

Comment,
HAGUE CONVENTION ON
INTERNATIONAL CHILD ABDUCTION:
CAN DOMESTIC VIOLENCE ESTABLISH
THE GRAVE RISK DEFENSE
UNDER ARTICLE 13

Abstract

Given the rise in “people flow,”¹ globalization, and the movement of individuals from low-income to high-income countries, it is more essential than ever to address the surreal reality facing many parents of having their child abducted by the other parent and taken to a different country.² This Comment explores the current law and evolution of The Hague Convention on the Civil Aspects of International Child Abduction, specifically whether domestic violence is enough to establish the “grave risk” defense under Article 13. This Comment will reference the effects that these proceedings and domestic violence have on children involved in such international disputes. The Article will also discuss the most recent case law to help aid attorneys in advocating for their clients utilizing the grave risk defense. In addition, the Comment will make suggestions to help ameliorate the potentially negative impacts on children involved in these international disputes. Finally, the Comment will conclude by making suggestions to expand Article 13(b) to better accommodate domestic violence victim seeking protection from their batterers.

I. Background

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter “Hague Convention” or “Convention”) is an international multilateral treaty formed by the Hague

¹ Richard B. Freeman, *National Bureau of Economic Research Working Paper Series: People Flows in Globalization* 1, 2 <http://www.nber.org/papers/w12315.pdf> (lasted visited Apr. 9, 2017) (“People flow refers to the movement of people across international borders in the form of immigration, international student flows, business travel, and tourism.”)

² *Id.*

Conference on Private International Law.³ Under the Convention, signatory countries agree to expeditiously cooperate in returning children who have been abducted by one parent and taken to a foreign country to their country of habitual residence.⁴ The Convention states that it is “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody.”⁵ The Convention also notes its purpose is “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”⁶ The Convention’s purpose is evident in Article 1’s specified three objectives: to (1) secure the immediate return of children wrongfully removed or retained in any Contracting State; (2) ensure rights of custody; and (3) guarantee that access under the law of one Contracting State are effectively respected in the other Contracting States.⁷

In the United States, Congress has enacted the International Child Abduction Remedies Act (“ICARA”) as the implementing legislation for the Hague Convention.⁸ “ICARA establishes the Hague Convention as the law of the United States, provides definitions, sets forth jurisdiction, and addresses certain details regarding how the United States will enforce the provisions of the

³ Hague Convention on the Civil Aspects of International Child Abduction art. 13, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (reprinted at 51 Fed. Reg. 10494, Mar. 25, 26, 1986) (hereinafter Hague Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (last visited Apr. 9, 2017).

⁴ Jennifer Lyday & Jamie Stone, *Filing and Litigating a Hague Convention Child Abduction Civil Case in Federal Court* 1, <https://casetext.com/posts/filing-and-litigating-a-hague-convention-child-abduction-civil-case-in-federal-court/> (last visited Apr. 9, 2017).

⁵ 51 Fed. Reg. at 10498.

⁶ *Id.*

⁷ *Id.*

⁸ Tai Vivatvaraphol, Comment, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3327 (2009). “ICARA was created to deal with the sudden abduction of children and to allow a petitioner to assert his or her rights in exigent circumstances.” *Distler v. Distler*, 26 F. Supp. 2d 723, 727 (D.N.J. 1998).

treaty.”⁹ ICARA explicitly states that its “provisions are in addition to, and not in lieu of, the Hague Convention.”¹⁰

II. Starting the Litigation

The attorney who represents the left-behind parent (“petitioner”) must first file a petition for the child’s return in the jurisdiction where the abducting parent (“respondent”) and child reside.¹¹ The petition must establish a prima facie case for the return of a child by proving three elements: (1) immediately prior to removal or wrongful retention, the child was habitually a resident in a foreign country; (2) the removal and retention was in breach of petitioner’s custody rights under the foreign country’s law; and (3) the petitioner was exercising those custody rights at the time of removal and wrongful retention.¹²

If the petitioner establishes a prima facie case for the return of a child, then the abducted child must be returned to his or her country of habitual residence unless the respondent can satisfy the requirements of one of the five affirmative defenses. The defenses are: (1) the child has become settled in his or her new environment; (2) the petitioner consented to or subsequently acquiesced in the removal or retention; (3) there is a grave risk that returning the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation; (4) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its view; or (5) returning the child violates public policy.¹³ However, despite a successful demonstration of an affirmative defense, a court can still order that the child be returned.¹⁴

⁹ Kilpatrick Townsend, *Litigating International Child Abduction Cases Under the Hague Convention*: NCMEC International Child Abduction Training Manual 2, http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf (last visited Apr. 22, 2017).

