

WHAT CONSTITUTES A “GRAVE RISK OF HARM?”: LOWERING
THE HAGUE CHILD ABDUCTION CONVENTION’S ARTICLE 13(B)
EVIDENTIARY BURDEN TO PROTECT DOMESTIC VIOLENCE
VICTIMS

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INTRODUCTION

Jane, an American woman, fell in love with her co-worker John, a Greek man, while they were living in California.¹ After two years, John asked Jane to move to Greece with him. While there, they married and had a child together. Jane had the picturesque life: living on the Aegean Sea and raising a child with the man of her dreams. But after five years, things started to change. John began to regularly punish the child by slapping her. Jane and John began to argue. Eventually, the yelling evolved to destroying items in the house, and John pushing both Jane and the child to the floor. When Jane threatened to leave, John tore up her passport in a violent rage and pulled her hair so hard that she was hospitalized with severe neck injuries. In fear for her and her child’s life, Jane attempted to leave Greece and return to California.

Before she could leave the country, however, John took the child back to his house, and refused to let Jane speak with her. In response, Jane filed a petition for custody. A Greek court assigned Jane care of the child until further judgment, but when the child returned to Jane, it suffered from a variety of new physical and emotional problems. Afraid of what John would do next, Jane finally fled back to the United States to live with her family in Kentucky. In response, John filed a petition through the Hague Child Abduction Convention (“the Convention”), a treaty aimed to prevent parents from wrongfully removing their child to another country, to retain custody of the child in an American court.²

In order to prevent the child’s return to Greece, Jane argued to a Kentucky court that the child fell under the treaty’s Article 13(b) exception,

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¹ The facts of this narrative are based on the facts recounted in *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 845-48 (Ky. Ct. App. 1999).

² See Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

which allows a judge to prevent the child's return if there is a "grave risk that his or her return would expose the child to physical or psychological harm."³ Jane argued that the child fell under the exception because John abused the child and the child also witnessed John abuse Jane. The court found that there was no "grave risk of harm," which occurs only if the child is in imminent danger of being returned to a zone of war, famine, or disease, or if the courts of the country from which they fled are unwilling to give the child adequate protection. Accordingly, the American court ordered that the child be sent back to Greece, with or without Jane. This unjust result was the consequence of the Kentucky court's misunderstanding of the Convention's purpose.

The court in *Janakis-Kosten v. Janakis*⁴ is not alone in its misinterpretation of the Convention.⁵ The confusion is the result of language found in Article 1 of the Convention. There, the Convention's stated objectives include securing the prompt return of children wrongfully removed from their home country, and ensuring that other countries respect the rights of custody under the respective home country's laws.⁶

However, the drafters made clear at the beginning of the document that the Convention's ultimate purpose is to protect the interests and safety of the child.⁷ At the time the Convention was drafted, the perception was that most people who abducted their children were fathers who were not the primary caretakers of the child and who only fled with the child to retain custody when a separation dispute would likely take away their custody rights.⁸ Congressional legislators made the same assumption when they enacted the treaty's implementing legislation, as well.⁹ If the Convention is solely intended to protect a parent from having their child kidnapped by the other parent who fears losing custody of the child, then a narrow interpretation of

³ *Id.* art. 13(b).

⁴ 6 S.W.3d 843, 845–48 (Ky. Ct. App. 1999).

⁵ *See, e.g.,* *Avendano v. Smith*, 806 F. Supp. 2d 1149, 1168, 1177 (D. N.M. 2011) (finding that evidence that Petitioner raped and abused the mother is not enough to merit *Friedrich*'s definition of "grave risk of harm" because the abuse was not directed to the child and does not place him in a zone of war); *Lieberman v. Tabachnik*, 625 F. Supp. 2d 1109, 1125–26 (D. Colo. 2008) (holding that testimony from the mother that she and her children suffered from years of domestic abuse and are working with a domestic violence organization because they are constantly afraid of the father do not rise to the level of returning a child to a zone of war, famine or disease); *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *23 (S.D. Fla. Oct. 23, 2008) (finding that a risk of a recurrence of domestic violence is not enough to merit protection under Article 13(b) because it does not show that authorities in the home country are incapable or unwilling to give the child adequate protection).

⁶ *See* Hague Convention, *supra* note 2, art. 1.

⁷ *See id.* pmbl.

⁸ *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 608–09 (2000) [hereinafter Weiner, *Escape from Domestic Violence*]; 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 Child Abductions*, 33 *COLUM. HUM. RTS. L. REV.* 275, 278–79 (2002) [hereinafter Weiner, *Navigating the Road*].

⁹ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 603–05.

Article 13(b) may make sense. However, for American courts to apply such an interpretation to domestic violence victims—who are fleeing their abusers—is counter-productive to recent efforts made by federal and state governments to punish those who commit domestic violence.¹⁰

By the early 1990s, the perception of an abductor changed as the public began to realize that abductors could be, and often were, parents fleeing from domestic abuse.¹¹ As such, many courts now interpret domestic violence as a risk of harm that may merit application of the Article 13(b) defense.¹² However, courts are still split as to the relevant inquiry when deciding whether the application of the Article 13(b) defense is merited, with some courts believing that the Convention’s ultimate purpose is to prevent forum shopping, and others believing that the goal is to protect the safety of the child in question.¹³

In an effort to interpret the Article 13(b) defense narrowly, courts tend to call for the child to be returned to its home country if the abductor does not show by clear and convincing evidence that domestic violence presents an immediate and serious harm.¹⁴ Typically, however, a clear and convincing

¹⁰ See *id.* at 593–94.

¹¹ *Id.* at 611–13.

¹² See, e.g., *Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013) (finding that the lack of evidence of Petitioner physically abusing the children does not necessarily render Article 13(b) inapplicable if Petitioner has a history of verbal or physical spousal abuse and anger management issues); *Khan v. Fatima*, 680 F.3d 781, 786 (7th Cir. 2012) (finding that if Respondent’s testimony of Petitioner’s ungovernable temper and brutal treatment of her is to be believed, then it would support an inference of a grave risk of psychological harm to the child if the child is to continue to live with Petitioner); *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) (finding that there can be a “grave risk of harm” to the child amid an absence of evidence showing the father abused the child since there was evidence of the father abusing alcohol, having a violent temper, and abusing the mother in the child’s presence); *Van de Sande v. Van de Sande*, 431 F.3d 567, 570, 752 (7th Cir. 2005) (holding that abuse of Respondent in her children’s presence was enough to merit protection from being sent back to Belgium under the Article 13(b) defense because it established a “grave risk of harm” to the children); *Walsh v. Walsh*, 221 F.3d 204, 219–20 (1st Cir. 2000) (reversing the lower court’s decision and finding there was a “grave risk of harm” to the children because the father was psychologically abusive and had severely beaten the children’s mother in their presence); *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 704 (D. Md. 2015) (finding that no physical abuse of the mother or children occurred, but there was a “grave risk of harm” to the children because the father verbally abused the mother in front of the children, forced the children to verbally abuse the mother, threatened to kill the mother, and abused drugs and alcohol); *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 553–54 (E.D. Pa. 2010) (holding that the Article 13(b) defense applies when Respondent testified that Petitioner beat her repeatedly, pointed a gun at her, and threatened to kill her, even though Petitioner did not do this to the children).

