims of domestic violence. Domestic violence was not an issue contemplated by the Convention drafters; consequently, there is no exception that provides for domestic violence.⁶⁰ The only means for relief in these cases is Article 13(1)(b). This chapter begins by defining domestic violence in Australia and internationally. Secondly, by discussing some Australian cases, the paper will reveal the existing tension between promoting the quick return of an abducted child and adequately assessing assertions of domestic violence abuse to protect the children concerned.⁶¹ Finally, a discussion of the approach taken by US and UK courts will prove the need to consider protective measures of victims and their children upon return without considering custody questions.

A Domestic Violence in Australian Domestic Law

The prevalence of domestic violence in Australia is extremely high with Australian police officers responding to around 264,028 domestic violence cases annually.⁶² Domestic violence is defined as, ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family or causes the family member to be fearful’.⁶³ In all jurisdictions, domestic violence includes assault (including sexual assault) and intentional damage to the protected person’s property or threats of this behaviour.⁶⁴ This abuse can occur in many relationships, including those between: de-facto, married, divorced/separated, same-sex partners, engaged and

⁶⁰ Merle Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ [2000] 69 *Fordham Law Review* 593, 654, 662; Brian Quillen, ‘The New Face of International Child Abduction: Domestic- Violence Victims Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction’, (2014) 49 *Texas International Law Journal* 621, 625. *Restraining Orders Act 1997* (WA), s6(1)(e)(i)-(ii).

⁶¹ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017) 71.

⁶² Clare Blumer, ‘Australian Police Deal with Domestic Violence Every Two Minutes’, *ABC News* (Online), 21 April 2016 <<http://www.abc.net.au/news/2016-04-21/domestic-violence/7341716>>.

⁶³ *Family Law Act 1975* (Cth), s4AB(1). Family Violence is a broader definition, which encompasses violent, threatening or other behavior that coerces or controls a member of that person’s family or causes that person to be fearful.

⁶⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Domestic Violence Laws in Australia*, June 2009, 15.

couple relationships and between parents and former parents of a child. Examples of behaviour recognised as domestic violence are: assaulting, kidnapping or depriving a person of liberty, causing damage to property or injuring/causing death to an animal or behaving in an intimidating, offensive or abusive manner.⁶⁵ A critical element of this definition is intention— there must be intent to intimidate the person or the behaviour must be ‘reasonably’ expected to intimidate that person.⁶⁶ In addition, a child will be exposed to domestic violence if they ‘see or hear domestic violence’ or otherwise experience its effects.⁶⁷

B *Domestic Violence in International Law*

In recent years, domestic violence has come into the international sphere with the United Nations recognizing that ‘domestic violence remains widespread and affects women across the world’.⁶⁸ They have defined domestic violence as being:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁶⁹

The Draft Guide deals with this definition in the context of Convention cases. It notes that domestic violence encompasses ‘a range of abusive behaviours within the family, including, for example, types of physical, psychological and financial abuse’.⁷⁰ Domestic violence in the context of Convention cases deals with violence that is perpetrated ‘towards a parent or other members of the household, which may affect *the child*, depending on the circumstances of the case, thus exposing *the child* to the effects of domestic violence’.⁷¹ The Convention is predominantly concerned with the potential risk that domestic violence has on children. In providing a definition, the Guide makes explicit

⁶⁵ Family Court of Australia, *Family Violence- What is family violence?* (3 May 2016) Family Court of Australia, < <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/what-is-family-violence/>>; *Restraining Orders Act 1997* (WA), s6(1)(a)-(f).

⁶⁶ *Restraining Orders Act 1997* (WA), s6(1)(e)(i)-(ii).

⁶⁷ *Family Law Act 1975* (Cth), s 4AB(3).

⁶⁸ *Intensification of Efforts to Eliminate All Forms of Violence Against Women* GA Res, UNGAOR, 3rd Comm, 67th mtg, Agenda Item 28(a), UN Doc 67/144 (27 February 2013) 4.

⁶⁹ *Declaration on the Elimination of Violence Against Women* GA Res, UNGAOR, 3rd Comm, 48th mtg, Agenda Item 111, UN Doc 48/104 (23 February 1994) art 1.

⁷⁰ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017) Annex 1.

⁷¹ *Ibid.*

reference to Australian legislation as a model definition of ‘domestic violence’.⁷² This indicates that the Australian approach to ‘domestic violence’ reflects the international definition.⁷³

C The Difficulty with applying Article 13(1)(b) in Domestic Violence Cases

When the Convention was first drafted it primarily dealt with the abductor as the father who took the child from the primary carer, the mother.⁷⁴ In fact, the Explanatory Report makes reference to ‘the father’ as the ‘abductor’.⁷⁵ Typically this was the parent who ‘either lost, or would lose, a custody contest’.⁷⁶ However, over time this has changed with 68% of recent cases involving the abductor as the ‘primary care giver’.⁷⁷ This shift has placed courts in a difficult position where they are to apply Article 13(1)(b) to cases that were not considered by the Convention’s drafters. This next section discusses how Australia, the UK and the US deal with Hague Convention cases concerning claims of domestic violence and the exception. These cases deal with taking mothers who allege that they or their children have suffered abuse by the applicant father, and/or the children were exposed to domestic violence.

1 The Australian Approach to Article 13(1)(b) in Domestic Violence Cases

Australian courts tend to adopt quite a strict view when dealing with domestic violence assertions under Article 13(1)(b). This section discusses pertinent cases to illustrate how there needs to be a balance between: protecting the Convention’s objective to return abducted children, and preventing a return that may cause harm to taking mothers and their children who have been exposed to domestic violence.

⁷² Ibid.

⁷³ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017) Annex 1; *G&C* [2006] FamCA 994 (6 October 2006) [176].

⁷⁴ Elisa Pérez-Vera, ‘Explanatory Report On The 1980 Hague Child Abduction Convention, 1980’ (Hague Conference On Private International Law, Acts And Documents Of The Fourteenth Session of the Conference on Private International Law, Vol. III, April 1981) 429.

⁷⁵ Ibid.

⁷⁶ Merle Weiner, ‘Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction’ (2002) 33 *Columbian Human Rights Law Review* 275, 278.

⁷⁷ Peter Ripley, ‘A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention’ (2008) 3(4) *Journal of Private International Law* 443, 445.

Department of Community Services v Hadzic was a case where the taking mother fled from the UK with her two children after suffering years of physical assaults, death threats and sexual abuse at the hands of her children's father.⁷⁸ She raised the 'grave risk of harm' exception, but despite producing substantial evidence of her years of abuse including police reports and restraining orders the Australian court ordered her to return to the UK. Upon returning, her ex-husband threatened, harassed and raped her after losing the custody battle. She sought help from the UK police by requesting a police escort to a women's refuge, but was denied, despite being considered on record as being 'at high risk of harm'. Tragically, as she got in her car to drive with her children to the women's refuge, the father intercepted the car, pulled her onto the street and stabbed her to death in front of both children.⁷⁹ Australian Justice Le Poer Trench made an order in the spirit of comity but misjudged that the UK authorities could protect the mother and children upon her return. This resulted in devastating consequences for the parties. This case demonstrates the tension courts face when dealing with grave risk and domestic violence, and the occasional failure of the Hague Convention to protect taking mothers and their children.