¹⁰ 42 U.S.C. § 11601(b)(2).

¹¹ 42 U.S.C. § 11603(b).

¹² Hague Convention, *supra* note 3, at art. 3-4; *See In re K.J.*, No. 9:16-CV-80177-RLR, 2016 WL 874360, at 3 (S.D. Fla. Mar. 8, 2016).

¹³ Hague Convention, *supra* note 3, at art. 12, 13, 20.

¹⁴ *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1347 (S.D. Fla. 2002) (citing *Feder*, 63 F.3d at 226 (citing Pub. Notice 957, 51 Fed. Reg. 10494, 10509 (1986))).

III. The Article 13 Grave Risk Defense

Under Article 13(b) of the Convention, the court is not bound to order the return of a child if the person who opposes the return establishes that there is a grave risk of either “physical or psychological harm” or the return would “place the child in an intolerable situation.”¹⁵ A respondent who opposes the return of the child must establish the affirmative defense of grave risk by clear and convincing evidence.¹⁶ The risk of harm necessary to support an Article 13(b) defense “requires grave, not merely serious risk to the child.”¹⁷ The Article 13(b) exception is “narrowly drawn in scope.”¹⁸ In fact, at least one court has cautioned that “the exception for grave harm to the child is not a license for a court in the abducted-to country to speculate on where the child would be happiest.”¹⁹ However, many courts recognize that even though the exception is narrowly construed, any amount of harm to a child “undoubtedly encompasses an ‘almost certain’ recurrence of traumatic stress disorder.”²⁰

In addition, the standard of the Convention “is narrower than the ‘best interests of the child standard’ in a custody proceeding; for example, it is not enough that the child would have

¹⁵ Hague Convention, *supra* note 3, at art. 13.

¹⁶ 42 U.S.C. § 11603(e)(2)(B).

¹⁷ *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (explaining that the exception “was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child’s best interests.”); *See also* *McManus v. McManus*, 354 F. Supp. 2d 62 (D. Mass. 2005) (holding that two incidents of a mother striking two of her four children and a generally chaotic home environment was sufficient to establish a serious risk, but not a grave risk of harm under Article 13(b)).

¹⁸ *In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006) (explaining that if a court were to “give an overly broad construction to its authority to grant exceptions under the Convention, it would frustrate a paramount purpose of that international agreement — namely, to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.”)

¹⁹ *Friedrich*, 78 F.3d at 1068; *See* *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Friedrich*).

²⁰ *Blondin v. Dubois*, 238 F.3d 153,163 (2d Cir. 2001); *See also* *In re Lozano*, 809 F. Supp. 2d 197, 224 (S.D.N.Y. 2011) (explaining that based on the testimony of Dr. Cling, a widely-recognized expert in child psychiatry and psychologist, that if a child is removed from his stable environment and repatriated, it could have a “catastrophic effects” on children.).

better prospects in one country or another, nor is general political or social unrest sufficient to prevent the child's return."²¹ But "psychological, sexual, or physical harm of a spouse or child poses a grave risk precluding a child's return."²² Thus, courts find that "a pattern of violence in the home may not be ignored as the privacy of the family and parental control of children results in most abuse of children by a parent going undetected."²³ Accordingly, the rendering court considering a Hague petition "must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned."²⁴

A. Domestic Violence as a Grave Risk

Domestic violence is becoming a customary fact pattern for parties who invoke the grave risk defense.²⁵ At first glance, "the defense appears useful for domestic violence victims because domestic violence between a child's parents can harm the child."²⁶ Although, the "standard of proof for an abductor raising this defense is higher than that for the petitioner's burden."²⁷ Many federal courts around the country have begun to interpret the standard to allow domestic violence victims to establish grave risk to a child under Article 13(b) when the violence is directed at the parent.²⁸ In *Ischuu v. Gomez*,²⁹ "the combination of physical abuse by Luis Ischuu, sexual abuse by his father and brother,

²¹ Noergaard v. Noergaard, 244 Cal. App. 4th 76, 84 197 Cal. Rptr. 3d 546, 552 (2015), review denied (Apr. 13, 2016).

²² *Id.* at 85.

²³ *Id.*

²⁴ *Id.*

²⁵ Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 652 (2000).

