International Child Abduction and Courts' Evolving Considerations in Evaluating the Hague Convention's Defenses To Return

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I. THE STEREOTYPE ABDUCTION

It is a tragic story that many Americans have heard before: a young child being ripped away from their family home in the United States when things go awry between their American mother and their foreign father. As a result of the parents' conflict and in an attempt to punish the mother, the father returns to his home country and, against the mother's will and the parents' custody arrangement, takes the child with him. In the early 1980s, this new fear was introduced into American homes at the behest of domestic and foreign political action as well as the media, whose attention was focused to what evolved into the typical American

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stereotype abduction.[1] Thirty years after the creation of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), when considering the concept of international child abduction, it is easy to picture the abductor as the sinister, vengeful foreigner and the childless parent as the wronged party.

Although international child abduction does encompass scenarios like the one above, situations involving taking children across international borders in violation of custody agreements are often far more complex. The Hague Convention sets forth guidelines for its states parties on how to proceed in requesting and receiving requests for the return of wrongfully removed children.[2] The basic function of the Hague Convention comes into play when one parent (the abducting parent) flees to another country with a child in violation of the other parent's (the left-behind parent) domiciliary rights. The left-behind parent can then petition for the return of the child by completing an application pursuant to the Hague Convention.[3] The abducting parent in the requested state (the country receiving the application for return) then has the opportunity to contest the child's return by asserting one of five listed defenses,[4] two of which pertain to potential harm to the child if the return is ordered;[5] these two harm-based defenses will be the focus of this Comment.

Since the creation of the Hague Convention, states parties' courts have struggled to interpret and apply the Convention's terms to individual cases that are often not tailored to the common scenario of international child abduction discussed above, particularly when the abductor is fleeing from domestic violence at the hands of the left-behind parent. Moreover, the changing face of the abductor over the past several decades may be contributing to the changing application of several key concepts contained within the Hague Convention, particularly in reference to the viability of the defense contained in article 13(b).

This Comment first examines foreign and domestic courts' application of the defenses provided in articles 13(b) and 20 of the Hague Convention. If there is a movement toward a more liberal interpretation of these defenses, this Comment questions whether this movement is indicative of a gradual progression toward the best-interest-of-the-child standard used in U.S. courts to determine custody issues and whether this

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1. *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 601-02 (2000).

2. *See* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

3. *See id.* art. 8.

4. *See id.* arts. 12-13, 20.

5. *See id.* art. 13(b).

development is sustainable. Whether a more liberal interpretation of the defenses is sustainable will be evaluated in light of the drafters' intentions not to be mired in domestic custody disputes, codified in articles 16 and 19 of the Hague Convention.[6]

II. STRUCTURE AND BACKGROUND OF THE HAGUE CONVENTION

Every year, there are approximately one thousand international parent-child abductions from the United States alone.[7] The Hague Convention provides a civil remedy for the left-behind parent to seek return of their child after the child has been wrongfully removed or retained by another party,[8] who is usually (and most relevant to this Comment) the other parent.[9]

The straightforward structure of the Hague Convention directs that after it is determined that a child has been wrongfully abducted from their state of habitual residence, a return shall be ordered as long as the abducting parent is not able to satisfy any of the five defenses.[10] Thus, the court must first determine the child's state of habitual residence, which can be difficult.[11] Although the Hague Convention does not expressly define habitual residence, the interpretation of this concept has been litigated at length. In U.S. courts, there is a split between the parental-focus approach and the child-centered approach, but each of these approaches places a heavy importance on the amount of time the child resided in the country and whether the facts objectively point to that country as the clear residence of the child.[12] Once the state of habitual residence has been determined, the court must then determine whether the removal of the child to the requested country was wrongful.[13] The removal or retention of a child is wrongful when it violates the custody rights of the law of the state of habitual residence and when "[a]t the time

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6. *See id.* arts. 16, 19.

7. *See Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, U.S. DEP'T OF STATE 6 (2010), http://travel.state.gov/pdf/2010 ComplianceReport.pdf; *Compliance Reports*, U.S. DEP'T OF STATE, http://travel.state.gov/abduction/resources/congressreport/congressreport_4308.html (last visited Nov. 22, 2013) (compiling compliance reports from 1999-2013).

8. Hague Convention, *supra* note 2, pmbl., art. 1.

9. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1980), at 426, 429 (1982), *available at* http://hcch.e-vision.nl/upload/expl28.pdf ("In the majority of cases, the [person who removes the child] is the father or mother.").

10. *See* Hague Convention, *supra* note 2, arts. 3, 12-13, 20.

11. *See* Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 32-34 (2006).