In domestic violence cases Australian family courts have strictly applied Article 13(1)(b) and have concluded that the degree of harm must be substantial and to a level comparable to an intolerable situation.⁸⁰ In *Bassi, DK and Director General of Community Services*, the court interpreted the exception narrowly to conclude that the risk of psychological or physical harm from domestic violence was not sufficiently grave to satisfy the exception.⁸¹ This case involved the abduction of two girls from the UK to Australia by their mother. The wife gave evidence as to the father's history of violence which included: violent, obsessive, drunken behavior where he would often make threats to kill her and both children, and would make physical attacks on the wife, resulting in harm to the children when they would intervene to help.⁸² Despite these allegations, before the removal the mother continued to allow the children to visit the father and his family. Furthermore, one daughter 'did not believe

⁷⁸ *Department of Community Services v Hadzic* (2007) FamCA 1703.

⁷⁹ BBC News, 'Husband Guilty of Murdering His Wife' *BBC News* (Online), 1 May 2009, <http://news.bbc.co.uk/2/hi/uk_news/england/8029357.stm>.

⁸⁰ *Bassi and Director-General, Department of Community Services* [1994] FLC 92-465, [34]; *Director-General of Family and Community Services v Davis* (1990) 14 Fam LR 381.

⁸¹ *Bassi and Director-General, Department of Community Services* [1994] FLC 92-465, [31].

⁸² *Ibid* [60], [31], [33].

her father would hurt her or N [her sister], however, she believe[d] he would hurt her mother and this caused her anxiety'.⁸³ The court found that there was not enough evidence to constitute a grave risk of harm because the children were not fearful of being subjected to violence. However, an order against their return was made on the basis of a separate exception because the eldest child objected to it.⁸⁴ This approach is also in line with Australia's domestic violence law that requires the victim to reasonably fear the perpetrator.

Similarly, in *Department of Communities (Child Safety Services) v Garning*,⁸⁵ the court assessed evidence from the parents, witnesses, psychologists and psychiatrists to determine whether the taking mother was subjected to domestic violence before the parents' separation.⁸⁶ The court concluded that despite concerns about the father's authoritative parenting style, the mother allowed the children to spend time with him and she took steps before the abduction to amend their Italian custody agreement to consent to the father having contact with the children.⁸⁷ The children were returned on the basis that the degree of harm was not sufficiently 'grave' and that Italian courts could deal adequately with their parenting arrangements.⁸⁸ These cases emphasize the difficult nature with asserting the grave risk of harm exception in domestic violence cases, particularly where the return would not place the children in an 'intolerable situation' because the children and/or the mother is not fearful of the perpetrator.

In Australia, domestic violence cases concerning Article 13(1)(b) are strictly dealt with. Courts regularly make judgments in the spirit of comity to presume that the requesting jurisdiction can adequately deal with domestic violence claims, particularly when dealing with New Zealand, the USA and the UK. By example, *State Central Authority v Morton*⁸⁹ was a case involving serious violence and sexual assault by the father towards the taking mother. The mother abducted her two children (two and one years old) from New Zealand to Australia. She argued that Article 13(1)(b)

⁸³ Ibid [34].

⁸⁴ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signatory 25 October 1980 TIAS 11670 1343 UNTS 89, art 13(1)(c).

⁸⁵ *Department of Communities (Child Safety Services) v Garning* [2011] FamCA 485 (23 June 2011).

⁸⁶ Ibid [89].

⁸⁷ Ibid [101].

⁸⁸ Ibid.

⁸⁹ *State Central Authority v Morton* [2010] FamCA 77 (12 February 2010).

should apply because the children often witnessed these acts of domestic violence and—as her psychologist asserted— she had major depression and was suicidal, which was made worse by living in New Zealand. The judge relied on evidence of the abuse from the New Zealand Department of Child, Youth and Family Services to conclude that the mother was a victim of domestic violence but it was not sufficient enough to give effect to the exception. This was on the basis that upon return to New Zealand the mother would be protected by the authorities— she had access to public housing, social welfare and legal aid— to adequately support her children.⁹⁰

The case of *HZ v State Central Authority* involved an application for three children born in Greece.⁹¹ The parents had been married for ten years when the mother took the children to Australia in 2005 for a vacation but illegally retained them in Australia.⁹² The grave risk of harm defence was raised on the basis that the father was aggressive and emotionally abusive to her. He was addicted to gambling and drugs, received psychiatric treatment, abused and sent threatening messages to her and had also assaulted her in front of their children. The court argued that it was not sufficient for the mother to pick out historical events involving violence. She had to provide evidence that upon return the future risk to the children would be ‘grave’.⁹³ The Appeal Court decided that the mother would be able to seek protection against the father’s threats in Greece and on this basis, Greece was considered the more appropriate forum to decide issues on the children’s welfare.⁹⁴ This case illustrates how evidence of past domestic violence does not determinately indicate the future to satisfy the standard required under Article 13(1)(b). This approach has been adopted across jurisdictions and reflects the observation that returning a child to their country of origin ‘need not necessarily entail exposure to the alleged harm’.⁹⁵

A large proportion of these domestic violence cases concerning Article 13(1)(b) result in a return order because it is difficult to rebut the presumption that the

⁹⁰ *Murray v Director, Family Services, ACT* (1993) FLC 92-416; *Cooper v Casey* [1995] FamCA 2.

⁹¹ *HZ v State Central Authority* [2006] FamCA 466.

⁹² *Ibid.*

⁹³ *Ibid* [38], [39].

⁹⁴ *Ibid* [78].