²⁶ *Id.* at 651

²⁷ Rial v. Rijo, No. 1:10-CV-01578-RJH, 2010 WL 1643995, at 2 (S.D.N.Y. Apr. 23, 2010) (stating that "a respondent who opposes the return of the child has the burden of establishing by clear and convincing evidence that one of the exceptions set forth in article 13(b) on the Hague Convention applies."

²⁸ *Ermini v. Vittori*, 758 F.3d 153 (2d Cir. 2014) (holding that the father's history of domestic violence towards the mother and the children was itself sufficient to establish the "grave risk" of harm defense, Hague Convention on the Civil Aspects of International Child Abduction art. 13(b)); *See also* *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008) (holding that a child would face a grave risk of harm if returned to Australia due to a father's violence towards the mother and drunkenness.); *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013); *Sim-*

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verbal abuse, and multiple, specific threats to kill Garcia Gomez, coupled with the child's awareness and witnessing of some of the abuse, establishes a similar grave risk of harm to child." However, many federal courts do not and have set the standard quite high, which has made domestic violence victims' ability to establishing grave risk to their child difficult.³⁰

B. Some Federal Courts Recognize Domestic Violence as Grave Harm

Although a clear judicial consensus has not emerged, many federal courts throughout the United States have begun to recognize a "child's observation of spousal abuse to be relevant to the grave-risk inquiry as well as the parent's general pattern of violence."³¹ This recognition of domestic violence establishing grave risk to the victim's child is evident, because statistics indicate that the "incidence of successful grave risk defenses [asserting domestic violence as the reason] has increased globally and in the United States."³² This increase is a result of courts like the U.S. Court of Appeals for the Eleventh Circuit holding that "a child's proximity to actual or threatened violence may pose a grave risk to the child" and that "sufficiently serious threats to a parent can pose a grave risk of harm to a child."³³ In addition, the California

cox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

²⁹ *Ischiu v. Garcia*, No. TDC-17-1269, 2017 BL 285104 (D. Md. Aug. 14, 2017).

³⁰ *Norinder v. Fuentes*, 657 F.3d 526 (7th Cir. 2011) (holding that children must be returned to their habitual residence because the mother failed to meet the demanding standard of proving a grave risk of harm to the children even after showing the father had drug addictions, alcoholism, and a history of violence); *See also* *Neumann v. Neumann*, 684 F. App'x 471 (6th Cir. 2017) (holding that Steve Neumann, pinning Julie Neumann against a kitchen counter with a knife to her throat, while two of the children pulled at his arm to get him away from her had to be remanded to determine if this violence was not enough to establish grave risk to the children).

³¹ *In re Lozano*, 809 F. Supp. 2d at 223 (quoting *Elyashiv*, 353 F. Supp. 2d at 408. *See Rial*, 2010 WL 1643995, at *2 ("Prior spousal abuse, though not directed at the child, can support the grave risk of harm defense.").

³² Townsend, *supra* note 9, at 53 (citing the 2011 Hague Global Statistical Analysis, at 30, 205, <https://assets.hcch.net/upload/wop/abduct2011pd08ae.pdf>).

³³ *Gomez v. Fuenmayor*, 812 F.3d 1005, 1014 (11th Cir. 2016) (holding that "ruling to the contrary would artificially and unrealistically ignore the pow-

Fourth District Court of Appeals held that “domestic violence or child abuse constitutes a grave risk to the child.”³⁴

Finally, within one of the most recent federal cases regarding domestic violence and the Convention, the dissenting judge stated the following:

There has been a movement to amend The Hague Convention to make fleeing from domestic violence for safety reasons a stand-alone defense to the return of an abducted child. There have also been efforts to revise the convention so that such flight is not a ‘wrongful removal’ in the first place. As Judge Richard Posner pointed out in *Khan v. Fatima*: “The Hague Convention was created to discourage abductions by parents who either lost, or would lose, a custody contest. . . The Convention drafters adopted a “remedy of return” . . . to discourage abductions, reconnect children with their primary caretakers, and locate each custody contest in the forum where most of the relevant evidence existed. But while the remedy of return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent’s violence.”³⁵

The shift towards courts recognizing domestic violence targeted at victims as posing a grave risk toward the child has been furthered by many seminal cases, congressional resolutions, and recent research showing the effects of domestic violence on children. In 1990, a congressional resolution passed that specifically found that “children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser” and “the effects of physical abuse of a spouse on children include . . . the potential for future harm where contact with the batterer continues [because] . . . children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent.”³⁶

erful effect that a pattern of serious violence directed at a parent may have on his children.”). *See also* *Ischiu v. Garcia*, Civil Action No. TDC-17-1269, 2017 U.S. Dist. LEXIS 130253 (D. Md. Aug. 14, 2017) (stating that “the potential psychological harm to the child that would derive from Gomez Garcias’s legitimate fear for her safety if they were to return to Guatemala, and the physical risk that the child would be caught up in potential violence directed at his mother, the Court finds that returning W.M.L.G. to Guatemala would create a grave risk of harm to the child and place him in an intolerable situation.”).