¹³ With the Third, Sixth, and Eight Circuits holding that the Convention is a venue statute to prevent forum-shopping, and the Seventh Circuit holding that it is to protect the safety of the children in question. See *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005); *Van De Sande*, 431 F.3d at 570; *Silverman v. Silverman*, 338 F.3d 886, 889 (8th Cir. 2003); *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996).

¹⁴ See Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 40 (1990).

evidentiary standard is extremely difficult to meet for domestic violence victims.¹⁵ Further, even if that standard is met, courts still typically require that all opportunities for the return of the child be given due consideration.¹⁶ These opportunities are typically found in the form of “undertakings,” which are verbal assurances that the Petitioner gives to the court as a condition of the child’s return.¹⁷ Undertakings are intended to assure that the child will receive certain necessities until the courts of the child’s home country make a judgment on custody matters.¹⁸ The assurances could include finding institutions in the child’s home country that would keep the child from the abusing parent, or the abusing parent agreeing to pay for airfare and lodging in the child’s home country.¹⁹

In this Comment, I will argue that the intent to ensure the safety of the abducted child is above all other considerations of Article 13(b) of the Convention, and that this purpose is undermined by the current use of undertakings when the abductor proves by clear and convincing evidence that a grave risk of harm exists. Thus, the burden needed to meet the Article 13(b) defense should be lowered from the clear and convincing evidentiary standard to the preponderance of the evidence standard, and undertakings should only be considered for use in cases where the judge finds that the clear and convincing standard would not have been met.

Part I of this Comment discusses the history and original purpose of the Convention, which is to secure the return of a wrongfully removed child while not sacrificing the safety interests of that child.²⁰ Part II then showcases

¹⁵ See Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How to Recognize It*, 17 FAM. ADVOC. 14, 14 (1995) (“Even when there is evidence of injury or threats of severe violence, the complex dynamics of domestic violence and the secrecy and distortions that shroud it can lead professionals to minimize or fail to recognize it altogether.”).

¹⁶ See, e.g., *Simcox v. Simcox*, 511 F.3d 594, 609–10 (6th Cir. 2007) (finding that despite holding that there is a grave risk of harm to the child and mother, the case should be remanded to the lower court to determine undertakings); *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) (“A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings.”); *Blondin v. Dubois*, 189 F.3d 240, 249–50 (2d Cir. 1999) (finding that even with ample evidence of a risk of harm to the child, the case needs to be remanded to account for undertakings). *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 708–09 (D. Md. 2015) (finding that although there was a grave risk of psychological harm to the children, undertakings are acceptable).

¹⁷ See Weiner, *Navigating the Road*, *supra* note 8, at 338 n.242; William M. Hilton, *The Limitations on Art. 13(b) of the Convention on the Civil Aspects of International Child Abduction*, 11 AM. J. FAM. L. 139, 142 (1997), [http://www.hiltonhouse.com/articles/Art_13\(b\)_limit.txt](http://www.hiltonhouse.com/articles/Art_13(b)_limit.txt) (“An ‘Undertaking’ is as an agreement/stipulation between the parties on the specific issue of the logistics of returning a child to his or her ‘habitual residence.’”).

¹⁸ See 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 L. 391, 412 n.190 (2000).

¹⁹ See *id.*

²⁰ See Hague Convention, *supra* note 2, pmb1., art. 1.

how American courts have interpreted the Convention’s Article 13(b) defense when confronted with an abductor’s claims of domestic violence. Finally, Part III challenges those interpretations as failing to properly follow the Convention’s purpose and argues that to accomplish that purpose, Article 13(b)’s evidentiary standard should be lowered and the use of undertakings should be limited.

I. BACKGROUND: THE PURPOSE AND STRUCTURE OF THE CONVENTION AND ITS IMPLEMENTING LEGISLATION

In 1980, the Fourteenth Session of the Hague Conference adopted The Hague International Child Abduction Convention.²¹ On December 23, 1981, the United States signed the Convention, and in 1988, Congress enacted federal implementing legislation, known as the International Child Abduction Remedies Act (“ICARA”).²²

In order to file a petition under the Convention, the parent must have a custody right.²³ Generally, if a parent petitions for the return of their child under the Convention within a year of the abduction, the country where the child was brought must order its return.²⁴ If it is outside of a year, the child may stay if the judge determines the child is settled in the new country.²⁵ Similarly, the court does not need to return the child if it finds that the petitioning parent was not exercising custody rights at the time of removal, or if the petitioning parent previously consented to removal.²⁶ In addition, if there is a “grave risk that his or her return would expose the child to physical or psychological harm,” the court can decide not to return the child.²⁷ However, the Convention allows for a court to return a child at any time regardless of whether a defense is applicable if the judge finds it would detract from the Convention’s purpose.²⁸ Consequently, certain courts have chosen to interpret ICARA to say that defenses to custody claims under the Convention should be construed narrowly.²⁹

²¹ See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 9 (1994).

²² *Id.* at 10. See also International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2012).

²³ See Hague Convention, *supra* note 2, art. 4, 8.

²⁴ *Id.* art. 12.

²⁵ *Id.* See also Silberman, *supra* note 21, at 30.

²⁶ Hague Convention, *supra* note 2, art. 13(a).

²⁷ *Id.* art. 13(b).

²⁸ See *id.* art. 18.

²⁹ See *Friedrich v. Friedrich*, 78 F.2d 1060, 1067 (6th Cir. 1996); *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).

At the time the Convention was written, domestic violence was not as prominent of a public issue as it is today.³⁰ As such, the drafters considered the typical abducting parent to be a male who absconds with the child because he is dissatisfied with the actual or predicted outcome of losing custody rights in a separation.³¹ However, since then, it has been determined that most abductors are women alleging domestic violence.³² This is seen in a majority of Convention cases today, where generally the pattern involves an American female marrying a foreign male, then moving to his country of origin where abuse begins, the female then moving back to the United States with their children, and the batterer petitioning under the Convention for the return of the children.³³ In order to determine if Article 13(b) applies to these cases, the purpose and structure of the Convention must be properly understood.

A. *Original Purpose of the Convention*

The very first sentence of the Convention explicitly states that “the interests of children are of paramount importance.”³⁴ To this end, the Convention’s Explanatory Report,³⁵ which details the drafters’ intentions, explains that to protect these interests, the goal of the Convention was to deter a parent from wrongfully obtaining a right of custody from authorities of another country.³⁶ Hence, Article 1 of the Convention states in seemingly broad terms that the Convention’s objectives are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of access under the law of one Contracting State are effectively respected in the other Contracting States.”³⁷

However, when writing the Convention, the drafters relied on reports implying that the abductor was a male worried about losing custody,³⁸ and

³⁰ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 605; Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 458 (2006).

³¹ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 608–09; Wills, *supra* note 30, at 430.

³² See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 615.

³³ Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN’S L.J. 181, 187 (2003).

³⁴ Hague Convention, *supra* note 2, pmb1.

³⁵ Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW (1982).

³⁶ See *id.* ¶¶ 1, 13.

³⁷ Hague Convention, *supra* note 2, art. 1.