⁹⁵ Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), 143, *See also, Gollogly v Owen* (1989) 13 Fam LR 622; *Mahler v Mahler* (1999) 3 RFL (5th) 428 (Man QB); *AS v PS* [1998] 2 IR 244; *Starr v Starr* (1999) SLT 335; *Nunez-Escudero v Tice-Menley* 58 F 3d 374 (8th Cir, 1995).

requesting State can adequately protect the abducted child.⁹⁶ By contrast, in *State Central Authority v Papastavrou*, violence was perpetrated by the father against the mother, and the children were exposed to domestic violence.⁹⁷ Justice Bennett commented that it is not relevant that the victim of domestic violence had not reported it to the police in its early stages because they may have for example, ‘pressure from a dominant spouse or related persons, a perception of no alternative means of support, a desire not to disrupt care arrangements...illness, fear and even shame and embarrassment’.⁹⁸ Her Honour concluded by distinguishing from *Murray* and deciding that the Greek authorities were not equipped and would not provide proper protection for the mother and children against domestic violence.⁹⁹

The Australian approach to Hague Convention cases dealing with domestic violence is quite strict. Courts face a tension when dealing with grave risk and domestic violence whilst trying to apply the quick return mechanism of the Convention. As explained, there appears to be a difficulty with asserting the exception especially in cases where the requesting country provides adequate protection for domestic violence victims. Often the facts of domestic violence cases are better dealt with under the laws of the requesting country, particularly because in that country it is easier and more accessible to obtain evidence of the actual abuse through reports from authorities as well as witness testimony. Australia at present upholds the Convention’s objectives by only allowing for a return order in extreme circumstances, but arguably these decisions cause adverse harm to taking mothers and their children. Australian courts need to assess the claims of domestic violence to adequately protect victims of harm but not too far so as to circumvent the Convention’s objective— to avoid considering custody determinations and to provide for a quick return of an abducted child.

⁹⁶ Nigel Lowe and Michael Nicholls, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing Ltd, Bristol, 2004), 335; *State Central Authority, Secretary to the Department of Human Services v Mander* [2003] FamCA 1128 (17 September 2003).

⁹⁷ *State Central Authority v Papastavrou* [2008] FamCA 1120 (22 December 2008).

⁹⁸ *Ibid* [57].

⁹⁹ *Murray v Director, Family Services ACT* (1993) FLC 92-416.

2 Other Jurisdiction's Approaches to Article 13(1)(b) in Domestic Violence Cases

In recent years US courts have decided Hague Convention cases by allowing domestic violence to be the basis of a defence under Article 13(1)(b).¹⁰⁰ Some courts have addressed the fact that spousal abuse can psychologically and potentially physically harm a child because of the likelihood that the abuser will also abuse the child.¹⁰¹ In *Walsh v Walsh*,¹⁰² the mother took the children to Ireland and then obtained a protective order against the father who had assaulted and abused her. The court considered the grave risk of physical and psychological harm to children generally in cases of spousal abuse and made reference to the ample evidence of the father's physical abuse towards the mother and children. The return was refused on the high likelihood that the father would abuse his children upon return. This ruling was followed in *Re Application of Adan* where abuse against a mother was said to create grave risk to her child.¹⁰³

Blondin v Dubois dealt with the abduction of a couple's two children by their mother from France to the US.¹⁰⁴ The father had a long history of domestic violence perpetrated against the mother. He beat her whilst she was pregnant, physically abused her, choked their one year old with electrical tape, threatened to kill the mother and her children. She resorted to living in a home for battered women and children until she was forced to flee to the US in 1997. The medical opinion of the doctor who had treated her was that returning to France would be traumatizing for the children, which would 'trigger long-term or even permanent harm'.¹⁰⁵ The court concluded that the Article 13(1)(b) exception applied, not based upon distrust of the French legal system, but by considering the best interests of the children. This approach afforded protection to victims of violence but also fostered comity between Contracting countries. The approach worked to respect the 'home country's jurisdictional authority without sacrificing the physical and emotional well-being of abducted children'.¹⁰⁶

¹⁰⁰ Gina Masterton, 'Australia's Embrace of the 1980 Hague Abduction Convention: How the Judiciary's Narrow Interpretation of the 'Grave Risk of Harm' Exception Harms Abused Taking Mothers and Their Children,' (LLM Thesis, Queensland University of Technology, 2016) 58.

¹⁰¹ *Tsarbopoulos v Tsarbopoulos* 176 F Supp 2d 1045, 1057 (ED Wash, 2001) [2].

¹⁰² *Walsh v Walsh* 221 F 3d 204 (1st Cir, 2000); *Van de Sande v Van de Sande* 431 F 3d 567 (7th Cir, 2005).

¹⁰³ *Re Application of Adan* 437 F 3d 381 (3rd Cir, 2000).

¹⁰⁴ *Blondin v Dubois* 19 F Supp 2d 123, 124 (SDNY, 1998).

¹⁰⁵ *Ibid* 292.

¹⁰⁶ *Turner v Frowein* 752 A 2d 955, 972 (Conn, 2000).

In the UK, the leading authority in this area is *Re E (Children)* which provides that, where allegations of domestic violence are made the court must first establish whether there is grave risk, and secondly must ask ‘how the child can be protected against the risk... Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues’.¹⁰⁷ The test in *Re E* requires a three-step approach:

- (i) identify the risks,
- (ii) consider protective measures and,
- (iii) in the absence of protective measures the court should resolve the disputed issue.

The test was applied in *Re M (Children)* where the father sought the return of his two children to the USA from the UK after the mother wrongfully retained them after a family holiday.¹⁰⁸ The mother alleged that she was subjected to serious violent incidents of domestic violence but failed to produce any proper evidence by way of photographs, medical reports or witness statements to support her claims. The father also supplied written evidence agreeing to take measures upon their return such as, ‘not to prosecute the mother, to allow the mother and children to reside in his property alone, to provide reasonable maintenance and to commence custody proceedings in the USA’.¹⁰⁹ The father was successful on appeal and the children were returned because his protective measures went above and beyond what would normally be required to protect victims of domestic violence. In addition, there was no basis to ‘doubt the effectiveness of the US courts or police to enforce protective measures’.¹¹⁰ This case shows the high level of protective measures required for victims of domestic violence.

Switzerland has had a unique approach by embracing the Paramountcy principle for cases under the Convention. *Neulinger and Shurunk v Switzerland*¹¹¹ is quite influential on the development of the law in this area, because if followed it would provide protection to domestic violence victims.¹¹² In this case, the Israeli father and Swiss mother divorced after the father decided to join a radical Jewish sector. The mother took the child to Switzerland but the father filed for his return. The European Court of Human Rights reviewed the issue and discussed whether a fair balance was struck between the interests

¹⁰⁷ *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27.

¹⁰⁸ *Re M (Children)* [2016] EWCA Civ 942.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Neulinger and Shurunk v Switzerland* (C-41615/07) [2010] ECHR 1053.