³⁴ *Noergaard*, 244 Cal. App. 4th at 84.

³⁵ *Neumann*, 684 F. App’x at 490-91.

³⁶ *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (citing H.R. Con. Res. 172, 101st Cong., 104 Stat. 5182, 5182 (1990)).

In fact, the U.S. Court of Appeals for the First Circuit in *Walsh v. Walsh*,³⁷ concluded that domestic violence is “sufficient to make a threshold showing of grave risk of exposure to physical or psychological harm” and an intolerable situation.³⁸ In addition, the Court of Appeals for the Eleventh Circuit stated that it “requires no stretch of the imagination to conclude that serious, violent domestic abuse repeatedly directed at a parent can easily be turned against a child” and thus must be taken very seriously.³⁹

C. *Many Federal Courts Are Reluctant to Recognize Domestic Violence as Grave Harm*

Many federal courts have taken the stance that when a party invokes the grave risk exception there needs to be evidence of a “sustained pattern of physical abuse and/or a propensity for violent abuse [towards the child as opposed to] evidence of sporadic or isolated incidents of abuse, or of some limited incidents aimed at persons other than the child at issue.”⁴⁰ In other words, courts do not find that isolated instances sufficiently support the application of the grave risk exception. Therefore, under this standard, a petitioner must have exhibited a pattern of domestic violence directed towards the child as opposed to evidence of domestic violence only towards them.⁴¹ Thus, it is clear that these courts believe the child himself or herself, not just the parent, needs to have been subjected directly to serious physical or psychological abuse for the grave risk defense to be met.⁴²

In addition, many courts believe that when abuse toward a spouse is relatively minor “it is unlikely that the risk of harm

³⁷ 221 F.3d 204 (1st Cir. 2000).

³⁸ *Id.*

³⁹ *Gomez v. Fuenmayor*, 812 F.3d 1005, 1014 (11th Cir. 2016).

⁴⁰ *Laguna v. Avila*, No. 07-CV-5136(ENV), 2008 WL 1986253, 1,8 (E.D.N.Y. May 7, 2008), quoted in *In re Lozano*, 809 F. Supp. 2d 197, 223 (S.D.N.Y. 2011).

⁴¹ *Rowe v. Vargason*, No. CIV. 11-1966, 2011 WL 4529341, at 10 (D. Minn. Sept. 28, 2011).

⁴² *Blondin*, 238 F.3d at 160-62 (affirming the denial of petitioner’s request for the return of his children to France where repatriation under any circumstances would create a “grave risk of psychological harm” prohibited under the Hague Convention. Explaining that where “the child faces a real risk of being hurt, physically or psychologically the grave risk of harm exception is met.”).

caused by the return of the child will rise to the level of a ‘grave risk’ or otherwise place the child in an ‘intolerable situation.’”⁴³ Under this standard, a petitioner must demonstrate a connection between the grave risk to her and the grave risk to the child.⁴⁴ However, “where spousal abuse evinces a propensity towards violence and is accompanied by other risk factors specific to the child, a grave risk of harm to a child may be found.”⁴⁵ Therefore, these courts are influenced by whether there is some amount of abuse or neglect towards the child and “not solely to a parent or some other third party.”⁴⁶

In addition, courts like the Ninth Circuit Court of Appeals have stressed that “the grave-risk inquiry should be concerned only with the degree of harm that could occur in the [child’s] immediate future.”⁴⁷ However, it is worth noting that courts like the First Circuit Court of Appeals have rejected the requirement that danger be “imminent” in order to establish the grave risk defense.⁴⁸ Since petitioners cannot rely on generalized evidence of future harm, they must produce specific evidence showing immediate potential harm.⁴⁹ Furthermore, these courts are concerned that considering isolated, remote, and non-codified exception such as domestic violence usurps and interferes with their obligation to “examine the full range of options that might make possible the safe return of a child to the home country.”⁵⁰ Thus, these courts find it essential to “take into account any ame-

⁴³ *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007).

⁴⁴ *Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013).