³⁸ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 609 (“The typical abductor must think that he has something to gain by his act of self-help.”).

fear of personal violence perpetuated by the other parent was never mentioned as a motivating factor for abduction.³⁹ Consequently, the drafters believed that the typical abductor was a foreign, non-custodial father who removed the child from the child’s mother and primary caretaker, typically an American.⁴⁰ This type of an abductor was, in the drafters’ minds, more likely raise a fraudulent custody claim in the new country of residence, and thus, attempt to legalize the abduction.⁴¹ Since the drafters believed this was the main source of international abductions, they were not concerned with broad language; their only goal was to create a deterrent to those parents who aimed to use a foreign country’s laws to get custody they would otherwise not receive.⁴²

Similarly, in the United States, the problem of international child abduction became prevalent during the late 1970s and early 1980s due to a series of high-profile abductions.⁴³ Moreover, during the Congressional ratification proceedings of the Convention in 1986, most legislators held the same stereotype of abductors as the Convention drafters.⁴⁴ That stereotype was arguably strengthened while attempting to secure the passage of ICARA, which used the text of the Convention without any alterations.⁴⁵ During the proceedings, Senators and Representatives alike regaled the public with stories of American women allowing the foreign-born fathers to see the children, only to have the children abducted to the father’s home country never to be returned.⁴⁶ Illinois Senator Alan Dixon even went as far as to say:

[The children who are abducted are] . . . brainwashed into hating their American parent. These children are told that the parent in this country has abandoned them, hates them, never wants to see them or speak to them again. Furthermore, not only are these children confused and disoriented . . . they are taught to hate their native country, the United States.⁴⁷

But during their discussions, the legislators never addressed the possibility of the abductors being victims of domestic violence, likely because it

³⁹ *Id.*

⁴⁰ *Id.* at 602.

⁴¹ See Pérez-Vera, *supra* note 35, ¶ 14.

⁴² See *id.* ¶ 15.

⁴³ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 602–03. See also Joe Sterling, *Missing Child Case ‘Awakened America,’* CNN (Apr. 20, 2012), <http://www.cnn.com/2012/04/20/us/etan-patz-significance/>.

⁴⁴ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 602–03.

⁴⁵ See 42 U.S.C. § 11603 (2012); Weiner, *Escape from Domestic Violence*, *supra* note 8, 603.

⁴⁶ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 603–05.

⁴⁷ *International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971 before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong. 60 (1988) (statement of Sen. Dixon).

was not a highly visible political issue at the time.⁴⁸ The press also furthered the idea of a male abductor skirting a country's law, since, at the time, it mainly wrote about the issue as fathers abducting children, and it almost exclusively portrayed the left-behind parent as American.⁴⁹ This painted a near-unanimous public perception of ICARA as legislation with no downsides for Americans, which left a belief that there was no need to modify the language of the Convention.⁵⁰

It was not until the early 1990s, with the rise of prominent abduction-related cases,⁵¹ that the press began to discuss international child abduction in the context of abductors fleeing domestic violence.⁵² The perception changed around the same time in Congress as well: in 1993, Congress enacted the International Parental Kidnapping Act,⁵³ which included the affirmative defense that “the defendant was fleeing an incidence or pattern of domestic violence.”⁵⁴ Similar domestic violence defenses were found in parental kidnapping statutes in all fifty states.⁵⁵ In addition, the perception that abductors were most often victims of domestic violence became globally accepted. This is reflected in the conclusion of the Third Special Commission to Discuss the Operation of the Convention,⁵⁶ which described women as the majority of abductors in Convention cases, and stated that mothers frequently allege that they or their children are victims of domestic abuse from the fathers.⁵⁷ Thus, the original purpose of the Convention—as seen by its drafters and the United States Congress that passed the Convention's implementing legislation—was to ensure that children are protected from abductors who take their children as a last resort in a custody battle, notwithstanding the seemingly broad language used in Article 1 that explains the Convention's objectives.⁵⁸

As the Convention's Explanatory Report explains, when the signatory states declared:

⁴⁸ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 605.

⁴⁹ See *id.* at 606–08.

⁵⁰ See *id.* at 607.

⁵¹ See, e.g., *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1543 (4th Cir. 1994) (holding that grandparents involved with a highly publicized child custody dispute were not public figures and did not need to prove actual malice in their defamation suit).

⁵² See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 611, 614.

⁵³ Making it a felony to remove a child from the United States or to retain a child outside the United States with the intent to obstruct the lawful exercise of parental rights. See International Parental Kidnapping, 18 U.S.C. § 1204 (2012).

⁵⁴ *Id.* § 1204(c)(2).

⁵⁵ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 613 n.95.

⁵⁶ Hague Conference on Private International Law, *Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, ¶ 4 (Aug. 1997).

⁵⁷ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 596.

⁵⁸ See *supra* notes 32–53 and accompanying text.

[T]he interests of children are of paramount importance in matters relating to their custody, they desired only to protect children from the harmful effects of *wrongful* removal or retention.⁵⁹ Wrongful in this sense means that which forces the child to suffer from “the sudden upsetting of . . . the traumatic loss of contact with the parent who has been in charge of his upbringing.”⁶⁰

The narrow interpretation of wrongful removal or retention is further confirmed, since the Convention’s Explanatory Report specifically says that it is understood that the removal of a child from their home country can be justified by objective reasons that have to do with either the person or the environment that the child is most closely connected.⁶¹ Therefore, the Convention’s objectives in Article 1 should not be interpreted as a general presumption that all children should be sent back to their original country of residence.

B. *Structure of the Convention*

As stated above, the Convention’s main objectives are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”⁶² With those objectives in mind, the preamble makes clear that they should be considered with the understanding that the interests of the children in these matters “are of paramount importance.”⁶³

The requirements for a *prima facie* case are found in Articles 3, 4, and 5 of the Convention.⁶⁴ Per Article 3, to establish whether a child can be returned to his home country, the petitioning parent must also have a “right of custody” over the child.⁶⁵ According to Article 5, a “right of custody” means the right to care for the child and to determine the child’s place of residence.⁶⁶ Out of respect for the laws of the child’s home country, it has been understood that the court hearing the case should not consider the merits of the underlying custody battle.⁶⁷ Once the “right of custody” is established, Articles 3 and 4 then require the petitioning parent to demonstrate that the other parent (1) wrongfully removed or retained the child (2) from the child’s home

⁵⁹ Pérez-Vera, *supra* note 35, ¶ 23.

⁶⁰ *Id.* ¶ 24.

⁶¹ *Id.* ¶ 25.

⁶² Hague Convention, *supra* note 2, art. 1.

⁶³ *Id.* pmb1.

⁶⁴ See Wills, *supra* note 30, at 434.

⁶⁵ Hague Convention, *supra* note 2, art. 3, 4.

⁶⁶ *Id.* art. 5.