¹¹² *Neulinger and Shurunk v Switzerland* (C-41615/07) [2010] ECHR 1053; HCCH, ‘Domestic Violence and the Article 13 ‘Grave Risk’ Exception in the Operation of The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper’ (May 2001) Prel. Doc, No 9, 28 [119]; *See also Raban v. Romania* (C-25437/08) [2011] ECHR.

of the child, the parents and of public order. The court concluded that the interests of the child were to be discussed by considering:

- (1) the ties with the child's family except when the family is proven unfit and;
- (2) to ensure the child's development is in a sound environment.¹¹³

They took into account such things as: the impact of forcing the mother to return to Israel, of uprooting the child again and comparing the difficulties of the child sustaining social, cultural and family ties in both Switzerland and Israel. It was not in the best interests of the child to return to Israel so a return order was not made. This case makes a thorough inquiry into the 'child's best interests', which is not considered one of Convention's roles. Following *Neulinger*, the UK Court of Appeal stated that, 'the judge evaluating grave risk of harm in the context of Article 13(1)(b) must weigh the *immediate* and not the ultimate best interests of the child'.¹¹⁴ Justice Black held that *Neulinger* does not require courts to 'change the present approach to Hague Convention applications'.¹¹⁵ Although it may provide more lenience for domestic violence victims, the approach in *Neulinger* hinders the expeditious return mechanism under the Hague Convention by obliging courts to examine the facts of the custody dispute, so courts should be cautious of following this decision.

In summary, exposure to domestic violence can cause 'serious psychological harm' to the affected child.¹¹⁶ Courts should regard exposure to violence as 'grave risk of harm' to satisfy a non-return order.¹¹⁷ Children who are part of a family where domestic violence is prevalent are 'at greater risk of being exposed to it themselves'.¹¹⁸ Additionally, violence against women can have 'devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children'.¹¹⁹ In fact, witnessing domestic violence can cause a high degree of harm to children with higher rates of aggression, fear, antisocial behavior, anxiety, repression and trauma.¹²⁰ Expanding the scope of the grave risk of harm defence to these cases may benefit children but it also would undermine the objective of the Convention— to return an abducted child to their place of habitual

¹¹³ *Neulinger and Shurunk v Switzerland* (C-41615/07) [2010] ECHR 1053

¹¹⁴ *Eliassen and Baldock v Eliassen* [2011] EWCA Civ 361, [69].

¹¹⁵ *Ibid* [125].

¹¹⁶ *Family Law Act 1975* (Cth), s4.

¹¹⁷ *Ibid*.

¹¹⁸ Masterton, above n 100, 44.

¹¹⁹ *Ibid*.

¹²⁰ Jeffrey Edleson, 'Children's Witnessing of Adult Domestic Violence' (1999) 14 *Journal of Interpersonal Violence* 839-870.

residence where custody issues will be determined. By considering assertions of domestic violence, courts are required to analyse a child's physical and psychological welfare, which involves making inquiries into custody issues. The UK approach should be favoured in that the court should be satisfied that upon return protective measures would be in place for the taking mother and children, without considering specific custody questions. There needs to be a balance between considering the wellbeing of a child in these cases but not too far so as to undermine the return mechanism of the Convention.

D Improving the Convention's Operation in Domestic Violence Article 13(1)(b) Cases

A number of suggestions on how to improve the operation of the Convention have been made. Most of these deal with measures to protect victims of domestic violence.¹²¹ Caron Bruch asserted that the Convention as currently applied 'imposes unnecessary hardships on domestic violence victims and their children'.¹²² Professor Merle Weiner also writes that 'much substantive work needs to be done in Hague cases to make the Convention less devastating for domestic violence victims who flee with their children to escape domestic violence'.¹²³ The three main suggestions to: provide for a domestic violence defence, create a guide to good practice and to encourage mediation before return proceedings will be discussed.

1 Creating a Separate Domestic Violence Defence

In an article from 2003 by Hoegger, a proposal was made to the effect that there be a new defence to meet the needs of domestic violence victims.¹²⁴ The separate exception would allow the country requested of the application to assess whether there exists sufficient

¹²¹ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017), Pt IV.

¹²² Carol Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38(3) *Family Law Quarterly*, 529.

¹²³ Merle Weiner, 'The Potential and Challenges of Transnational Litigation For Feminists Concerned about Domestic Violence Here and Abroad' (2003) 11(2) *American University Journal of Gender, Social Policy & The Law*, 749-800, 766.

¹²⁴ Roxanne Hoegger, 'What If She Leaves? Domestic Violence Cases under The Hague Convention and the Insufficiency Of The Undertakings Remedy' (2003) 18 *Berkley Women's Law Journal* 183.

evidence of violence, and if so, that court would then adjudicate the custody matter.¹²⁵ The benefits of this approach are that it would draw attention to the issue of domestic violence and its adverse effects upon children as well as providing more support for domestic violence victims in Hague Convention cases. However, this approach is time-consuming which goes against the expeditious nature of Hague Convention cases. It may also create conflict across countries because of the differing approaches to both domestic violence and custody and access across jurisdictions.¹²⁶ Barbara Lubin also acknowledged that the prevalence of domestic violence and its consequences on families justifies a separate exception.¹²⁷ Although a separate domestic violence defence is mentioned in the literature and would benefit victims and their children, the absence of any mention of one within the Draft Guide indicates that the objective of the Convention— to provide for the quick return of an abducted child— outweighs the call for a separate defence.¹²⁸

2 Creating a Guide to Good Practice

Despite being in its early stages, the Draft Guide has dedicated a specific section to dealing with victims of Domestic Violence in Hague Convention cases.¹²⁹ It takes on some of the views of academics in this area who have asserted that domestic violence should be a consideration whilst assessing the grave risk of harm to an abducted child, because often where a spouse is abused there is the likelihood that children will be abused in the future.¹³⁰ There is a concern though that by considering these questions the intention of the Convention—its deterrent effect and predictability— will be undermined. However, Lubin believes that these concerns are ‘substantially outweighed by the international need to protect victims of domestic violence and their children’.¹³¹ The Draft Guide seems to have addressed the concerns from academics by providing certain considerations to deal with when hearing Article 13(1)(b) cases. In particular, it acknowledges that ‘violence against a parent has a traumatic effect on

¹²⁵ Ibid 206.

¹²⁶ Weiner, above n 60; Masterton, above n 100, 117.

¹²⁷ Barbara Lubin, ‘International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention’ (2005) 4 *Washington University Global Studies Law Review* 422, 444.

¹²⁸ Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017).

¹²⁹ Ibid Pt IV.

¹³⁰ Weiner, above n 60, 654; Quillen, above n 60 633.

¹³¹ Lubin, above n 127, 444.

children who witness it’ and that there is a ‘correlation between instances of spousal abuse and child abuse’.¹³² It says consideration should be given to the exposure of the child to domestic violence between parents and their views on the violence (depending on their age and maturity).¹³³ The Guide stipulates that certain types of information and evidence be considered, such as:

Information on pending court proceedings against the left-behind parent, police reports, records from consulates or embassies, reports from domestic violence shelters, and medical certificates regarding domestic violence incidents. [Additionally,] admissions such as emails and other correspondence ...¹³⁴

Furthermore, courts are to utilise direct judicial communication regarding findings of domestic violence in foreign courts and to discover any existing protection orders in place.¹³⁵ The Draft Guide provides some necessary guidance for courts in domestic violence Article 13(1)(b) cases, particularly regarding putting in place protections for victims of domestic violence and their children.