⁴⁵ *Acosta v. Acosta*, No. CIV. 12-342 ADM/SER, 2012 WL 2178982, at 7 (D. Minn. June 14, 2012), *aff’d.*, *appeal dismissed*, 725 F.3d 868 (8th Cir. 2013).

⁴⁶ *Id.*

⁴⁷ *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005) (explaining that “psychological harm is often cumulative, especially in the absence of physical abuse or extreme maltreatment, even a living situation capable of causing grave psychological harm over the full course of a child’s development is not necessarily likely to do so during the period necessary to obtain a custody determination”).

⁴⁸ *Walsh v. Walsh*, 221 F.3d 204, 208-09 (1st Cir. 2000) (petitioner’s request for the return of his children to Ireland reversed on finding the district court erroneously required a showing of an “immediate, serious threat” to the children under the Hague Convention.).

⁴⁹ *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995).

⁵⁰ *Blondin IV*, 238 F.3d at 161, quoted in *In re Lozano*, 809 F. Supp. 2d 197, 222 (S.D.N.Y. 2011).

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liorative measures” by petitioner in cases of abuse before they deny or require repatriation.⁵¹

Respondents that find themselves in one of these difficult districts should attempt to establish a connection between the violence perpetrated on them and the child. A respondent should also allege that the harm is immediate to both themselves and the child. Finally, counsel for respondents should cite the extensive and growing list of other federal district courts that have held domestic violence is relevant to the grave risk inquiry. These supportive district courts often reference much more than just their opinion of the legal issues, but also a voluminous amount of research that irrefutably shows the effects domestic violence has on children.⁵²

D. Factors Courts Consider in Determining Whether Domestic Violence Establishes Grave Harm

Showing grave risk of “physical or psychological harm” or an “intolerable situation” awaiting the child back home can be difficult.⁵³ However, “[i]n alleging grave risk to the children, liti-

⁵¹ *Blondin II*, 189 F.3d at 248, quoted in *In re Lozano*, 809 F. Supp. 2d at 221 (stating that it is “important that a court . . . 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”). That even if a district court finds a grave risk of harm, it also must consider whether it could protect a child from that harm “while still honoring the important treaty commitment to allow custodial determinations to be made – if at all possible – by the court of the child’s home country.”).

⁵² Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety, A Study of Hague Convention Cases*, Final Report, NIJ #2006-WG-BX-0006 (Dec. 2010), https://gspp.berkeley.edu/assets/uploads/page/HagueDV_final_report.pdf; Weiner, *supra* note 25, at 662; see also Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1090 (1991) (“[D]omestic violence. . . traumatizes and terrorizes [children] when they witness their fathers abusing their mothers, and it teaches them that violence is acceptable. Second, a parent’s disregard of the effect of violence on his children indicates that the parent may not be able to care adequately for the children’s needs. Finally, women may be disadvantaged because of the violence, thus experiencing economic and psychological problems.”).

⁵³ Hague Convention, *supra* note 3, at art. 13.

gants are increasingly raising the issue of domestic abuse.”⁵⁴ The allegation of a grave risk of harm compels courts to contemplate the various risks of return. At one end of the spectrum are “those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child’s preferences; at the other end of the spectrum are “those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation.”⁵⁵ Typically, most courts agree that alone the former does not constitute a grave risk of harm under the Convention.⁵⁶ This is because courts have consistently held the level of risk and danger required to trigger the exception to be very high.⁵⁷ However, once the grave risk defense is asserted, “subsidiary facts need only be proven by a preponderance of the evidence.”⁵⁸

1. Factors Needed to Establish Grave Risk of Physical or Psychological Harm

Since courts hold the level of risk and danger required to trigger the exception to be very high,⁵⁹ what must a respondent prove to establish physical or psychological harm as a result of domestic violence to the child? Many courts state that the physical or psychological harm exception “requires that the alleged harm to the child be a great deal more than minimal.”⁶⁰ This means that, “the harm must be greater than what is normally expected when taking a child away from one parent and passing the child to another parent.”⁶¹ The Seventh Circuit has added that “the gravity of the risk must involve not only the probability of

⁵⁴ Townsend, *supra* note 9, at 53 (citing *Charalambous v. Charalambous*, 627 F.3d 462, 468-69 (1st Cir. 2010), where the “respondent waived other factual claims to her grave risk defense on appeal and focused solely on the spousal abuse she suffered and was likely to face in the future”).

⁵⁵ *In re Lozano*, 809 F. Supp. 2d at 220, quoting *Blondin IV*, 238 3d at 162.

⁵⁶ *Id.*

⁵⁷ *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000), citing *Blondin*, 189 F.3d at 249.