12. JEREMY D. MORLEY, INTERNATIONAL FAMILY LAW PRACTICE 327-30 (2012).

13. Walsh & Savard, *supra* note 11, at 34.

of removal or retention those rights were actually exercised . . . or would have been so exercised but for the removal or retention" of the child.[14] The retention option exists for cases where a parent leaves with the child for another country under the premise of a lawful vacation or visit with family and then refuses to return within the agreed-upon or lawful amount of time.[15] If the case is adjudicated in the United States, the International Child Abduction Remedies Act (ICARA) requires the left-behind parent to prove by a preponderance of the evidence the child's state of habitual residence and that the abducting parent wrongfully removed or retained the child.[16]

The Hague Convention was adopted on October 24, 1980, during the Fourteenth Session of the Hague Conference on Private International Law.[17] The stated objective of the Hague Convention is "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State; and [t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[18] The Hague Convention was created as an answer to an increasing number of child abductions over international borders[19] and was designed to create a clear and strict mechanism by which countries could help to facilitate the swift return of children to their home countries—though not, by necessity, to the left-behind parent.[20] The creators intended for the Hague Convention to be applied in favor of return, except in rare, extenuating circumstances.[21] This intention is evident through the wording of article 2: "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."[22] There are currently ninety signatory states to the Hague Convention.[23] Even at its

14. Hague Convention, *supra* note 2, art. 3(a)-(b).
15. *See* Walsh & Savard, *supra* note 11, at 34.
16. *See* 42 U.S.C. § 11603(e) (2006).
17. Pérez-Vera, *supra* note 9, at 426.
18. Hague Convention, *supra* note 2, art. 1.
19. Theresa A. Spinillo, *The Hague Convention on the Civil Aspect of International Child Abduction: An Analysis of the Grave Risk of Harm Defense*, 14 N.Y. INT'L L. REV. 129, 130 (2001).
20. Pérez-Vera, *supra* note 9, at 429.
21. *See* Hague Convention, *supra* note 2, arts. 1-2, 12-13, 20.
22. *Id.* art. 2.
23. INT'L CHILD ABDUCTION DATABASE (INCADAT), http://www.incadat.com/index.cfm?act=text.text&lng=1 (last visited Nov. 22, 2013).

introduction, the Hague Convention was extremely well-received and was adopted by a unanimous vote of the twenty-three states present.[24]

In the Explanatory Report on the 1980 Hague Child Abduction Convention (Explanatory Report) written at the time of adoption, conference reporter Pérez-Vera describes the competing objectives in creating the Hague Convention by pointing out the "potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations."[25] Pérez-Vera goes on to state that although the Hague Convention "is not essentially concerned with the merits of custody rights . . . the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody."[26] This statement encapsulates the issue of whether courts can appropriately adhere to the drafters' intention not to become entangled in custody disputes, which is articulated through several articles as well as the Explanatory Report.[27] Particularly in situations where the abducting parent has asserted one of the defenses in articles 13 or 20, it can be difficult for a court not to consider matters of custody in the requesting state (the state making the request for the return of the child) if the child is ordered to be returned, in spite of the court's best efforts to view the request solely as a return to the country and not necessarily to the left-behind parent.[28]

In fact, the very nature of some of the defenses in the Hague Convention call for a court's inquiry into the child's home life with the left-behind parent.[29] In this way, a strict adherence to the Hague Convention's principles deters courts from finding that abuse only between the parents constitutes a sufficient risk of harm to the child.[30] Such claims are asserted under the grave-risk-of-harm defense of article 13(b), which dictates that the return of the child to the requesting state is not mandatory under the Hague Convention when "[t]here is a grave risk that his or her return would expose the child to physical or psychological

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24. Pérez-Vera, *supra* note 9, at 426.

25. *Id.* at 428.

26. *Id.*

27. *See* Hague Convention, *supra* note 2, arts. 1, 16-17, 19; Pérez-Vera, *supra* note 9, at 430.

28. *See* Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 292 (1st Cir. 2004).

29. *See* Hague Convention, *supra* note 2, art. 13(b).

30. *See* Weiner, *supra* note 1, at 657 ("Courts in [interparental violence] situations tend to have confidence in the willingness and ability of the courts in the place of the child's habitual residence to sort out these claims and take the necessary protective measures. . . .").

harm or otherwise place the child in an intolerable situation."[31] Even those advocating for a narrow application of the 13(b) defense to return recognize that there are certain cases of abuse that mandate the child be kept from the left-behind parent, including those situations "in which a custodial parent sexually abuses the child [and] the other parent removes or retains the child to safeguard it against further victimization."[32]

The principal thing to remember when discussing the Hague Convention and its application in foreign and domestic courts is important enough to reiterate: the Convention was created with an eye toward the wronged, left-behind parent who is entitled to an expeditious reunion with their child, and it does *not* employ any variation of the best-interest-of-the-child standard used in U.S. courts to determine custody issues.[33] Instead, the standard is a presumption toward the return of the child to the state of habitual residence, and only in extreme circumstances should return be refused.[34]

III. HARM-BASED DEFENSES TO RETURN

Keeping in mind the structure and purpose of the Hague Convention, a more in-depth analysis of the article 13(b) exception and a discussion of the use and relevance of article 20 are instructive to a discussion about the general movement of foreign courts and the presumptions guiding their decisions. Specifically, an examination of decisions from the past decade pertaining to the grave-risk-of-harm defense will reveal a surprisingly common pattern of a strict-to-moderate interpretation of the grave-risk-of-harm standard. This movement points to a modern recognition of domestic violence as a motivator for child abduction and perhaps even to a future overhaul of what constitutes a grave risk of harm under article 13(b) of the Hague Convention.

A. Article 13(b)

Article 13 of the Hague Convention states:

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31. Hague Convention, *supra* note 2, art. 13(b).

32. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986).

33. *See* Pérez-Vera, *supra* note 9, at 428-30; Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1055 (2005) ("However, the [Hague] Convention is quite clear that this defense should not serve as a pretext for inquiring into the merits of the custody issue and is not to be equated with a 'best interests of the child' standard.").