⁶⁷ See Deborah M. Huynh, Croll v. Croll: *Can Rights of Access Ever Merit a Remedy of Return Under the Hague Abduction Convention?*, 26 N.C. J. INT’L L. & COM. REG. 529, 542 (2001).

country, also known as his “habitual residence.”⁶⁸ Finally, although the petitioning parent may be found to have a “right of custody,” the Convention requires the petitioning parent to have exercised that right before the child’s removal, or show that the petitioning parent would have exercised that right if given the opportunity.⁶⁹ The standard of proof when exercising the right is low, and it only requires proof of actual custody or care of the child by preponderance of the evidence.⁷⁰

However, the Convention lays out several defenses that an abductor may use to prevent the return of the child. The first is found in Article 12, and is known as the “well-settled exception.” If the child has been out of his home country for over a year, a judge is allowed to use his discretion to decide if “the child is now settled in [his or her] new environment.”⁷¹ Second, according to Article 13(a), a court does not have to order a return if the petitioning parent was not exercising custody rights at the time of abduction, or the parent consented to or subsequently acquiesced to the abduction.⁷² The third defense, which will be discussed in more detail in Part II, is the “grave risk of harm” defense found in Article 13(b).⁷³ If the court finds by clear and convincing evidence that a return would expose the child to physical or psychological harm, or otherwise would place the child in an intolerable situation, courts are not bound to order the return of the child.⁷⁴ Similarly, under Article 13 the Court may also refuse to order a return if the child is at an age and maturity the court deems appropriate, and he or she objects to the return.⁷⁵ Lastly, per Article 20, a court may refuse to return a child if its home country violates “human rights and fundamental freedoms.”⁷⁶

II. COURT DECISIONS INVOLVING THE ARTICLE 13(B) DEFENSE

When petitioned under the Convention to return their children, victims of domestic violence frequently utilize the Article 13(b) “grave risk of harm” defense.⁷⁷ There is evidence that the drafters of the Convention intended for Article 13(b) to be utilized in such situations. For example, during the Fourteenth Session of the Hague Conference, a delegate noted the importance of

⁶⁸ Hague Convention, *supra* note 2, art. 3, 4.

⁶⁹ *Id.* art. 3(b).

⁷⁰ *See* Wills, *supra* note 30, at 435–36.

⁷¹ Hague Convention, *supra* note 2, art. 12.

⁷² *Id.* art. 13(a).

⁷³ *Id.* art. 13(b).

⁷⁴ 42 U.S.C. § 11603(e)(2)(A) (2012); Hague Convention, *supra* note 2, art. 13(b).

⁷⁵ Hague Convention, *supra* note 2, art. 13.

⁷⁶ *Id.* art. 20.

⁷⁷ 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).

the final phrase in the Article 13(b) defense, “or otherwise place the child in an intolerable situation.”⁷⁸ The delegate believed that phrase was necessary to deal with situations where a mother flees domestic violence and the child may be in an intolerable situation, but not in immediate harm.⁷⁹ However, although it is logical to consider domestic violence a “grave risk of harm,” and therefore a defense to the child’s return, courts and scholars fear using Article 13(b) in that way would be the “Convention’s Achilles heel,”⁸⁰ because it would provide an easy way for abductors to search for a country that would allow them to fraudulently raise a claim and prevent the child’s return.⁸¹ Thus, they have called for the defense to be interpreted narrowly.⁸²

As such, some courts have interpreted the Convention as merely a venue statute that is supposed to prevent forum shopping.⁸³ In doing so, they encourage the use of what American courts have called “undertakings.”⁸⁴ Undertakings are remedies issued by the court that are supposed to ensure the safe return of the abductor and child to the child’s home country in order to allow the court in that country to make the custody decisions.⁸⁵ They usually include, among other options, restraining orders against the alleged batterer, as well as arrangements for education, transportation, and lodging.⁸⁶

However, this understanding does not adequately achieve the Article 13(b) defense’s purpose, as given by the Convention’s Explanatory Report, which makes clear that protecting the child from being exposed to physical or psychological danger is more important than returning the child to his or her home country.⁸⁷ Despite the Convention’s Explanatory Report’s direction, there is still a disagreement in American courts as to how to apply Article 13(b), which is illustrated in the following cases.

⁷⁸ Hague Convention, *supra* note 2, art. 13(b).

⁷⁹ See Hoegger, *supra* note 33, at 207.

⁸⁰ Weiner, *Navigating the Road*, *supra* note 8, at 337.

⁸¹ See Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 301 (2013).

⁸² See Weiner, *Navigating the Road*, *supra* note 8, at 337.

⁸³ See *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (citing *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005); *Silverman v. Silverman*, 338 F.3d 886, 899 (8th Cir. 2003)).

⁸⁴ See, e.g., *Danaipour v. McLarey*, 386 F.3d 289, 303–04 (1st Cir. 2004) (finding that undertakings must be considered in every situation, though they are not mandatory); *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (finding that even if an Article 13(b) is applicable, undertakings must be taken into account).

⁸⁵ See Hoegger, *supra* note 33, at 183.

⁸⁶ *Id.*

⁸⁷ See Pérez-Vera, *supra* note 35, ¶ 29.

A. Van De Sande v. Van De Sande

In *Van De Sande v. Van De Sande*,⁸⁸ the husband and wife were married, but estranged; the wife lived in the United States with their two children, while the husband lived in Belgium, which was both children's home country.⁸⁹ A Belgian court awarded the husband custody rights, but the wife refused to let the husband see the children.⁹⁰ The wife presented the trial court with six affidavits that showed that, before the couple had children, the husband would choke her, throw her against a wall, and kick her in the shins several times a week throughout the time they lived together.⁹¹ After the children were born, the physical and verbal abuse continued and was done in the children's presence, which made them cry.⁹² Physical abuse of the oldest child began when she was less than four years old because she began wetting her bed.⁹³ Once, when the wife tried to stop the abuse, the husband grabbed the wife by the throat and shoved her out of the room.⁹⁴

Later, after visiting her parents in the United States with the husband and children, the wife informed the husband that she and the children would not go back to Belgium with him.⁹⁵ The husband responded by threatening to kill the children, and the next day he threatened to kill everyone else in the family.⁹⁶ Police were called to escort him from the house.⁹⁷ When the husband returned to Belgium without the children, the oldest child stopped wetting her bed, except after her weekly conversation with her father.⁹⁸ The district court found that although there was a risk of harm to the children, there was not a grave risk of harm, because most of the abuse was directed at the wife rather than the children, and the wife did not present expert evidence of the psychological effects on the children.⁹⁹

The Seventh Circuit overruled the district court, finding that "[t]he gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes."¹⁰⁰ The Seventh Circuit went further and found that the inquiry in determining whether to use the Article 13(b) defense should not be whether there is a risk to the children *only if* it is assumed the children's home country has no laws to protect them. Rather, it

⁸⁸ 431 F.3d 567, 570 (7th Cir. 2005).

⁸⁹ *Van De Sande*, 431 F.3d at 569.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Van De Sande*, 431 F.3d at 569.

⁹⁶ *Id.* at 569–70.

⁹⁷ *Id.* at 570.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

should be whether there is a risk to the children *even if* there are sufficient laws in the children’s home country to protect them.¹⁰¹ This is because “[t]here is a difference between the law on the books and the law as it is actually applied.”¹⁰² To define the inquiry as whether the child’s home country has sufficient laws, or even if the country has sufficient laws and zealously enforces them, “disregards the language of the Convention.”¹⁰³

The court found that it is not an accident that the Convention says nothing about the sufficiency of the laws of the child’s home country and only mentions the “grave risk of harm.”¹⁰⁴ And “[i]f handing over custody of a child to an abusive parent creates a grave risk of harm to the child . . . the child should not be handed over, [no matter how] severely the law of the parent’s country might punish such behavior . . . [because] the safety of children is paramount.”¹⁰⁵

B. Friedrich v. Friedrich

The Sixth Circuit took a different approach in determining how to interpret Article 13(b) in *Friedrich v. Friedrich*.¹⁰⁶ After initially remanding the case to establish if the husband had custody rights, the court took on the task of defining “grave risk of harm.”¹⁰⁷ In the case, the wife was an American servicewoman stationed in Germany, and the husband was a German citizen.¹⁰⁸ While in Germany, they had a child together.¹⁰⁹ One night after a heated argument, the husband ordered the wife to leave their apartment with the child, going so far as to throw all their belongings in the hallway.¹¹⁰ The wife did not have a place in which she could afford to stay with the child in Germany, so she moved the child back to the United States to live with her family while she finished her service.¹¹¹ The husband filed a petition under the Convention after an Ohio court issued a temporary order not to send the child back to Germany.¹¹²

The wife claimed that she proved by clear and convincing evidence that sending the child back to Germany would cause psychological harm, and

¹⁰¹ *Van De Sande*, 431 F.3d at 570. *Contra* *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996).