⁵⁸ *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 404 (E.D.N.Y. 2005) (quoting *Danaipour v. McLarey*, 183 F. Supp. 2d 311, 315 (D. Mass. 2002)).

⁵⁹ *Norden-Powers*, 125 F. Supp. 2d at 640, citing *Blondin*, 189 F.3d at 249.

⁶⁰ *Dallemagne v. Dallemagne (In re D.D.)*, 440 F. Supp. 2d 1283, 1298 (M.D. Fla. 2006), quoting *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000).

⁶¹ *Id.*, quoting *Whallon*, 230 F.3d at 459.

harm, but also the magnitude of the harm if the probability materializes.”⁶² Courts like the Seventh Circuit conclude that “even incontrovertible proof of a risk of harm will not satisfy the exception to repatriation if the risk of harm proven lacks gravity.”⁶³

This high burden of proof can pose great difficulties for victims of domestic violence to establish grave risk to a child since the violence often is not solely directed towards the child, but rather “just” the spouse. Thus, one can easily begin to see that this high burden to establish grave risk ignores the harm or future harm that has or will be perpetrated on children. These high burdens ignore the harm victims and children of the domestic violence are suffering and have suffered, despite “decades of scholarship addressing the harmful effects of domestic violence on children in the home.”⁶⁴ Thus, attorneys on both sides of a case should be prepared to plead the issue of domestic violence as establishing grave risk when litigating a Hague Convention case.

2. *Factors Needed to Establish Grave Risk of an Intolerable Situation*

In addition to providing a defense where grave risk of harm is shown, Article 13 provides a defense where the return would place the child in an “intolerable situation.”⁶⁵ Whether there is a risk of an intolerable situation is an “independent legal question” requiring an independent legal analysis.⁶⁶ Courts state that the

⁶² Townsend, *supra* note 10, at 50, quoting *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

⁶³ Laguna No. 07-CV-5136(ENV), 2008 WL 1986253 at 8, quoting *Blondin IV*, 238 F.3d at 162.; *See In re Application of Adan*, 437 F.3d 381, 398 (3d Cir. 2006) (remanding a case to district court because the court explained that the risk of harm proven to the child lacks gravity).

⁶⁴ Townsend, *supra* note 10, at 54 (citing Hague Permanent Bureau, Domestic and Family Violence and the Article 13 “Grave Risk” Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper 4 (May 2011), <http://www.hcch.net/upload/wop/abduct2011pd09e.pdf>).

⁶⁵ Hague Convention, *supra* note 3, at art. 13.

⁶⁶ *In re Lozano*, 809 F. Supp. 2d at 221 (citing State Dep’t Legal Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510 (noting that a “parent sexually abusing a child would clearly be an example of an ‘intolerable situation’ and, if the other parent removed the child to protect it from further abuse, a court could deny a petition brought by the abusing parent for the child’s return because “such ac-

“word ‘intolerable’ also indicated that a high degree of risk was required.”⁶⁷ An “intolerable situation” requires a court to evaluate “the people and circumstances awaiting that child in the country of her habitual residence.”⁶⁸ Thus, courts carefully examine and consider the “environment in which the child will reside upon returning to [the home country].”⁶⁹

Professor Merle Weiner states some courts hold that:

The ‘intolerable situation’ must arise from the child’s ‘habitual residence,’ not from the child’s relationship to a particular parent. Of course, sometimes the risk of harm is not attributable solely to the habitual residence or to the child’s relationship with a particular parent, but rather to some combination of the two. This combination of factors exists when a child is returned to a jurisdiction that does not adequately protect domestic violence victims and the child’s mother is such a victim. In this situation, it is important for courts to assess both the lethality of the batterer and the level of protection offered to the mother by the child’s habitual residence.⁷⁰

In *Blondin v. DuBois* the second circuit took this approach and assessed the level of protection that would be offered to the child in his habitual residence.⁷¹ In spite of a trial court record chockfull with examples of domestic and child abuse, the Second Circuit still directed the lower court to consider France’s ability to give the child adequate protection upon the child’s arrival.⁷² The Second Circuit went on to emphasize that the “structure of the Convention required [giving] deference to the courts in the child’s habitual residence, and that before finding an Article 13(b) defense, a district court must consider whether ‘any ame-

tion would protect the child from being returned to an ‘intolerable situation’ and subjected to a grave risk of psychological harm.”).

⁶⁷ Weiner, *supra* note 25, at 657 (citing *In re Walsh*, 31 F. Supp. 2d 200 (D. Mass. 1998), *rev’d*, *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. 2000)).