34. *See* Pérez-Vera, *supra* note 9, at 432-35.

> Notwithstanding the provisions of the preceding article [requiring an order of return within one year of the date of wrongful removal or retention], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: . . . [(b)] There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[35]

Because "grave risk of harm" and "intolerable situation" are not defined in the Hague Convention, courts have struggled to come up with uniform definitions in order to adhere to the intention of the drafters. It is important to remember that the primary goal of the Hague Convention was to ensure the rapid return of abducted children without courts having to concern themselves with case-specific, and often complicated, custody matters.[36] Indeed, even if the defense is found to be satisfied, the court considering the return petition still retains the discretion of whether to grant the return order; this is evidenced by the specific language that "the requested State is not bound to order the return of the child," rather than a clause dictating that the state *must not* order the return of the child.[37] This discretionary language is not lost on courts favoring return orders.[38]

1. Foreign Courts' Interpretation of the Grave-Risk-of-Harm Defense and the Development of Its Application

The United Kingdom has historically taken a very strict approach in evaluating article 13(b) defenses, even in cases where the abducting parent is the primary caretaker and has threatened not to return with the child if a return order is granted.[39] One example is seen through the case of *In re M*,[40] from the House of Lords, which is the final court of appeal for civil cases in the United Kingdom. In that case, which concerned the requested return of two girls to Zimbabwe, Baroness Hale of Richmond pointed out the discretionary nature of article 13 and the need for discretion in considering such delicate matters as the interests of a child.[41]

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35. Hague Convention, *supra* note 2, art. 13.

36. Pérez-Vera, *supra* note 9, at 428-30.

37. Hague Convention, *supra* note 2, art. 13.

38. *See* Peter McEleavy & Aude Fiorini, *Case Law Analysis*, INT'L CHILD ABDUCTION DATABASE (INCADAT), http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1 (last visited Nov. 22, 2013) (follow "Exceptions to Return" hyperlink; then follow "General Issues" hyperlink; then follow "Discretionary Nature of Article 13" hyperlink) (providing case law analyses on the discretionary nature of the article 13 exception).

39. *See id.* (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Primary Care Abductions" hyperlink).

40. [2008] 1 A.C. 1288 (H.L.) 1297 (appeal taken from Eng.).

41. *Id.* at 1297, 1307.

She cited the Explanatory Report, which specifically refers to the interests of the child, though notably not the *best* interests.[42] This reference was made with an awareness of the drafters' intentions, and the Baroness concluded diplomatically, "[T]he Convention is designed to protect the interests of children by securing their prompt return to the country from which they have wrongly been taken, but recognises some limited and precise circumstances when it will not be in their interests to do so."[43] Thus, the discretionary nature in article 13(b) can be seen as a potential mechanism by which courts are able to take into consideration—whether overtly or covertly—the best interest of the child, even in spite of the drafters' aversion to looking into such matters.

Cases involving alleged sexual abuse by the left-behind parents have been handled differently by different courts.[44]

> In the most straightforward cases the accusations may simply be dismissed as unfounded. Where this is not possible courts have been divided as to whether a detailed investigation should be undertaken in the State of refuge, or, whether the relevant assessment should be conducted in the State of habitual residence.[45]

Thirty years after the drafting of the Hague Convention, a majority of international child abductors are mothers, many of whom abduct their children in order to escape domestic violence at the hands of the father.[46] In the United States, an increasing awareness of the unique dangers faced by domestic violence victims has led to a broader application of the 13(b) defense to include domestic violence.[47] Other countries, however, may be slower to adopt such a standard, especially in jurisdictions requiring a higher burden of proof for abuse. In those jurisdictions, some courts have dismissed claims of abuse and potential harm to the child in domestic violence cases.[48] In some circumstances, the dismissal may follow a logical progression, for example, where the abducting parent

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42. *Id.* at 1298.

43. *Id.*

44. McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Allegations of Inappropriate Behaviour/ Sexual Abuse" hyperlink).

45. *Id.*

46. *See* Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1195 (2011).

47. Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 16-17 (1st Cir. 2002) (finding sexual abuse constituted an intolerable situation under article 13(b)).

48. *See, e.g.*, McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Allegations of Inappropriate Behaviour/Sexual Abuse" hyperlink).

fails to provide significant proof of harm or potential harm to the child.[49] Other cases, however, serve as a reminder of the strict construction of the Hague Convention.[50]

In Canada, for example, the Superior Court of Québec found a mother's concerns about her son's well-being with his father to be discounted by the fact that the mother had previously left him alone with the father.[51] Because the mother had left the child in the father's care while she went on vacation after an alleged incident of abuse integral to the claim, the court's consideration of this fact seems fairly logical.[52] The Canton Zürich Court of Appeals in Switzerland used a similar rationale in a case that involved sexual abuse of a minor daughter.[53]

In a case from New Zealand, a mother tried to establish a grave risk of harm after taking her son from his father in the United States by showing that the father was sexually deviant.[54] Because the mother's only evidence of deviance or potential danger to the child was through personal advertisements and a pornographic film, Judge Carruthers declined to find a grave risk of harm and ordered the son's return to the United States.[55] More pertinent to this discussion, however, is the reasoning and standard by which Judge Carruthers evaluated the case. In his analysis of the article 13(b) claim, he began by stating that "the language used is forceful and vigorous. It is not a 'best interests' test."[56] Despite this statement, however, he later pointed out that the mother had taken the child to New Zealand out of concern for her *own* well-being, and also looked into the intent of the mother to keep the child away from his father, instead of focusing on whether there were sufficient evidence showing that contact with the father would put the child in danger of a grave risk of harm.[57]

In order to uphold the purpose of the Hague Convention, some courts have persisted in ordering a return in cases of alleged abuse, but have attempted to temper the return with an instruction that an

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49. *See id.* ("The Court noted [the] fears of the [abducting] mother . . . were deemed to be largely irrational.").