¹⁰² *Van De Sande*, 431 F.3d at 570–71.

¹⁰³ *Id.* at 571.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 571–72.

¹⁰⁶ 78 F.3d 1060 (6th Cir. 1996).

¹⁰⁷ *Id.* at 1069.

¹⁰⁸ *Friedrich v. Friedrich*, 983 F.2d 1396, 1398 (6th Cir. 1993).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1399.

¹¹¹ *Id.*

¹¹² *Id.*

therefore she met the requirements for using the “grave risk of harm” defense.¹¹³ The psychological harm claimed was that the child would suffer the tremendous loss of his mother, and he would be angry with both parents while growing up, which would springboard into developmental problems for him.¹¹⁴

The court correctly found that was not enough to meet the “grave risk of harm” defense,¹¹⁵ but it took an unnecessary step afterwards. In reaction to the child’s adjustment problems claimed by the wife, the court said that it is not the duty of the court to speculate on where the child would be happiest.¹¹⁶ Therefore, the presumption is that the Convention’s purpose is to prevent forum shopping, and the court in the child’s home country should decide matters regarding the child’s interests.¹¹⁷ According to the court, this presumption means that “grave risk of harm” can only occur when sending the child back would put it in an immediate risk of harm, such as “a zone of war, famine, or disease,” or when there is a risk of abuse that the child’s home country is unable or unwilling to protect against.¹¹⁸ This dictum has since been frequently repeated by other federal courts.¹¹⁹

¹¹³ *Friedrich v. Friedrich*, 78 F.3d 1060, 1067, 1069 (6th Cir. 1996).

¹¹⁴ *Id.* at 1067.

¹¹⁵ *Id.* at 1067–68.

¹¹⁶ *See id.* at 1068.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 1069.

¹¹⁹ *See, e.g., Silverman v. Silverman*, 338 F.3d 886, 900–01 (8th Cir. 2003) (finding that general regional violence in Israel such as suicide bombers was not sufficient to establish a “zone of war” for purposes of the grave risk of physical or psychological harm exception under the Convention); *March v. Levine*, 249 F.3d 462, 466, 472 (6th Cir. 2001) (holding that accusations that the father murdered the mother are not enough to merit a “grave risk of harm” because they do not amount to sending the children back to “a war zone, or to an area of rampant disease or famine”); *Miller v. Miller*, 240 F.3d 392, 403 (4th Cir. 2001) (finding that the children should be sent back to their parent in Canada because if the parent posed a threat to the children, the Canadian courts are willing to protect them); *Blondin v. Dubois*, 238 F.3d 153, 162–63 (2d Cir. 2001) (upholding the district court’s finding that the children will suffer from traumatic stress disorder upon return to France is beyond the control of the French authorities, and, therefore, meets *Friedrich*’s definition of “grave risk of harm”); *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 920–21 (W.D. Tex. 2012) (finding that Mexican drug cartel violence including dead bodies floating in the river near the family’s home and an instance of the child’s brother witnessing a member of the cartel pointing a gun at his uncle’s head is merely sociopolitical disruption and does not meet the high “zone of war” standard set forth in *Friedrich*); *Krefter v. Wills*, 623 F. Supp. 2d 125, 137–38 (D. Mass. 2009) (finding that a past history of refusing to pay child support as punishment to the mother meets the high bar for “grave risk of harm” set by *Friedrich*); *Morrison v. Dietz*, No. 07-1398, 2008 WL 4280030, at *10–13 (W.D. La. Sept. 17, 2008) (finding that expert testimony of a great risk of psychological harm due to the mother’s past history of alcohol and drug abuse, having other adults in her home, and removing the children from school without informing them is not enough to merit a “grave risk of harm” because it does not amount to the requirements laid out in *Friedrich*); *Robert v. Tesson*, No. Civ.A. 1:04-CV-333, 2005 WL 1652620, at *24 (S.D. Ohio June 29, 2005) (finding that no grave risk of psychological harm will occur if Petitioner’s children are sent back to France because the mother could accompany the children back and there is no evidence that the French courts would not be willing to protect the children if needed);

C. Turner v. Frowein

The influence of *Friedrich*'s reasoning can be seen in the use of undertakings despite a finding of grave risk of harm by clear and convincing evidence in *Turner v. Frowein*.¹²⁰ In that case, the wife was American and the husband Dutch, and they had one child.¹²¹ Initially, they lived in the United States, where the husband verbally abused the wife, choked her in front of the child, tried to push her down the stairs, and spat in her face.¹²² The wife told the husband she wanted a divorce, and the husband then kidnapped the child.¹²³ He later called the wife saying that as punishment she would not see her child again.¹²⁴ After the wife placed a restraining order on the husband, he eventually returned the child.¹²⁵ They reconciled on the condition that the husband receive counseling.¹²⁶ Five months later, they moved to Holland.¹²⁷ Once there, the husband took complete control of the family's finances, refused to let the wife access any money, and continued to verbally and physically abuse her.¹²⁸

Around this time, the husband also began taking the child to sleep alone with him.¹²⁹ When the child was six, the wife discovered the child naked from the waist down and accused the husband of sexually abusing the child.¹³⁰ After an argument, the husband moved to an apartment behind their house, but regularly returned to the wife's apartment—even when the wife changed the locks.¹³¹ Eventually, the wife secured employment back in the United States, and she informed the husband that she and the child were going to move back there.¹³² In response, the husband removed the child's passport and birth certificate from the wife's home and kidnapped the child for ten days.¹³³ The wife instituted divorce proceedings, but after a trial, the Dutch court denied

Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1365–66 (M.D. Fla. 2002) (finding that testimony describing Argentina as having: a lack of governmental and economic legitimacy, violent demonstrations in the streets, low financial reserves and high debt, exceptionally high unemployment with few job opportunities, and corruption in both the judicial system and among the police, does not amount to returning a child to a war zone, and does not mean Argentina is unwilling to protect the children in the case).

¹²⁰ 752 A.2d 955 (Conn. 2000).

¹²¹ *Id.* at 961.

¹²² *Id.* at 961–62.

¹²³ *Id.* at 962.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Turner*, 752 A.2d at 962.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Turner*, 752 A.2d at 962.