⁶⁸ *In re D. D.*, 440 F. Supp. 2d 1283, 1299 (M.D. Fla. 2006), citing *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (holding that “only severe potential harm to the child will trigger this Article 13b exception.”).

⁶⁹ *Id.*, citing *Nunez-Escudero*, 58 F.3d 374.

⁷⁰ Weiner, *supra* note 25, at 659.

⁷¹ 189 F.3d 240, 242 (2d Cir. 1999); *See Turner v. Frowein*, 312, 343, 752 A.2d 955, 973 (Conn. 2000).

⁷² *Id.* at 250; *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (suggesting that abuse or neglect does not constitute a “grave risk of harm” absent an additional finding that the abducted-from country cannot protect the child upon the child’s return).

liorative measures' could be taken by the parents or authorities of the habitual residence in order to reduce the risk attending the child's return."⁷³

Despite many courts being skeptical and setting a high burden of proof for domestic violence victims attempting to establish the grave risk defense, attorneys advocating for their clients should continue to plead domestic violence as creating an intolerable situation for the child. Also, when representing victims of domestic violence, attorneys should advise their clients to file a protective order for themselves as well as their children. This can help demonstrate to subsequent courts that the respondent and her children are in grave fear of harm and it provides prior courts with a legal finding of danger to the child.

IV. How Courts Attempt to Ameliorate Harm to Children

Under the Convention, courts look at ameliorative measures (commonly referred to as "undertakings") that can potential allow a child to return safely to the home country, despite the presence of a grave risk of harm.⁷⁴ However, several courts have recognized that "even when a grave risk of harm is not present, undertakings should be used 'to ensure that a potential harm does not manifest when a child returns to his or her country of habitual residence.'"⁷⁵ Typically courts use undertakings when they are concerned with "support, housing, and the child's care pending resolution of the."⁷⁶ Courts will only utilize their discre-

⁷³ Weiner, *supra* note 25, at 659-60 (citing *Blondin*, 189 F.3d at 248).

⁷⁴ *Blondin*, 238 F.3d at 160 (stating that "although the Hague Convention does not use the term 'undertakings,' in cases under the Convention courts use the term 'undertaking' to refer to a promise by the petitioning parent 'to alleviate specific dangers that might otherwise justify denial of the return petition.'").

⁷⁵ *Rial*, No. 1:10-CV-01578-RJH, 2010 WL 1643995, at 3 (citing *Krefter v. Wills*, 623 F. Supp. 2d 125, 138 (D. Mass. 2009). *See also* *Simcox v. Simcox*, 511 F.3d 594, 604-11 (6th Cir. 2007) (stating "where a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all.").

⁷⁶ *Blondin*, 238 F.3d at 160 (quoting Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 *FAM. L.Q.* 35, 52 n.41 (1994) (explaining use of undertakings by British courts)).

tion to return a child subject to proof that the required undertaking will be implemented upon the child's return and that those undertakings will substantially lessen the risk to a child.⁷⁷ Thus, if a court finds that an undertaking is sufficient, it will consider ordering the child's repatriation to the home country.

The Sixth Circuit in *Simcox v. Simcox*⁷⁸ has outlined "three broad categories" of cases and the role of undertakings in analyzing the grave risk defense. First, "there are cases in which the abuse is relatively minor."⁷⁹ Most of the times, in these cases, the Article 13b threshold has not been met and thus the court lacks discretion to refuse to order the return of the child with or without undertakings.⁸⁰ Second, "are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect."⁸¹ In these cases, any undertaking can be inadequate and unsatisfactory in ameliorating the risk of harm to the child.⁸² This is due to the "difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign court's orders."⁸³ Finally, there are those cases that "fall somewhere in the middle, where the abuse is substantially more than minor, but is less obviously intolerable."⁸⁴ In

⁷⁷ *Neumann*, 684 F. App'x at 481 (holding that there "was 'grave risk,' but nevertheless indicating that returning the children might be appropriate if sufficient undertakings could be made to provide for their safe return.').

⁷⁸ 511 F.3d 594, 607 (6th Cir. 2007).

⁷⁹ *Id.* at 607 (stating that "in such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a "grave risk" or otherwise place the child in an 'intolerable situation' under Article 13b.').