50. *See id.* (analyzing the Swiss case *Obergericht des Kantons Zürich*).

51. *See id.* (analyzing the Canadian case *Droit de la Famille*).

52. *Id.*

53. *See id.* (analyzing the Swiss case *Obergericht des Kantons Zürich*).

54. Wolfe v. Wolfe, No. 743/92, 1993 NZFLR LEXIS 77, at *15-16 (D. Ct. Wellington Feb. 16, 1993) (N.Z.).

55. *Id.*

56. *Id.* at *12.

57. *Id.* at *15-16.

investigation be carried out in the state of habitual residence.[58] One example of this is a case from the Supreme Court of Finland, in which the Court ordered the return of a daughter to France at the request of her alleged sexually abusive father.[59] In that case, "the Court noted that a grave risk [of] harm did not arise if the mother were to return with the children and saw to it that their living conditions were arranged to their best interests. Accordingly, the Court found that there was no barrier to the return of the children."[60]

In cases in which the abductor threatens not to return with the child if a return order is issued, many courts initially took a very strict approach, adhering to a similar logic as that used in the Finnish case: it is the mother's duty to return with and to protect the child.[61] In the years following the adoption of the Hague Convention into Australian law, Australian courts were particularly strict in their interpretation of what constituted a grave risk of harm.[62] When a Hague Convention case came before the Full Court of the Family Court of Australia in 2001, the court reiterated the opinion of an earlier judge that "the purpose of the Hague Convention and the [Australian adoption of the Convention] was 'to limit the discretion of the Court in the country to which the children had been taken quite severely and stringently.'"[63] Interestingly, one author directly references the consideration given to the best interests of the child in such cases, finding that returning the child to the state of the left-behind parent was generally the way to serve the child's best interests.[64] Even though in that situation the author used the best-interest-of-the-child standard to justify a stricter application of the 13(b) exception, the reference to the standard could be an indication of a trend toward a broadening consideration of factors when determining when to issue a return order. To that end, some scholars believe that Australian courts have turned toward a greater focus on the child's potential living situation

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58. *See* McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Allegations of Inappropriate Behaviour/Sexual Abuse" hyperlink) (analyzing cases where "[r]eturn ordered with investigation to be carried out in the State of habitual residence").

59. *See id.* (analyzing a Finish Supreme Court case).

60. *Id.*

61. *See* McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Preliminary Court Abductions" hyperlink).

62. *See* McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Australia and New Zealand Case Law" hyperlink).

63. Michael Kirby, *Chief Justice Nicholson, Australian Family Law and International Human Rights*, 5 MELB. J. INT'L L. 221, 233 (2004) (citation omitted).

64. *Id.*

after their return when determining whether there is a grave risk of harm.[65]

In 2012, the Supreme Court of Justice of Uruguay attempted to delineate when separation from a primary caretaker is sufficient to establish a grave risk of harm to the child.[66] In that case, the child was born and raised in the United States, and his mother took him to Uruguay under the presumption that she would stay there with the child for fifteen days, but never returned.[67] The first instance court found that removal of the child back to the United States would expose the child to an extreme psychological risk; the father appealed, and the appellate court ordered the return of the child.[68] When the mother appealed, the Supreme Court of Justice found that there was, indeed, a grave risk of harm to the child.[69]

Although citing to the high level of trauma inflicted on children who are removed from one parent, the Court also stressed the importance of a narrow interpretation of the defense and pointed out that in order to satisfy the grave-risk-of-harm defense, "the child should be exposed to a serious emotional disturbance, more significant than that normally occurring upon the break-up of his/her parent's relationship."[70] Therefore, a main factor in the Court's decision to reverse the return order was the threat of retaliation from the father against the mother if the child was returned to the father, and the physical discipline exhibited in the past by the father against the child in light of the child's tender age.[71] Additionally, the Court considered "that the child had probably witnessed a situation of domestic violence between his parents" that had contributed to his psychological fragility.[72] The Court's consideration of domestic violence as a separate issue from actual abuse of the child is significant.

The Supreme Court of the United Kingdom has recently attempted to solve the issue of how to address a child's potential future situation in the context of an article 13(b) defense to return.[73] In that case, the Court

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65. McEleavy & Fiorini, *supra* note 38 (follow "Exceptions to Return" hyperlink; then follow "Grave Risk of Harm" hyperlink; then follow "Primary Care Abductions" hyperlink).