3 Encouraging Mediation for Parties Preceding the Return Hearing

The procedure of whether, under what conditions and by whom mediation can be conducted in these cases varies across jurisdictions.¹³⁶ However, the Draft Guide advocates mediation as a good means for parties to reach a solution on return or access arrangements for their child.¹³⁷ It indicates that mediation is not to put the safety of any person at risk, so mediation cases should be screened and conducted by experienced family mediators with training in child abduction and domestic violence cases.¹³⁸

Although mediation may be useful to ready the parties for the possible outcome of return proceedings, it is important that mediation does not unduly delay a decision regarding the return or non-return of the abducted child.

Australia has recently reported to the latest Special Commission Meeting that it was important to have discussions about domestic violence and how it is dealt with under

¹³² Hague Conference on Private International Law Permanent Bureau, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg, Agenda Item 19 (October 2017), 72 [274].

¹³³ *Ibid.*

¹³⁴ *Ibid* 73 [274].

¹³⁵ *Ibid.*

¹³⁶ *Ibid* 50 [191].

¹³⁷ *Ibid* 72 [274], 50.

¹³⁸ *Ibid* 72 [274], 51.

the Convention's framework without undermining its operation.¹³⁹ Although the Guide is merely a draft, it highlights some pertinent points and deals with the main concerns from the Australian Central Authority and academics such as Carol Bruch. She thought it was essential for the new drafters to articulate specific provisions to protect caregivers and to protect children's welfare.¹⁴⁰ The Guide has done so by creating provision for mediation and counseling for the parties, creating considerations for courts to deal with when deciding on these cases, and overall, by acknowledging the correlation between domestic violence and child abuse.

¹³⁹ Hague Conference on Private International Law Permanent Bureau, *Questionnaire on the Practical Operation of the 1980 Convention*, Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 7th mtg. Preliminary Document 2 (January 2017) 17 (Australia).

¹⁴⁰ Carol Bruch 'The Promise and Perils of a Protocol to the 1980 Convention on the Civil Aspects of International Child Abduction' in Andrea Büchler and Markus Müller-Chen (eds), *Private Law- National-Global-Comparative*, (Stampfli Verlag Publication, AG Bern, 2011), 237, 237.

V NON-CONVENTION COUNTRIES

The Hague Convention is an effective way to protect children from the consequences of parental abduction. However, its limited signatories have impacted its application— particularly in cases concerning Non-Convention countries.¹ A major struggle arises when a child is abducted to a non-signatory nation because the Convention becomes unavailable as a means to seek the return of an abducted child.² The parent is then forced to litigate custody determinations in a foreign country where there is no obligation on foreign courts to afford similar rights to the parties as those outlined within the Convention.³ Instead, the foreign court must decide how to balance the child’s interests with the international stance to combat the unlawful removal or non-return of children abroad.⁴ Commentators often discuss the difficulties that arise in countries with clashes of cultural, religious and social norms such as Lebanon and Egypt where child custody laws are based upon Shari’a law and Islamic social and religious values.⁵ This chapter will explore the way Australia deals with Non-Convention countries by comparing Australia’s bilateral agreements with the UK-Pakistan Protocol. It will also mention the difficulty with upholding the spirit of the Convention and remedying child abductions in Islamic countries, and it will propose that the ‘Malta Process’ is a beneficial means to promote communication between Convention and Muslim Non-Convention countries.

A Bilateral Agreements: A Means to Address Non-Convention Child Abductions

Negotiations resulting in the creation of bilateral agreements between Convention and Non-Convention countries are necessary to facilitate the return of abducted children. The focus of this chapter will be on Consular Agreements on Co-

¹ HCCH, *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Status Table* (2 August 2017) < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>>.

² Deborah Zawadski, ‘The Role of Courts in Preventing International Child Abduction’ (2005) 13 *Cardozo Journal of International and Comparative Law* 353, 360; Frank Bates, ‘Grave Risk, Physical or Psychological Harm or Intolerable Situation: The High Court of Australia’s View’ (2003) 11 *Asia Pacific Law Review* 43, 44.

³ Julia Todd, ‘The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?’ (1995) 2(2) *Indiana Journal of Global Legal Studies* 553, 560.

⁴ *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 11(1).

⁵ Zawadski, above n 2, 364; Ericka Schnitzer-Reese, ‘International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court’ (2004) 2 *Northwestern Journal of International Human Rights* 1, 3.

operation,⁶ which is the process of taking inspiration from multilateral agreements (Hague Convention) when drafting bilateral agreements.⁷ This type of agreement promotes the development of an amicable relationship between States and ensures for protection and assistance for children travelling between the two States.⁸ Examples of Bilateral Agreements are those created between: France and Algeria (1988), Egypt (1982), Lebanon (2000), Morocco (1983) and Tunisia (1994) as well as, Canada and Egypt (1997), and Lebanon (2000).⁹ The two Australian bilateral agreements are between Australia and Lebanon (2009), and Egypt (2000).¹⁰ Although drafted differently, these agreements share common beliefs such as: that the child's best interests lie in respecting his/her right to have personal, direct and regular relations with both parents, the promotion of respect for the custodial parent's right of access, and the establishment of an Advisory Commission to ensure that disputes are resolved amicably.¹¹ Overall, the goal of these agreements is identical: 'to ensure effective co-operation between States in conflicts concerning custody and access across international borders'.¹²

B Australian Bilateral Agreements with Egypt and Lebanon

The Attorney General's Department of Australia has identified the difficulty with resolving disputes involving Australian children where there are no arrangements in place to assist.¹³ If a child is abducted to a Non-Convention country the Australian Family Court can make an order to seek that child's return, which then allows the

⁶ Other types of bilateral instruments are: bilateral conventions on administrative and judicial cooperation, those inspired by multilateral conventions or consular cooperation agreements and administrative agreement protocols.

⁷ Caroline Gosselain for the Hague Conference on Private International Law Permanent Bureau, *Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States- A Research Paper*, Special Commission of September-October 2002 on the Hague Child Abduction Convention, prel doc 7 (August 2002), 11.

⁸ *Ibid* 20.

⁹ HCCH, *Non-Hague Convention Child Abductions - Bilateral Agreements* (October 2017), HCCH < <https://www.hcch.net/en/publications-and-studies/details4/?pid=5215>>.

¹⁰ *Agreement between Australia and the Republic of Lebanon regarding Co-operation on Protecting the Welfare of Children*, signed 18 March 2009, [2010] ATS 14 (entered into force 1 May 2010); *Agreement between Australia and the Arab Republic of Egypt regarding the Co-operation on Protecting the Welfare of Children*, signed 22 October 2000, [2002] ATS 3 (entered into force 1 February 2002).

¹¹ Gosselain, above n 7, 20.

¹² *Ibid* 11.