¹³³ *Id.*

the wife's request to transfer the child to the United States and granted temporary custody to the husband.¹³⁴

When the wife went to the husband's house begging to see the child to explain the custody order, the husband beat her so severely that she required a hysterectomy.¹³⁵ Like the other beatings, the child witnessed it all.¹³⁶ The wife eventually dropped the divorce based upon assurances by the husband that he would release the child to her.¹³⁷ The same day that she received custody of the child, she departed with him for the United States.¹³⁸ Subsequently, the husband filed a Convention petition for the return of the child in Connecticut state court.¹³⁹

After hearing the evidence of the physical and verbal abuse, as well as new evidence of the husband's sexual abuse of the child, the trial court found that there was a grave risk of harm to the child and refused to return him to Holland.¹⁴⁰ The husband appealed, and the case made its way to the Connecticut Supreme Court.¹⁴¹ Citing *Friedrich's* concern of international forum shopping¹⁴² and the Second Circuit's rule in *Blondin v. Dubois*¹⁴³ that a court must exhaust all possible measures to reduce in the slightest whatever risk might be associated with a child's return,¹⁴⁴ the court held that the trial court should have gone further in considering all possible undertakings to facilitate the child's safe return.¹⁴⁵ The court then highlighted that the child should be returned if, upon arrival in the home country, (1) the mother could retain custody of the child, (2) an appropriate third party in the home country could care for the child, or (3) the home country could enforce conditions of a return order.¹⁴⁶ It also found that, notwithstanding the fact that the child was protected under Article 13(b), the trial court found no explanation as to why the child should not be returned under circumstances that could provide him protection.¹⁴⁷

¹³⁴ *Id.* at 963.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Turner*, 752 A.2d at 963.

¹³⁹ *Id.* See also Pfund, *supra* note 14, at 43 (“[There is] concurrent original jurisdiction of federal and state courts to hear return requests pursuant to the Convention.”).

¹⁴⁰ See *Turner*, 752 A.2d at 964–66.

¹⁴¹ *Id.* at 966.

¹⁴² *Id.* at 972.

¹⁴³ 189 F.3d 240 (2d Cir. 1999).

¹⁴⁴ See *Turner*, 752 A.2d at 972–74; *Blondin*, 189 F.3d at 248–49.

¹⁴⁵ See *Turner*, 752 A.2d at 975–76.

¹⁴⁶ *Id.* at 974.

¹⁴⁷ *Id.* at 976.

III. ANALYSIS

There is a misunderstanding on the part of both judges and laypersons that if the batterers and victims are separated, they will not impact child custody issues.¹⁴⁸ Central to that misunderstanding is a belief that domestic violence does not affect children.¹⁴⁹ On the contrary, when children witness domestic abuse, it dramatically impacts them psychologically—and the same is true even when they are not present to witness it.¹⁵⁰ Children are intuitive, and they are aware of and impacted by such abuse when they witness household tensions or a mother’s emotional distress.¹⁵¹ Furthermore, even if separated from the abuser, the abuse can continue. In many cases, batterers seek to maintain control and use the children as pawns by putting the domestic violence victim through years of custody litigation, affecting both child and parent alike.¹⁵² At times, certain victims need safety plans created for them that involve hiding in confidential locations, changing phone numbers, and wearing disguises.¹⁵³ And even those lucky enough to avoid these measures often suffer from a constant fear.¹⁵⁴ Asking a child to grow up in such an environment and witness such traumatic experiences goes against the Convention’s intention to prevent psychological harm. However, interpreting the Convention as a way to prevent forum shopping, as the court in *Friedrich* would, asks the child to grow up in exactly such a situation.

Since the Convention is a treaty, it is important for judges to be consistent with the intention of the treaty, because their decisions contribute to international law.¹⁵⁵ Therefore, courts should look to the Vienna Convention on the Law of Treaties¹⁵⁶ (“Vienna Convention”) when interpreting Article 13(b). The State Department described the Vienna Convention as the “generally recognized . . . authoritative guide to current treaty law and practice,”¹⁵⁷ and judges should adhere to its principles, even though they are not bound to interpret by international standards since they are pronouncing national law under the Convention’s implementing legislation.¹⁵⁸

¹⁴⁸ See Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996).

¹⁴⁹ *Id.*

¹⁵⁰ See Hoegger, *supra* note 33, at 185.

¹⁵¹ See *id.*; Zorza, *supra* note 148, at 1115.

¹⁵² See Hoegger, *supra* note 33, at 185–86.

¹⁵³ *Id.* at 186.

¹⁵⁴ See *id.* at 186.

¹⁵⁵ Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3340–41 (2009).

¹⁵⁶ Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁵⁷ Weiner, *Navigating the Road*, *supra* note 8, at 297 (quoting Senate Comm. On Foreign Relations, Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, at 1 (1971)).

¹⁵⁸ *Id.* at 297–98.

With this in mind, Article 31 of the Vienna Convention lays out a two-part process for interpreting treaties.¹⁵⁹ It says that a treaty should “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁶⁰ I will analyze both steps of the Vienna Convention analysis with respect to Article 13(b) below.

A. *Interpreting the Ordinary Meaning of Article 13(b)*

With regards to the Vienna Convention’s first step of analysis, interpreting grave risk of harm as including only “immediate danger from war, famine, disease, or abuse that the child’s home country cannot prevent”¹⁶¹ goes against the Convention’s ordinary meaning. According to Webster’s Third Dictionary, the definition of *grave* means “likely to produce real harm or damage,”¹⁶² and the definition of *harm* is “physical or mental damage.”¹⁶³ Nowhere is immediacy implied, and to read that extra step into the definition clearly goes beyond what the plain text requires. Moreover, the definition of *risk* further implies that the drafters did not intend to include the immediacy requirement, since the definition is merely the “possibility of loss, injury, disadvantage, or destruction.”¹⁶⁴ The simple “possibility” of anything occurring does not imply immediacy. Additionally, Webster’s Third defines *psychological* as “relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind esp[ecially] in its affective or cognitive functions,”¹⁶⁵ and *physical* as “of or relating to the body.”¹⁶⁶

B. *Understanding the Object and Purpose of Article 13(b)*

The next step of the Vienna Convention analysis involves understanding the object and purpose of Article 13(b).¹⁶⁷ To do that, the purpose of the entire treaty must be first examined. The Preamble states that the Convention’s foremost concern is the interest of the child.¹⁶⁸ Moreover, the Conven-

¹⁵⁹ *Id.*

¹⁶⁰ Vienna Convention art. 31(1).

¹⁶¹ *See* Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

¹⁶² WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 992 (2002).

¹⁶³ *Id.* at 1034.

¹⁶⁴ *Id.* at 1961 (emphasis added).

¹⁶⁵ *Id.* at 1833.

¹⁶⁶ *Id.* at 1706.

¹⁶⁷ Vienna Convention, *supra* note 156, art. 31(1).

¹⁶⁸ Hague Convention, *supra* note 2, pmb1.

tion’s Explanatory Report, which is considered the authority on the Convention drafters’ intentions,¹⁶⁹ explicitly states that the importance of any person, whether child or abductor, not being exposed to physical or psychological danger and not being placed in an intolerable situation comes before the interest of the child returning to his home country.¹⁷⁰ That means, that although the objects of the treaty are to secure the return of a child who was wrongfully removed, and to respect the custody laws of the child’s home country,¹⁷¹ the interest of the child is overriding. Thus, the Convention, in fact, was not created “to deter parents from engaging in international forum shopping in custody cases.”¹⁷²

Moreover, the Commission on the Practical Operation of the Convention—the entity that ensures that the Convention meets its objective—stated that “the overall goal of the Convention was to protect the child,”¹⁷³ and that domestic violence matters need to be given the utmost attention regardless of venue considerations, since the “integrity of the proceedings should not give way to expedience.”¹⁷⁴ Interpreting the purpose of the treaty—as the court does in *Friedrich*—to say that Article 13(b) should only be used in the most extreme circumstances in order to prevent forum shopping¹⁷⁵ is a mischaracterization that can lead to harmful effects.¹⁷⁶

Even if at the time of its drafting there was a presumption that the Convention would be used to prevent forum shopping by male abductors who were fleeing with the child because they thought they would lose custody rights,¹⁷⁷ courts today should still not use Article 13(b) in only extreme times of war, famine, or disease.¹⁷⁸ Nowadays, the perception of an abductor has evolved and there is a greater public understanding that most abductors are fleeing with their children from domestic violence.¹⁷⁹ And since domestic violence causes psychological harm to the child,¹⁸⁰ allowing it as a defense is

¹⁶⁹ Weiner, *Escape from Domestic Violence*, *supra* note 8, at 637.