66. *Case Law Search*, INT'L CHILD ABDUCTION DATABASE (INCADAT) (Aug. 3, 2012), http://www.incadat.com/index.cfm?act=search.detail&cid=1185&lng=1&s1=2 (summarizing and commenting on Uruguay case *Solicitud conforme al Convenio de La Haya sobre los Aspectos Civiles de la Sustracción Internacional de Menores*).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See In re* E., [2012] 1 A.C. 144 (S.C.) (Appeal taken from Eng.).

cited an Australian case in determining that article 13(b) did not need to be narrowly construed because the exception was written narrowly.[74] The Court introduced a two-part test in cases involving claims of domestic violence:

> [T]he court should first ask whether, if [the claims] are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk.[75]

A recent case decided by the Second Civil Law Division of the Federal Supreme Court of Switzerland is instructive as to the movement of courts toward the consideration of a child's interests in determining whether there is a grave risk of harm.[76] Although the standard for grave risk of harm was not found to be satisfied in that case, the tribunal related several factors that constitute a sufficiently intolerable situation as to prevent the child's return, including when "placement with the applicant parent is manifestly inconsistent with the child's interest," or when "the abducting parent, in the circumstances, is unable to care for the child in the State where the child had its habitual residence at the time of the removal, or he or she manifestly cannot be required to do so."[77] Even though this statement was issued after the instruction that the defenses to return should be interpreted strictly, the direct reference to the interest of the child may indicate movement toward a standard more similar to a best-interest-of-the-child standard than the strict standard applied by earlier courts.

There is another important point to be made about the nature of the Hague Convention (and international law generally): even if there is a return order issued in a grave-risk-of-harm case or if the court orders an investigation to take place in the requested country, the effectiveness of such orders are mitigated greatly by the difficulty in enforcing foreign court orders. Many legal scholars have made this criticism about Hague Convention decisions:

> The Hague Convention is criticized for its inability to enforce the decision of a requested Contracting State, particularly if the decision involves conditions to be observed in the habitual residence once the child is returned. One mechanism courts employ to satisfy the required return

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74. *Id.* ¶ 31.

75. *Id.* ¶ 36.

76. *Case Law Search*, INT'L CHILD ABDUCTION DATABASE (INCADAT) (July 13, 2012), http://www.incadat.com/index.cfm?act=search.detail&cid=1179&lng=1&s1=2 (summarizing and commenting on the Swiss case *Number 5A_479/2012*.

77. *Id.*

> under the Hague Convention and yet consider the best interest of the child is to order specific conditions or "undertakings." Commentators supporting the view that "undertakings" ought to accompany the return of the child to the habitual residence base the success of the Convention upon the "fair-minded[ness] and impartial decision making" of the authorities in the state of the child's habitual residence.[78]

This excerpt contains two noteworthy points. First, it addresses the problem of enforcing return orders, which is a common problem to the field of international law.[79] Second, it addresses the potential for courts to order undertakings that take place after the return of the child; this concept is potentially twofold. First, courts have the option to condition a return order upon the initiation of an investigation in the requesting state after the child is returned.[80] Second is the potential implication that to be in accord with the best interest of the child, the return order *should* be accompanied by instruction as to how the return should be carried out after the duties of the Hague Convention have been satisfied.[81]

Thus, the concern that another country will not employ diligent means to protect children from violence in the home is a real one and contains many facets beyond the basic concern of enforceability. These problems have given rise to a school of thought advocating for an unequivocal refusal of return when a grave-risk-of-harm claim has been satisfied.[82]

2. U.S. Courts' Interpretation of the Grave-Risk-of-Harm Defense and the *Friedrich* Standard

In the United States, the Hague Convention has been implemented via the ICARA,[83] which fully adopts the terms of the Hague Convention

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78. Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW. 391, 427-28 (2000) (citations omitted). The author continues to state that "[t]he Convention is further criticized for a lack of systematic follow-up regarding the status of the child after the return" due to the effective termination of the Hague Convention duties after the implementation of the ordered return of the child. *Id.* at 428.

79. "[W]hether an order to return the child is enforced by the country into which the child was abducted depends entirely upon the judicial system of that country." *Id.* at 428.

80. *See id.* at 427-28.

81. *See id.* at 428-29.

82. Judge Richard Posner stated:

> If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over, however severely the law of the parent's country might punish such behavior.

Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005).

83. 42 U.S.C. § 11601 (2006).

and also establishes the burden of proof for Hague Convention claims and defenses brought in U.S. courts.[84] The ICARA reiterates that Hague Convention proceedings should not become entangled with child custody claims.[85] In evaluating an article 13(b) defense, the abducting parent has the burden of demonstrating the defense by clear and convincing evidence.[86] A well-known and often-cited case from the United States Court of Appeals for the Sixth Circuit, *Friedrich v. Friedrich*, established a standard for the application of the 13(b) defense.[87] In that case, an American mother abducted her son from Germany and claimed that he would face a grave risk of psychological harm if ordered to return to Germany due to the emotions associated with being separated from his mother because she would not return with her son if he were ordered back to Germany.[88] In finding the claims insufficient to satisfy the grave-risk-of-harm standard, the court noted: "Mrs. Friedrich alleges nothing more than *adjustment* problems that would attend the relocation of most children. There is no allegation that Mr. Friedrich has ever abused Thomas."[89] The court reiterated the findings of the district court pertaining to the child's home life upon his return to Germany, including the evidence of the father's reasonable working hours and the availability of the grandmother to care for him as well.[90]

These statements call attention to two separate areas of inquiry. First, the direct reference to a lack of abuse by the father indicates that abuse by one parent is a real and legitimate means for application of the defense, and perhaps if Mrs. Friedrich had been able to show abuse or potential for abuse by the father, the case would have turned out completely different.[91] This is in keeping with a strict reading of the text of article 13(b). Second, the reference to factors pertaining to the child's future upon return serves as an example of the difficulty courts face in not becoming entangled in any future custody dispute.[92] In addressing factors such as the father's work schedule, the court signals, if subtly, a possible extension of the article 13(b) exception.