¹³ Standing Committee on Foreign Affairs, Defence and Trade, Senate, 'Helping Australians Abroad: A Review of the Australian Government's Consular Services' (1997) ch 9 [9.21].

Australian consular officer to apply to the foreign country on their behalf.¹⁴ This seems like a simple approach, however difficulties often arise when dealing with countries of strong religious beliefs that would be reluctant to return a child to a country where decisions will be made on a civil rather than a religious basis.¹⁵

However, Australia has created two separate bilateral agreements to deal with non-signatories to the Convention to ensure that both countries cooperate in the return of an abducted child.¹⁶ These agreements apply to children under 18-years-old who share either Australian or the other country's nationality, or dual citizenship. The Australia-Egypt and Australia-Lebanon Agreements are similar in nature and wording, with both agreements having a focus on promoting cooperation between the two States and ensuring the protection of the welfare of children.¹⁷ They mandate that the 'best interests of the child' be of primary consideration in cases relating to parent's rights of contact with their children.¹⁸ Both agreements do not provide any method of legal enforcement through either country's family courts, however they provide a consultative mechanism to effectively resolve child abduction cases.¹⁹ These agreements each establish a Joint Consultative Commission with the role of locating abducted children, encouraging discussions between parents and facilitating that child's return.²⁰ The Commission also plays a role in mediating disputes, assisting parents and children with travel documents and visas,²¹ as well as following the progress of cases to ensure that they are resolved expeditiously.²²

A highly publicized example is the Sally Faulkner 60-minutes abduction case where Faulkner's husband took their children to Lebanon and illegally retained them

¹⁴ Ibid [9.24].

¹⁵ Ibid [9.25].

¹⁶ *Agreement between Australia and the Republic of Lebanon regarding Co-operation on Protecting the Welfare of Children*, signed 18 March 2009, [2010] ATS 14 (entered into force 1 May 2010); *Agreement between Australia and the Arab Republic of Egypt regarding the Co-operation on Protecting the Welfare of Children*, signed 22 October 2000, [2002] ATS 3 (entered into force 1 February 2002).

¹⁷ Ibid Preamble.

¹⁸ Ibid.

¹⁹ Eugene Cotran and Martin Lau (eds), *Yearbook of Islamic and Middle Eastern Law* (Kulwer Law International, vol 8, 2001-2002) 106.

²⁰ *Agreement between Australia and the Republic of Lebanon regarding Co-operation on Protecting the Welfare of Children*, signed 18 March 2009, [2010] ATS 14 (entered into force 1 May 2010) Art 3, 4,5; *Agreement between Australia and the Arab Republic of Egypt regarding the Co-operation on Protecting the Welfare of Children*, signed 22 October 2000, [2002] ATS 3 (entered into force 1 February 2002) Art 3, 4, 5.

²¹ Ibid Art 6.

²² Ibid.

there.²³ Following a botched kidnapping attempt by Faulkner (the mother) and the 60-minutes crew, negotiations took place to allow her access to her children in Lebanon. Difficulties arose because Lebanon is a non-signatory, their legal system gives custody to the father and it is based on the French system, which allows for arrests and investigations to take place before the judge determines charges to be laid.²⁴ The Australia-Lebanon bilateral agreement was promising in offering a solution for Faulkner. However, the reality is that the process is ‘very slow and frustrating’ even where a mediation commission exists.²⁵ It may take months or years to resolve the case, frequent updates to the applicant parent are not always possible, and the outcome may not be what the applicant was seeking.²⁶ The agreement also does not provide for methods of legal enforcement. Despite having full custody of the children in Australia, since the abduction, the mother has lost custody of her two children to the father (the abductor) based upon a religious order in Lebanon. This case is a clear example of how Australia’s bilateral agreements often fail to provide any protection for the left-behind parent particularly where attitudes of parental responsibility differ from Australia.

C The UK-Pakistan Protocol on Children’s Matters

This section advocates that the UK-Pakistan Protocol provides a better approach in cases of child abduction to Non-Hague convention cases compared to Australia’s bilateral agreements.²⁷ In addition to the usual requirements to protect children and to promote judicial cooperation and mediation between jurisdictions,²⁸ the Protocol provides extra protections for children. The Protocol explicitly states that the ‘welfare of a child is best determined by the courts of... the child’s habitual/ordinary residence,’²⁹ which reflects the views of the Convention. It essentially creates a judicial understanding aimed at securing the return of abducted children to their country of habitual residence without regard

²³ Jennifer Olsson, ‘Child Abductions and International Custody Disputes in Lebanon and Other Non Hague Convention Countries’ (2016) 7(38) *Bulletin of the Law Society of South Australia* 28, 28-29.

²⁴ Latika Bourke and Suzan Haidamous, ‘60 Minutes: Judge Declares Case a Kidnapping not a ‘Custody Case’ as Tara Brown Returns to Court’, *The Sydney Morning Herald* (Sydney), 19 April 2016.

²⁵ Olsson, above n 23, 29.

²⁶ *Ibid.*

²⁷ *United Kingdom-Pakistan Judicial Protocol on Children Matters*, signed 17 January 2003.

²⁸ *Ibid* Preamble.

²⁹ *Ibid* art 1.

to nationality, culture or religion of the parents or either parent.³⁰ A group of liaison judges in the UK and Pakistan facilitate its working.³¹ The judges ensure that courts in both countries are aware of existing court orders from the child's home country and do their best to advance the objects of the Protocol.³² The judicial guidelines also promote the need for judges from both countries to meet occasionally to discuss the implementation of the Protocol.³³ In the spirit of comity, the Protocol also addresses the need for Judges to respect each other's decisions.³⁴ In essence it is effective, but it is not incorporated into either country's law, which means that judges are not legally bound to abide by its provisions.

Similarly, Pakistan operates under Shari'a law which challenges its implementation because there is a conflict between Sharia' law and the provisions of the Protocol. The Protocol explains that the country where the child is taken to is not to exercise jurisdiction over the child 'save in so far as it is necessary for the court to order the return of the child to the country of the child's ordinary residence'.³⁵ Due to its non-binding nature, UK courts have taken a liberal view of this. In the matter of *U (Children)*,³⁶ the mother (a dual Pakistan-UK citizen) brought her three children to the UK. The father had not had contact with the children for a period of five years before the abduction, yet upon finding out about it he was granted custody by the Pakistan courts. The children passionately described their father as a 'violent bastard' and 'drunken rascal' and refused to return to his care.³⁷ The decision outlined that there should be 'circumstances where the court *can* extraordinarily exercise jurisdiction' and this case was one of them because of the 'exceptional strength of the children's wishes and feelings'.³⁸ The court considered that if the case were considered in

³⁰ *United Kingdom-Pakistan Judicial Protocol on Children Matters*, signed 17 January 2003, art 4; Foreign & Commonwealth Office, *Child Abduction and the UK-Pakistan Protocol* (10 November 2009) Foreign & Commonwealth Office UK
<<http://webarchive.nationalarchives.gov.uk/20091110183735/http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/child-abduction>>.