¹⁷⁰ Pérez-Vera, *supra* note 35, ¶ 29.

¹⁷¹ Hague Convention, *supra* note 2, art. 1.

¹⁷² *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005).

¹⁷³ Hague Conference on Private International Law, *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, at 32, Prel. Do. No. 14 (November 2011) [hereinafter *Conclusions and Recommendations*].

¹⁷⁴ *Id.*

¹⁷⁵ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1063–64 (6th Cir. 1996).

¹⁷⁶ See, e.g., *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (holding that courts should not speculate on where the child would be happier, and the child should therefore be returned to his home country, even though the father assaulted the mother and sent her to the hospital with neck injuries).

¹⁷⁷ See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 608–09.

¹⁷⁸ See *Friedrich*, 78 F.3d at 1069.

¹⁷⁹ See Weiner, *Navigating the Road*, *supra* 8, at 277–78; Weiner, *Escape from Domestic Violence*, *supra* note 8, at 614.

¹⁸⁰ See *supra* notes 148–154 and accompanying text.

the only way to uphold the Convention's paramount concern of protecting the child's interest.¹⁸¹

Additionally, although domestic violence is not specifically mentioned in the text of Article 13(b), the original drafters have said that the Article is intended to protect victims of domestic violence,¹⁸² and there is a present-day global understanding that many abductors in Convention cases are domestic violence victims.¹⁸³ The most recent report from the Commission on the Practical Operation of the Convention noted there is an interconnection of harm towards a parent who is a victim of domestic violence and a child's well-being.¹⁸⁴ It further stated that the "intolerable situation" aspect of Article 13(b) is a sufficient defense to such a scenario.¹⁸⁵ The drafters specifically left out of Article 13(b) any reference deferring to the courts of the child's home country because the primary purpose is to protect the child.¹⁸⁶ And, as *Van de Sande* made clear, giving custody of a child to an abusive parent creates a risk of harm to the child that does not protect it, and therefore the child should not be handed over, no matter how severely the law of the parent's country might punish future abusive behavior.¹⁸⁷

The Supreme Court recently dealt with a similar interpretation question in *Obergefell v. Hodges*.¹⁸⁸ There, the Court acknowledged that when it described the right to marry in previous cases, it presumed that only opposite-sex partners could marry because it made an assumption defined by the world and time of which it was a part.¹⁸⁹ However, it further found that assumption is no longer consistent with the present-day understanding of the right to marry.¹⁹⁰ With that knowledge, the interpretation of marriage as solely between opposite-sex couples can no longer be maintained.¹⁹¹ Courts should similarly understand that the present-day understanding of "grave risk of harm" encompasses the risk of domestic violence, and any interpretation otherwise can no longer be maintained.

The text of Article 13(b), coupled with the general public's growing awareness of domestic violence,¹⁹² shows that the ordinary meaning of the

¹⁸¹ Hague Convention, *supra* note 2, pmb1.

¹⁸² See Hoegger, *supra* note 33, at 207.

¹⁸³ See Weiner, *Navigating the Road*, *supra* note 8, at 277–78; *Conclusions and Recommendations*, *supra* note 173, at 31.

¹⁸⁴ *Conclusions and Recommendations*, *supra* note 173, at 34.

¹⁸⁵ *Id.*

¹⁸⁶ See Hague Convention, *supra* note 2, pmb1., art. 13(b).

¹⁸⁷ *Van De Sande v. Van De Sande*, 431 F.3d 567, 570–71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations. Because . . . most abuse of children by a parent goes undetected.").

¹⁸⁸ 135 S. Ct. 2584 (2015).

¹⁸⁹ *Id.* at 2598.

¹⁹⁰ *Id.* at 2602.

¹⁹¹ See *id.*

¹⁹² See Weiner, *Escape from Domestic Violence*, *supra* note 8, at 606–07.

term “grave risk . . . [of] . . . physical or psychological harm” includes the risk of being a victim to, or witnessing, domestic violence.¹⁹³ Accordingly, a fair understanding of the object and purpose of Article 13(b) encompasses domestic violence as a defense to a child’s return to his home country. Therefore, following the Vienna Convention’s two-part test, courts should interpret domestic violence to be an acceptable reason to allow a defense under Article 13(b).

C. *The Undertakings Dilemma*

Despite the drafters’ intention not to create a venue statute that solely protects against forum shopping, courts are still influenced by the *Friedrich* court’s reasoning, and the extra step of using undertakings has been added to the “grave risk of harm” analysis.¹⁹⁴ Judges now consider “the full panoply of arrangements that might allow children to be returned” to their home country.¹⁹⁵ Even courts that consider domestic violence to be under the “grave risk of harm” defense allow for the use of undertakings.¹⁹⁶ Many scholars see undertakings as a compromise,¹⁹⁷ but in fact, they open the door for the abuser to continue to manipulate and control the abductor.

In *Turner*, the court remanded the denial of the husband’s petition because it reasoned undertakings should be used to prevent international forum shopping.¹⁹⁸ However, there is no authority for the use of undertakings in the Convention’s language.¹⁹⁹ Nor do the guidelines that describe the drafters’ intent refer to the ability of home countries to protect children.²⁰⁰ Furthermore, undertakings cannot properly be enforced, since once the batterers leave the country, courts no longer have jurisdiction.²⁰¹ The closest defense of undertakings is that federal courts retain the discretion to return a child,

¹⁹³ Hague Convention, *supra* note 2, art. 13(b).

¹⁹⁴ See *supra* notes 14–17 and accompanying text.

¹⁹⁵ *Blondin v. Dubois*, 189 F.3d 240, 242 (2d Cir. 1999).

¹⁹⁶ *Van De Sande v. Van De Sande*, 431 F.3d 567, 571–72 (7th Cir. 2005) (“Return plus conditions (‘undertakings’) can in some, maybe many, cases properly accommodate the interest in the child’s welfare to the interests of the country of the child’s habitual residence.”).

¹⁹⁷ See Peter Glass, *Blondin v. Dubois: A Closer Step to Safeguarding the Welfare of Abducted Children?*, 26 BROOK J. INT’L L. 723, 758 (2000) (advocating use of undertakings); Courtney E. Hoben, *The Hague Convention on International Parental Kidnapping: Closing the Article 13(b) Loophole*, 5 J. INT’L LEGAL STUD. 271, 290 (1999) (calling undertakings a “viable solution”); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221, 239 n.77 (2000) (describing undertakings as practical and effective); Weiner, *Navigating the Road*, *supra* note 8, at 351 (taking a middle ground on undertakings by recommending their use as a valuable tool, but cautioning that they may not always be adequate when domestic violence is present).

¹⁹⁸ *Turner v. Frowein*, 752 A.2d 955, 970–72 (Conn. 2000).