⁸⁰ *Id.*

⁸¹ *Id.* at 607-08. *See also* *Ischui v. Garcia*, Civil Action No. TDC-17-1269, 2017 U.S. Dist. LEXIS 130253 (D. Md. Aug. 14, 2017) (stating that despite the petitioner not requesting undertakings, "even if he had, under the present circumstance, undertakings would be inappropriate because of the grave risk caused by Luis Ischui and his family towards Gomes Garcia" and that "the Court would only consider the return of the child if the child remained in the custody of Gomez Garcia pending custody proceedings in Guatemalan courts.').

⁸² *Simcox*, 511 F.3d at 607-08.

⁸³ *Id.* (stating that "consequently, unless the rendering court can satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody. Thus, the court should refuse to grant the petition.').

⁸⁴ *Id.*

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these cases, the court will undertake a fact-intensive inquiry into whether repatriation would put the child in “grave risk” of harm or otherwise place the child in an “intolerable situation.”⁸⁵ This fact-intensive inquiry includes the court carefully considering several factors such as “the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.”⁸⁶ Even in this middle category, “undertakings should be adopted only where the court satisfies itself that the parties are likely to obey them.”⁸⁷ Thus, “undertakings would be particularly inappropriate, for example, in cases where the petitioner has a history of ignoring court orders.”⁸⁸

After respondent raises a grave risk defense because of domestic violence, her counsel should be prepared to combat the court’s consideration of undertakings. Assuredly, the petitioner will attempt to provide the court with information showing that the foreign country’s child protective services or other organizations have offered support to ensure the child will be safe if returned to the home country. Also, respondent’s counsel should be prepared to confront petitioner’s presentation of information attempting to reassure the presiding court of his understanding and responsibility to enforce the court ordered undertakings. Counsel for respondent should contest such a showing with examples of petitioner’s history for ignoring court orders or a past pattern of violence.

V. Conclusion

The Convention’s structure works well to remedy those abductions it was intended to address: abductions by parents looking to gain litigation advantages and abductions by non-custodial parents attempting to circumvent custody orders. In these situations, the abductor’s act is selfish, and most of the children probably are harmed by the unlawful abduction. However, the Convention operates to the detriment of children when its rem-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

edy of return can be used by the father who has abused the child's mother and caused her to abscond to another country for her own and the children's safety. In this all too common scenario, the remedy of return hurts the domestic violence victim and worse, the child.

Currently, the Convention offers very little confidence for the domestic violence victim who flees to a different country with the children because on arrival she faces her abuser's petition for the children's return. Under the current law in many state and federal courts, the abuser can easily make out a *prima facie* case for the children's return.⁸⁹ Under the Convention, the various defenses afford inadequate aid to domestic violence victims and their children to avoid their return. This is because so few courts have recognized that domestic violence is a type of "grave risk" under Article 13(b).

In addition, undertakings have proved to be insufficient since often the only true way for a domestic victim and her child to be safe are to be on a different continent than their abuser. This is because the abuser can be extreme dangerous, or the child's habitual residence would ineffectively protect the mother and children from when the abuser violates, or threatens to violate, the undertaking. U.S. courts are well-intentioned in seeking to return children to their habitual residence so custody proceedings can commence as soon as possible utilizing undertakings, but a domestic violence victim should not have to put her life in danger to litigate custody. The reality is that upon the return of the child it is too easy for an abuser to simply ignore the undertaking order issued by the abducted-to countries' courts and commence the violence and begin revictimizing the mother and children.

Thus, reforming the Hague Convention on the Civil Aspects of International Child Abduction is essential. While every country should strive to adequately protect victims of domestic violence, and while women and their children should not have to

⁸⁹ Weiner, *supra* note 26, at 659 (stating that the "batterer will almost always be able to establish that the removal was "wrongful" because "rights of custody" is defined so broadly. Her children's "habitual residence" can be determined, and most likely will be determined, without reference to the background violence that caused her to travel to the children's habitual residence in the first place, or to remain there even though her trip was to be a temporary visit.).

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flee to other countries in search of safety, sometimes such flight is necessary. Sending these domestic violence victims and their children back to the source of the violence from which they fled is wrong. To conclude, Professor Merle Weiner stated it best:

Until every signatory to the Hague Convention on Child Abduction protects domestic violence victims effectively, women who take self-help measures to escape abusive relationships deserve our empathy. In no case should we privilege forum shopping accomplished through force by a batterer over a forum incidentally selected by his victim in her effort to escape from that violence. Nor should we ever require domestic violence victims to return to an unsafe jurisdiction in order to litigate custody. International cooperation can benefit both children and their abused parents.⁹⁰

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⁹⁰ Weiner, *supra* note 26, at 661.