³¹ *United Kingdom-Pakistan Judicial Protocol on Children Matters*, signed 17 January 2003, art 9.

³² *Ibid* art 8.

³³ *Ibid* Supplemental Judicial Guidelines, art 6.

³⁴ *Ibid* Supplemental Judicial Guidelines, art 7.

³⁵ *Ibid* art 2.

³⁶ *U (Children)* [2014] EWHC 4535 (Fam).

³⁷ *Ibid* [12].

³⁸ *Ibid* [18], [19].

accordance with Article 13(1)(b) of the Hague Convention ‘it would be unthinkable injurious and harmful to return the children to Pakistan’.³⁹ The return was refused and the Judge emphasized the need to take ‘small steps...to begin the process of restoration of the paternal relationship with these children’.⁴⁰ Although the Protocol is not as binding compared to the Convention, it provides a better approach to Non-Convention country abductions than Australia’s bilateral agreements, because it stipulates a means for the UK and Pakistan to facilitate the return of a child without disrespecting each other’s views on parental responsibility. However, the Protocol’s objectives would be further enhanced if it were incorporated into the domestic law of both countries.

D Shari’a Law and the Difficulties with Remediating Child Abductions

Although these bilateral agreements are helpful in facilitating discussion between countries, different cultural and judicial traditions can often make it difficult to agree on what is in the child’s best interests. This is prevalent in Islamic countries that are non-signatories because their notion of parental responsibility differs from the ‘Western’ viewpoint. This creates a problem with protecting the best interests of a child who has roots in both cultures, and makes it difficult for Convention countries to uphold the spirit of the Convention when dealing with Non-Convention States.

1 The Rules of Custody under Shari’a Law

Shari’a law refers to the ‘historical formulations of Islamic religious law, including a universal system of law and ethics purporting to regulate all aspects of Muslim’s public and private life’.⁴¹ Unlike most Western countries, ‘religious and social values dictate the answers to questions of upbringing and parental authority...’⁴² Difficulties arise because the allocation of custody and guardianship of an Islamic child depends on the tradition of Koranic law that is followed in the relevant jurisdiction. For example, in Iran (Shia Muslims under Jaafari jurisprudence) the mother retains

³⁹ Ibid [13].

⁴⁰ Ibid [3].

⁴¹ Thomas Foley, ‘Extending Comity to Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations’ (2003) 41 *Family Court Review* 257, 260.

⁴² Lara Cardin, ‘The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One’ (1996) 20 *House Journal of International Law* 141, 157.

custody until the male is two and female is seven-years-old.⁴³ In Bahrain (Shaafi jurisprudence), the mother has custody of children until they reach the age of discretion, the minimum age being seven-years-old, after which the children have a choice of whether to remain with the mother or move to the father.⁴⁴ In Pakistan (Sunni Muslims under Hanafi jurisprudence) the mother has the right to custody until the male reaches seven-years-old and the female reaches puberty.⁴⁵

Shari'a law does however have certain universal values, such as: that the father has 'ultimate legal custody of his children',⁴⁶ that all children be raised Muslim,⁴⁷ as well as, if the mother has physical custody of the children she is prohibited from 'moving any substantial distance from the father without [his] permission'.⁴⁸ Islamic law places importance on religious upbringing of the child by the father when making custody determinations, whereas Western countries tend to place little weight on religion and share the view that mothers and fathers have equal shared parental responsibility.⁴⁹ Overall, Shari'a law makes Islamic countries resistant to signing the Convention. It also makes remedying international child abduction difficult due to the stark difference in their religious and parental custody views.⁵⁰

2 The 'Malta Process': To Promote Cooperation with Islamic Countries

Bilateral agreements between 'Western' and Islamic countries are often merely expressions of a willingness to cooperate without proper structures to support them. Dr Freeman explained that 'more is required to deal with the serious problems of child abduction between States which are not parties to the 1980 Hague Convention'.⁵¹ The Hague Conference on Private International Law has addressed these concerns through the 'Malta Process', which is a meeting of experts to develop

⁴³ Marilyn Freeman, 'When the 1980 Hague Child Abduction Convention Does Not Apply: The UK-Pakistan Protocol' (Paper presented at The International Society of Family Law Regional Conference, Israel, June 2009) 182.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Zadora Hightower, 'Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases' (2013) 2(22) *Michigan State International Law Review* 638, 653.

⁴⁷ Foley, above n 41, 261.

⁴⁸ Marianne Blair, 'International Application of the UCCJEA: Scrutinizing the Escape Clause (2004) 38 *Family Law Quarterly* 547, 571.

⁴⁹ *Family Law Act 1975* (Cth), s64B.

⁵⁰ See generally *B v EL-B (Abduction: Sharia Law: Welfare of Child)* [2003] 1 FLR 811.

⁵¹ Freeman, above n 43, 184.

a more effective means to mediate cross-border disputes involving a Convention and a Non-Convention country with Shari'a influence.⁵²

The most recent Malta Conference (2016) saw representatives from Muslim jurisdictions and authorities from countries signatory to the Hague Convention meet to exchange their views on how to solve abduction cases where the Convention does not apply. The aim of the initiative is 'to fill the legal gaps resulting from the reluctance of Muslim countries to embrace the Convention'.⁵³ The Conference encouraged the working party on mediation to establish mediation structures and principles to deal with Muslim countries. By example, States were encouraged to designate a central contact point for mediation to take place, and to appoint a dedicated group of mediators with expertise in cross-cultural abduction disputes in the relevant languages.⁵⁴ It was also discussed that the agreement decided upon from mediation proceedings should be agreed as binding or enforceable in the relevant jurisdictions.⁵⁵ The Malta Process has been successful in facilitating diplomatic relations between Muslim countries and Convention countries with both being open to learning about each other's legal systems.⁵⁶ The conference participants acknowledged that judicial exchanges should be encouraged to 'reinforce mutual trust and confidence among judges'.⁵⁷ The Malta Process is relatively new, but there is hope that it will encourage more jurisdictions to unite to remedy child abduction.

Bilateral cooperation is a useful way to channel information and communication between authorities, but all 'western' countries must strengthen their dialogue with Islamic States to protect the interests of children. This requires a level of openness where Islamic countries' courts should not be denied jurisdiction merely because

⁵² Hague Conference on Private International Law, Fourth Malta Conference on Cross-Frontier Child Protection and Family Law Declaration' (Paper presented at The Fourth Malta Conference on Cross-Frontier Child Protection and Family Law, Malta, 5 May 2016) < <https://assets.hcch.net/docs/91ab60a5-1ebe-46ca-91ce-72e6e55c0ae7.pdf>>.