¹⁹⁹ Hoegger, *supra* note 33, at 195.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 198.

regardless of a valid defense, if return would further the aims of the Convention.²⁰² But, as discussed, the aims of the Convention are to protect the child,²⁰³ and sending the child back to the country where the abuse occurred blatantly contradicts that aim. Yet, that is precisely what undertakings accomplish.²⁰⁴

D. *Proposed Solution*

The debate about whether the judge should require undertakings is irrelevant if the abductor cannot show by clear and convincing evidence that there is the grave risk of harm to the child.²⁰⁵ However, domestic violence often occurs in private, and many victims do not utilize the legal systems.²⁰⁶ Subsequently, there is not access to legal documentation of abuse, which makes it nearly impossible to meet the evidentiary standard. And even if proof existed, it would most likely be located in the home country. Consequently, many genuine victims of domestic abuse who in fact face a grave risk of harm would be unable to prove it to the degree necessary to utilize the “grave risk of harm” defense.

In response to this dilemma, this comment proposes to lower the burden of proof needed to meet the Article 13(b) defense, but still potentially allow for the use of undertakings. However, if a judge were to find that the evidence of abuse meets the clear and convincing standard, then no undertakings would be allowed. This way, the courts may continue to utilize undertakings in regards to less serious cases, such as situations where the petitioner is an alcoholic or a workaholic who verbally abuses the abductor at times, while not enabling the abuser to continue to manipulate the victim: “[U]ndertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive.”²⁰⁷

²⁰² *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995).

²⁰³ See Hague Convention, *supra* note 2, pmb.; *Conclusions and Recommendations*, *supra* note 173, at 43; Pérez-Vera, *supra* note 35, ¶ 29.

²⁰⁴ Weiner, *Navigating the Road*, *supra* note 8, at 341 (“The Second Circuit . . . emphasized that undertakings might allow the children to be returned notwithstanding the risk of harm.”).

²⁰⁵ 42 U.S.C. § 11601(e)(2)(A) (2012).

²⁰⁶ See *Dutton & Waltz*, *supra* note 15, at 14 (“Even when there is evidence of injury or threats of severe violence, the complex dynamics of domestic violence and the secrecy and distortions that shroud it can lead professionals to minimize or fail to recognize it altogether.”).

²⁰⁷ *Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002). See also Hoegger, *supra* note 33, at 196–99; Weiner, *Escape from Domestic Violence*, *supra* note 8, at 678–81.

One alternative solution could be to call for an amendment of ICARA that creates a specific domestic violence defense,²⁰⁸ much as provided in similar domestic legislation.²⁰⁹ However, to do so would imply that the “grave risk of harm” defense does not currently cover domestic violence. Moreover, if any additional defenses are to be added, that amendment should be done to the Convention, since ICARA only empowers courts to determine the rights of the Convention, and its provisions are not to be interpreted as in lieu of the Convention.²¹⁰ And any amendment of the Convention is not practical since treaty amendments are “a difficult, if not impossible, process.”²¹¹ Furthermore, since the language is plain and the intention clear that grave risk of physical and psychological harm encompasses domestic violence, to make such an amendment would be superfluous.

On the other hand, the current evidentiary standard for the “grave risk of harm” defense is not found in the Convention, and is only found in ICARA; thus, an amendment to the evidentiary standard would not require an amendment to the Convention. Currently, to prove the “grave risk of harm” defense, the abductor must meet the “clear and convincing evidence” burden,²¹² which is very hard to meet.²¹³ Lowering the evidentiary burden to the “preponderance of the evidence” in order to account for domestic violence victims who have not reported previous abuse furthers the purpose of the Convention because it makes it easier for the victims to prove their case without forcing the courts to simply take their word for it.

If there is concern that “preponderance of the evidence” is too easy of a standard to meet to prevent fraudulent claims, a compromise could require that courts follow a formula similar to the “well-founded fear” standard used in asylum cases.²¹⁴ That standard is both subjective and objective.²¹⁵ Objective evidence could include police reports, photographs of injuries, or witness testimony, while subjective evidence could be how fearful the abductor is of

²⁰⁸ See Hoegger, *supra* note 33, at 206.

²⁰⁹ See International Parental Kidnapping, 18 U.S.C. § 1204(c)(2) (2012).

²¹⁰ 42 U.S.C. § 11603(d), (h) (2012).

²¹¹ See Weiner, *Navigating the Road*, *supra* note 8, at 279.

²¹² 42 U.S.C. § 11603(e)(2)(A) (2012).

²¹³ See Pfund, *supra* note 14, at 40; King, *supra* note 81, at 308 (stating that evidence that is typically required includes: documentation of legal steps taken in the other country concerning abuse, protective orders against petitioner in other country, police reports, social service records, U.S. Embassy records of applications for protection).

²¹⁴ Recently, the Board of Immigration Appeals established that domestic violence victims in Guatemala could potentially claim asylum. See *e.g.*, *In re A-R-C-G-*, 26 I. & N. 388, 392 (BIA 2014) (finding that “married women in Guatemala who are unable to leave their relationship” consists of women who are in a particular social group with discrete and definable boundaries, and, therefore, can be granted asylum at the judge’s discretion if he or she finds a well-founded fear).

²¹⁵ See, *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987) (citations omitted).

the batterer and whether there is a belief the batterer will abuse again if given the opportunity.²¹⁶

However, even under a preponderance of the evidence standard that does not have that requirement, the use of undertakings could still be allowed at the judge's discretion to further ensure that unfounded allegations of abuse are protected against. Allowing the option of undertakings with the lower evidentiary standard would also satisfy the *Friedrich* court's desire to protect against forum shopping because it would still give a judge the discretion to return the child with undertakings if there is any remaining suspicion of unfounded allegations. This use of undertakings would then continue to keep the Article 13(b) defense narrow,²¹⁷ and prevent it from becoming the "Convention's Achilles heel."²¹⁸

CONCLUSION

When the signatories drafted the Hague International Child Abduction Convention, and when the U.S. Congress implemented ICARA, there was a belief that most child abductors were fathers who kidnapped and fled with their child because they thought they would lose custody rights. Even then, the drafters intended for the abducted children's interests to be the Convention's paramount concern. To protect these interests, the drafters wrote Article 13(b) to guarantee that no child who would face a grave risk of psychological or physical harm, including from domestic violence, would return to their home country where the abuse would be imposed. That intention still holds true today; moreover, today's general understanding is that most abductors are women fleeing with their children from domestic violence.

However, even with this understanding, current interpretations of the Article 13(b) defense endanger many of these victims because it requires them to meet the clear and convincing evidentiary burden to prove their abuse. Many domestic violence victims are unable to do this because they did not report their abuse to legal authorities, or they cannot access the legal documents because the files are located in the country from which they fled. Lowering the evidentiary burden to the "preponderance of the evidence" or requiring a formula akin to the "well-founded fear" standard can prevent this injustice; likewise, potentially allowing undertakings only for cases in which the evidence of abuse would not meet the clear and convincing standard provides a safeguard against fraudulent claims, while also ensuring that the Convention's main purpose of protecting the abducted children's interest is fully realized.

²¹⁶ See Hoegger, *supra* note 33, at 206 n. 277.

²¹⁷ See Weiner, *Navigating the Road*, *supra* note 8, 353.

²¹⁸ See *id.* at 337.