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84. *Id.* § 11603(e).

85. *Id.* § 11601(b)(4) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

86. *Id.* § 11603(e)(2)(A).

87. *See* 78 F.3d 1060, 1069 (6th Cir. 1996).

88. *Id.* at 1067.

89. *Id.*

90. *Id.* at 1067-68.

91. *See id.*

92. *See id.* at 1068.

However, the ultimate finding of *Friedrich* is less notable than the two-factor test it introduced. The *Friedrich* test is integral to understanding the progress of article 13(b) jurisprudence because it limits application of the defense to two situations. "First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone of war, famine, or disease."[93] This first scenario applies to situations wholly outside the control of either parent, and in fact seems to mirror the article 20 defense, addressed later in this Comment. "Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[94] By tacking on the modifying clause at the end of the second scenario, the court attempts to add an objective means for evaluating claims of domestic abuse.

Of particular interest in this second element is the phrase "incapable or unwilling."[95] This terminology is familiar to scholars of international law and can be traced to international instruments such as the Rome Statute of the International Criminal Court (Rome Statute).[96] Some legal scholars have argued that the Rome Statute's lack of direction on what constitutes unwilling or unable effectively undermines the test by making its uniform application difficult.[97] Although the test is being used in a different context here, the difficulty in its application is a common strain in post-*Friedrich* cases.[98] In spite of this, courts have recognized the utility of the *Friedrich* standard because it highlights the importance in deferring to the jurisdiction of the courts in the state of habitual residence instead of attempting to overstep that state's interest in determining its own custody cases.[99]

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93. *Id.* at 1069.

94. *Id.* Additionally, the court judiciously stated: "[W]e acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly." *Id.* at 1068.

95. *Id.* at 1069.

96. Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

97. *See* Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 488 (2012) ("The test's lack of content undermines the legitimacy of the test as it currently is framed and suggests that it is not, in its current form, imposing effective constraints on a state's use of force.").

98. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1347-48 (11th Cir. 2008) (commenting on Pérez-Vera's Explanatory Report and the lack of a duty to consider the child's home country's ability to protect the child).

99. *See id.* at 1347.

Since *Friedrich*, many courts have welcomed the new standard for application of article 13(b), and some have recognized the danger in setting too high of a threshold for satisfaction of a grave-risk-of-harm defense.[100] For example, cases involving substantial sexual abuse of any kind at the hands of the left-behind parent should always satisfy the article 13(b) defense; any standard that would prevent this is contrary to the Hague Convention.[101]

In *Blondin v. Dubois* (*Blondin II*), the United States Court of Appeals for the Second Circuit held that the grave-risk-of-harm standard was satisfied where the abducting parent established that returning the child to the site of domestic violence would constitute such a risk.[102] This decision marked an important step in U.S. determinations of domestic violence and the article 13(b) defense. Though the facts of the case involve a fairly typical pattern of domestic abuse at the hands of the father toward both the mother and the daughter,[103] the court's evaluation is what makes this case significant. In finding that the defense was satisfied, the court reiterated its words from an earlier appeal that "'it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation.'"[104] This instruction strays from a traditional interpretation of the Hague Convention. This broadening of the factors, in conjunction with the court's deference to the testimony of an expert witness,[105] can arguably be interpreted as a movement toward a different standard for evaluating article 13(b) defenses, even to the extent of causing those advocating for a greater awareness of domestic violence in international child abduction cases to balk at the potential future impacts.[106]

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100. *See* Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007) ("We pause to note that, although the 'grave risk' threshold is necessarily a high one, there is a danger of making the threshold so insurmountable that district courts will be unable to exercise any discretion in all but the most egregious cases of abuse. Absent a grave risk finding, the Convention leaves no room for a court to establish, as the district court did in this case, ameliorative undertakings designed to protect children against the risk of harm upon their return."); *see also* Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005) (stressing the importance of protecting the safety of children even in light of the desire to interpret article 13(b) narrowly).

101. *See Danaipour I*, 286 F.3d 1, 16-17 (1st Cir. 2002).

102. 238 F.3d 153 (2d Cir. 2001).

103. Blondin v. Dubois (*Blondin I*), 189 F.3d 240, 243 (2d Cir. 1999).

104. *Blondin II*, 238 F.3d at 156 (citing *Blondin I*, 189 F.3d at 249).

105. *Id.* at 160-61.