⁵³ Nadjma Yassari, Lena-Maria Moller and Imen Gallala-Ardnt (eds) *Parental Care and the Best Interests of the Child in Muslim Countries* (TMC Asser Press, 2017) 350.

⁵⁴ Hague Conference on Private International Law, Fourth Malta Conference on Cross-Frontier Child Protection and Family Law Declaration' (Paper presented at The Fourth Malta Conference on Cross-Frontier Child Protection and Family Law, Malta, 5 May 2016) < <https://assets.hcch.net/docs/91ab60a5-1ebe-46ca-91ce-72e6e55c0ae7.pdf>> 3.

⁵⁵ Ibid.

⁵⁶ Yassari, Moller and Gallala-Ardnt, above n 53, 350.

⁵⁷ Hague Conference on Private International Law, Fourth Malta Conference on Cross-Frontier Child Protection and Family Law Declaration' (Paper presented at The Fourth Malta Conference on Cross-Frontier Child Protection and Family Law, Malta, 5 May 2016) < <https://assets.hcch.net/docs/91ab60a5-1ebe-46ca-91ce-72e6e55c0ae7.pdf>> 3.

they would apply a Muslim perspective in child welfare considerations.⁵⁸

Additionally, in the view of Justice Brennan,

the capacity, sensitivity or procedures [of the place of the Child's habitual residence]... is of minor importance unless the evidence shows that those courts are unlikely to make and to enforce orders deemed to be appropriate in that society to protect the child and to serve his/her best interests.⁵⁹

Australian courts need to be open when dealing with parties from different cultural and parenting backgrounds, unless there is a significant adverse effect on the child. The Hague Convention is designed to have a global reach and to be compatible with diverse legal traditions, so Australia must encourage the appropriateness of the Convention to resolve these abduction disputes.

In summary, bilateral agreements are necessary but offer difficulty if there is no confident relationship between the authorities of both countries. However, they are an 'elementary and useful legal framework serving...as a channel of information and communication between authorities...and the return of the child and arrangements for access across international borders'.⁶⁰ The UK-Pakistan Protocol is a favourable means to encourage judicial communications across borders, which is an initiative that Australian legislators should consider. Additionally, the Malta Process should eventually help to bridge the gap between Convention countries and Muslim Non-Convention countries. Child abductions to Non-Convention countries create a huge problem for member states as well as the victims of these abductions. By creating bilateral agreements Australian courts have taken a step to effectively implement the essence of the Convention, but more legal consequences need to be included in such agreements for them to provide a proper remedy to international child abduction.

⁵⁸ *Re F (Minor: Abduction: Jurisdiction)* [1991] Fam 25.

⁵⁹ *Ibid.*

⁶⁰ Gosselain, above n 7, 27.

VI CONCLUSION

International child abduction is a global issue that must be dealt with effectively to protect its victims. The Article 13(1)(b) exception under the Hague Convention provides a means for parties to defend the quick return mechanism of the Convention if the return would expose the child to grave risk of physical or psychological harm, or if the child would be placed in an intolerable situation. However, courts have faced some difficulty with applying this exception especially in cases concerning domestic violence victims and Muslim Non-Convention countries.

The primary argument discussed how Australian courts have recently adopted a more liberal view by placing greater consideration on the impact of the return on the individual child's welfare. By comparison, adopting a severely strict approach (like in the USA and UK) a limitation is placed on the circumstances where the exception can apply. Implicit in the success of the Convention is the strict application of its provisions in the spirit of comity. However, Australia needs to find a balance between considering the position of the child after their return, and being restrictive enough to respect the ability of other Contracting States to make custody and welfare determinations on the child's return.

Courts find great difficulty with applying the Article 13(1)(b) exception in cases concerning victims of domestic violence who have fled from their habitual residence. There is a tension between promoting the quick return of the abducted child and adequately assessing claims of domestic violence to protect the children and victims concerned. Australian courts tend to adopt a strict view when dealing with domestic violence assertions. Courts regularly make judgments in the spirit of comity to presume that the requesting jurisdiction can adequately deal with domestic violence claims. However, witnessing domestic violence can have a traumatic effect on children. This paper favours the UK approach because the courts should be satisfied that upon return protective measures are in place for the domestic violence victim and children, without going too far and beginning to make custody or access determinations. The Draft Guide makes favourable suggestions to improve the application of the exception in domestic violence cases, such as: to utilize direct judicial communication regarding assertions of

domestic violence to discover existing protection orders in place, and to encourage mediation for parties before the return hearing. Above all, it has acknowledged that there is a correlation between domestic violence and child abuse, which is necessary for courts to understand when determining ‘grave risk of harm’ to children. Australia must strike a balance between protecting the Convention’s objective to return abducted children without considering custody determinations, but also must act to prevent a return that may cause harm to domestic violence victims and their children.

Another struggle for Convention countries arises when a child is taken to a Non-signatory nation because the Convention then becomes unavailable as a means to seek the return of an abducted child. In particular, there is a difficulty with upholding the spirit of the Convention and remedying child abductions in Muslim countries because child custody is based upon Shari’a law. Australian bilateral agreements with Egypt and Lebanon establish separate consultative commissions with the role of locating abducted children, encouraging discussions between each country, mediating disputes and facilitating the child’s return. However, they lack substance because there is no legal obligation to follow them. The UK-Pakistan Protocol is an admirable approach to deal with Non-Convention countries. It goes further than a mere agreement to protect children because it reflects the Hague Convention’s view that the welfare of the child is to be determined in the country of the child’s habitual residence. In the spirit of comity, it sets up a group of liaison judges to ensure that there is communication between both countries. Australia should take inspiration from this approach because it promotes communication between countries and respect of each other’s legal systems.

Although helpful in facilitating discussion between countries, the effectiveness of these agreements and protocols becomes limited when dealing with Islamic countries. The Malta Conferences have been successful in facilitating diplomatic relations between Muslim countries and Convention countries by encouraging both to be open to each other’s views on child custody. Although relatively new, the ‘Malta Process’ has encouraged the development of mediation structures to deal with Muslim countries and has tried to reinforce mutual trust and confidence among judges. By creating bilateral agreements Australian courts have taken a step to

effectively implement the essence of the Convention into their relations with Non-Convention countries. However, more legal consequences need to be included in such agreements for them to provide a proper remedy to international child abduction.

Overall, Australia's approach to international child abduction cases dealing with the Article 13(1)(b) exception appears to be in line with the perspectives of the UK and USA. However, in order to more consistently and effectively apply the exception, Australian courts need to reassess the way in which they deal with domestic violence victims and Non-Convention countries. There needs to be a balance between protecting the parties affected by child abductions, and preserving the overall objective of the Convention— to promote international comity and to promptly facilitate the return of an abducted child to their place of habitual residence.

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