106. *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of The Hague Convention on the Civil Aspects of International*

B. Article 20

Article 20 of the Hague Convention provides: "The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[107] At the time the treaty was created, the inclusion of this article was hotly debated.[108] As pointed out in the Explanatory Report, the placement of the article at the end of the chapter should serve as an indication of the extremely exceptional nature of the provision.[109] The Explanatory Report then takes care to make clear that in order to invoke an article 20 defense, "it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles."[110] Accordingly, courts have been extremely hesitant to allow article 20 defenses except in truly exceptional circumstances.[111]

The strict standard and unwillingness of any court to allow an article 20 defense has been cited as a reason for the infrequency of cases in which courts decline to order a child's return solely on the basis of a violation of human rights or fundamental freedoms.[112] Those courts that do hold return inappropriate due to an article 20 defense usually address circumstances of grossly inhumane behavior by one or both parents, or situations outside the control of the parents causing extreme danger in the state requesting return.[113]

Courts have not extended their broadening standard of review concerning the interests of the child to article 20 defenses. Indeed, if the article 13(b) defense is broadened in the direction indicated earlier in this Comment, it seems likely that the article 20 defense will continue to be addressed in only the most extreme cases. If anything, a greater

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Child Abduction, 33 COLUM. HUM. RTS. L. REV. 275, 344 (2002) (advocating for a more concise and workable interpretation of the grave-risk-of-harm defense than that employed by the Second Circuit in *Blondin II*).

107. Hague Convention, *supra* note 2, art. 20.

108. Pérez-Vera, *supra* note 9, at 433.

109. *Id.* at 462.

110. *Id.*

111. *See* Weiner, *supra* note 1, at 665 ("Courts show more resistance to allowing this defense than any other. In fact, few courts, if any, have ever accepted the defense.").

112. *Id.*; Walsh & Savard, *supra* note 11, at 46 ("[The article 20] defense to the [Hague] Convention is rarely utilized and is rarely successful. At the present time, it has minimal doctrinal significance.").

113. Pérez-Vera, *supra* note 9, at 462.

accessibility of article 13(b) will likely cause the article 20 defense to become even less relevant.

IV. ANALYSIS

In the twenty-nine years since the creation of the Hague Convention, much has changed in international law and international relations. The signatory nations to the Hague Convention saw one universal goal of returning the abducted child to the state of habitual residence as soon as practicable and created a treaty that sought to describe narrowly and succinctly the means by which to achieve this goal. Although these intentions are still valid, the increasing worldwide awareness of the dangers presented by violence in the home, even when it is limited to interparental violence, have opened many courts' eyes to the prevalence of a new type of abduction.[114] The body of law involving an abducting parent who has taken the child in order to escape violence at the hands of the left-behind parent therefore acts as the perfect illustration of the dilemma presented to courts in determining whether to refuse to order the child's return due to the Hague Convention's grave-risk-of-harm defense.[115]

The decision that courts must make in evaluating Hague Convention grave-risk-of-harm claims can be articulated as having two principal elements. First, a court must decide whether to narrowly interpret the language presented in the Hague Convention, specifically article 16, which direct courts not to make decisions on the merits of any possible custody dispute in the state of habitual residence, and article 19, which directs courts not to take a Hague Convention decision as a determination of custody in any future proceeding.[116] However, this decision is more complex than it seems at first blush. The second facet of this dilemma is closely tied to the first: when evaluating article 13(b) defenses, how much are courts willing to take into account the interest of the child? The development of case law over the past thirty years demonstrates an upward trend in the amount of weight given to a child's interest, with courts becoming more willing to decline to issue a return order in cases where return is against the child's best interests. As this Comment has discussed, these evaluations more frequently include a greater number of factors, such as the left-behind parent's working hours

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114. *See* Weiner, *supra* note 1, at 611.

115. *See* Hague Convention, *supra* note 2, arts. 13, 20; *see also* Browne, *supra* note 46, at 1196.

116. Hague Convention, *supra* note 2, arts. 16, 19.

and child care opportunities.[117] This development is fascinating in light of the drafters' clear intention to stay away from a best-interest-of-the-child standard and the desire for courts not to become bogged down in any potential custody disputes.

A. Issues of Overextension and the Difficulty of Separating Hague Convention Decisions from Custody Decisions

The drafters of the Hague Convention were clear about their desire to limit the scope of the Hague Convention to the circumstances directly pertaining to the abduction of the child.[118] That is, once a child is deemed to have been wrongfully removed from their state of habitual residence, the rest of the process should be simple. Either the court should facilitate a speedy return of the child or there is some extenuating circumstance that warrants consideration of one of the defenses, which should be applied sparingly and with a mind to the preference for return. However, as the case law demonstrates, the decision of whether to order the return of the child has become increasingly difficult as abducting parents have brought more complex defenses to the courts. Domestic violence, particularly interparental violence, is one example of the difficulty courts face in applying the terms of the Hague Convention neatly. While the drafters certainly imagined grave-risk-of-harm cases to involve such atrocities as sexual abuse of the child or persecution due to race or religion, the psychological and emotional trauma to children who witness domestic violence can be far more difficult to investigate, and the physical dangers to the child can be hard to prove with empirical evidence.[119]

Even in light of these difficulties, there has been a shift in some courts' evaluations of article 13(b) defenses. It is possible that because judges are beginning to recognize the physical and psychological risks to children exposed to domestic violence, even when the violence is solely interparental, they have begun to blur the line between Hague Convention determinations and child custody determinations.[120] In

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117. *See* Friedrich v. Friedrich, 78 F.3d 1060, 1067-68 (6th Cir. 1996).

118. *See* Hague Convention, *supra* note 2, art. 3.

119. Browne, *supra* note 46, at 1207 ("Courts must make individualized findings in each Convention case as to whether there is 'specific evidence' of grave risk of harm to the child upon return; they may not rely merely on studies and statistics to make Article 13(b) determinations." (citation omitted)).

120. *See, e.g.*, Spinillo, *supra* note 19, at 149 ("[T]he fact that certain evidence is used in custody proceedings, at which the best interests of the child dominates the outcome, is no reason for courts to dance around the realization that what is in fact under evaluation . . . is the best interests of the child.").

considering factors like the child's home life in the state of habitual residence upon return, courts are effectively creating precedent for the courts in the state of habitual residence to consider in any future custody disputes. Even though a court's explicit reliance on a Hague Convention decision would be in direct violation of the Hague Convention's terms,[121] it seems illogical to expect courts to ignore a decision that has been made on the basis of an identical investigation (or at least similar) to the one it must make.

B. Toward a Best-Interest-of-the-Child Standard?

There is no question that the interests of children are paramount to the creation of the Hague Convention; in the preamble, it states the purpose "to protect children internationally from the harmful effects of their wrongful removal or retention."[122] However, the Hague Convention is unique in its goal not simply to take into account the child at stake in each case, but children in the aggregate. It refers to children internationally and stresses the importance of remaining uninvolved in domestic proceedings.[123] This distinction is vital to the interpretation of the standard by which courts should judge cases: it is emphatically not a best-interest-of-the-child standard, but instead a presumption toward returning the child, rebuttable only by satisfaction of one of the listed defenses.[124] Instead of determining how each parent is able to see the child, the Hague Convention seeks only to establish in which jurisdiction the custody dispute shall take place.[125] However, in certain circumstances, this intention is mitigated by the overarching desire to protect children:

> [A]rticle 13 contain[s] exceptions which clearly derive from a consideration of the interests of the child. . . . [T]he interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.[126]

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121. *See* Hague Convention, *supra* note 2, art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.").

122. *Id.* pmbl.

123. *See* Pérez-Vera, *supra* note 9, at 431.

124. *See supra* Part II.

125. Pérez-Vera, *supra* note 9, at 430.

126. *Id.* at 433.

Therefore, the ultimate need to protect the interest of the child was evident from the time the Hague Convention was created.[127] The grave-risk-of-harm defense has been cited as the most frequent reason for courts' refusal to order the child's return,[128] and article 13(b) has been referred to as a potential threat to the strict enforcement of the Hague Convention.

As the case law has shown, however, especially in circumstances which prevent the abducting parent from returning with the child, the decision of where to litigate becomes more akin to a determination of the child's future living situation. Decisions such as *In re E*—the U.K. case that addressed the need to protect a child from potential domestic violence[129]—and the Swiss case that delineated factors to determine whether domestic violence rose to the level of a grave risk of harm[130] are instructive in evaluating whether courts are moving toward a different standard for establishing the harm defenses of article 13(b).

The deeper a court delves into evaluating the many factors that play into a child's daily life, the closer it inches toward employing a best-interest-of-the-child standard. Some courts may not be cognizant that in broadening their application of article 13(b), they are opening the door to an even more unwieldy standard. The very nature of the best-interest-of-the-child standard that makes it appealing to domestic courts, namely, that the judge is able to take into account all the evidence of potential living situations and tip the scale toward whichever situation is in the child's best interest,[131] is what makes it impractical in cases of international child abduction.

V. CONCLUSION

Whether or not courts will continue in the direction they have been moving in recent years, the increased amount of weight given to the interests of the child in determining whether they should be returned to the state of habitual residence is undeniable. This change can be attributed, at least in part, to the changing face of the stereotype abductor. In the past, the mere thought of an international child abduction conjured images of the foreign fathers and the left-behind mothers, but people are

127. *See* Weiner, *supra* note 106, at 337 ("Convention supporters have always feared that this provision would be the Convention's Achilles heel.").

128. *Id.* at 337 n.236.

129. [2012] A.C. 144 (S.C.) (appeal taken from Eng.).

130. *Case Law Search*, *supra* note 76 (analyzing the Swiss case *Number 5A_479/2012*) .

131. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 675, 694 (3d ed. 2012).

coming to realize the increasing frequency of abductions that occur to *help* the child.

With regard to the standard by which courts can and should evaluate defenses under the Hague Convention's article 13(b), one might think that simply moving toward a best-interest-of-the-child standard would be the most humane decision. However, as any scholar of family law can attest, the best-interest-of-the-child standard is not easily applied, and inquiries into what is best for the child often involve drawn-out and costly investigations. Of course, these types of investigations, and the subsequent litigation, were exactly what the drafters of the Hague Convention intended to avoid.

In keeping with the intent of the drafters, one must consider a court's ability to push through cases of simple abduction. In cases in which the only harm to the child is inevitable (the harm caused by the dispute between the parents and the child's displacement to another country), courts must be able to facilitate a speedy return of the child to avoid any further intrusion into their childhood. If all courts internationally were inclined to apply a best-interest-of-the-child standard instead of the Hague Convention standard, this would not be practicable.

The ethical considerations that take place within courtrooms are not to be ignored. However, courts are not simply barometers for the jurisdiction's moral zeitgeist, and decisions are not made in a vacuum. Courts, as well as legislators, must balance considerations such as judicial efficiency when determining which standard to apply. Therefore, if judges worldwide are going to continue adhering to the Hague Convention as written, there must be a more uniform interpretation of the standard by which the grave-risk-of-harm defense is satisfied, whether or not it takes into account a broader consideration of the best interest of the child.