

DISAGGREGATING THE TWO PRONGS OF ARTICLE 13(B) OF THE HAGUE CONVENTION TO COVER UNSAFE AND UNSTABLE SITUATIONS

*Lauren Cleary**

The Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”) is a treaty designed to coordinate a uniform response to international child abductions. It establishes a civil remedy for a left-behind parent seeking the return of his or her child after the child has been wrongfully removed to or retained in another state that is also a party to the Convention. The Convention requires the courts of a signatory state to order the prompt return of a wrongfully removed or retained child to his or her state of habitual residence unless the responding party can prove that one of the defenses available under the Convention is satisfied.

Article 13(b), which provides the most frequently cited defense available under the Convention, stipulates that a court is not required to order the return of a child to his or her state of habitual residence if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” To this end, U.S. courts agree that one situation in which Article 13(b) is satisfied is when the child’s return would place him or her in a “zone of war.”

Even though Article 13(b) establishes two alternative bases upon which a court can refuse to order the return of an abducted child, U.S. courts traditionally analyze Article 13(b) claims entirely or primarily under the “grave risk of harm” prong of the defense, ignoring or de-emphasizing the “intolerable situation” prong. This practice results in an extremely narrow interpretation of Article 13(b), especially in the zone of war context. For example, virtually all courts require that the party raising the defense identify a specific risk of harm directed at the individual child to prove that a zone of war exists and that the defense is satisfied. This requirement ignores the fact that a child’s return to a dangerous or unsafe region may expose him or her to an “intolerable situation” even if the party cannot identify a specific threat directed at the individual child.

* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2018, Villanova University. I would like to thank Professor Clare Huntington for her guidance, the *Fordham Law Review* editors and staff for their diligence, and my family and friends for their encouragement, love, and support.

To protect the children involved in cases under the Convention, this Note argues that U.S. courts must disaggregate the two prongs of Article 13(b). First, the disaggregation of the “grave risk of harm” and “intolerable situation” prongs is required by the plain meaning of the text of the defense, the intent of the framers of the Convention, and the purposes of the Convention itself. Second, disaggregating the two prongs of Article 13(b) allows zone of war to cover unstable and volatile situations, even if a party cannot identify a specific threat of danger directed at the individual child because the limited “intolerable situation” case law allows courts to consider the environment to which a child will be returned. As such, fully analyzing both prongs of Article 13(b) allows U.S. courts to better fulfill their obligations under the Convention and better defend children, a particularly defenseless population.

INTRODUCTION.....	2621
I. THE CONVENTION’S FORMATION, GOALS, AND MAJOR PROVISIONS	2624
A. <i>Formation of the Convention</i>	2624
B. <i>Objectives of the Convention</i>	2626
C. <i>Necessary Requirements for a Child’s Case to Fall Within the Purview of the Convention</i>	2627
D. <i>Elements of a Hague Case</i>	2629
II. ARTICLE 13(B): DEFINITION, SCOPE, AND CURRENT INTERPRETATION.....	2631
A. <i>Definition and Scope of Article 13(b)</i>	2631
B. <i>Current Interpretation of Article 13(b) by U.S. Courts</i>	2633
III. U.S. COURTS SYSTEMATICALLY FAIL TO ANALYZE BOTH PRONGS OF ARTICLE 13(B)	2637
A. <i>Traditional Application of Article 13(b) in the Zone of War Context</i>	2638
B. <i>The Failure to Disaggregate the Two Prongs of Article 13(b) and Acknowledge That the Defense Has Two Alternative Bases upon Which to Refuse Return</i>	2640
C. <i>Plausible Challenges to Disaggregating the Prongs of Article 13(b) and Creating a Broader Definition of Zone of War</i>	2641
IV. THE TWO PRONGS OF ARTICLE 13(B) SHOULD BE DISAGGREGATED TO ALLOW ZONE OF WAR TO COVER UNSAFE AND UNSTABLE SITUATIONS.....	2643
A. <i>U.S. Courts Must Disaggregate the Two Prongs of Article 13(b) to Better Serve the Text and Purposes of the Convention</i>	2643

1. Disaggregating “Grave Risk of Harm” and “Intolerable Situation” Is Required by the Text of Article 13(b).....	2643
2. The Framers of the Convention Intended the Two Prongs of Article 13(b) to Be Separate and Distinct.....	2644
3. Disaggregating the Two Prongs of Article 13(b) Better Serves the Overarching Purposes of the Convention.....	2645
B. <i>A Broader Definition of Zone of War</i>	2645
1. The Limited “Intolerable Situation” Case Law Allows Courts to Consider the Environment to Which a Child Will Be Returned.....	2645
2. The Application of the Principles Identified from the Limited “Intolerable Situation” Case Law to the Zone of War Context.....	2647
CONCLUSION.....	2648

INTRODUCTION

One of the “most difficult and heart-rending tasks” a judge faces is deciding whether to return an abducted child to his or her state of habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction¹ (the “Convention”) when a party raises an Article 13(b) defense.² An Article 13(b) defense asserts that a child faces a “grave risk of harm” or an “intolerable situation” if returned to his or her state of habitual residence and, if successful, allows the child to remain in the state to which he or she was wrongfully removed or retained.³ This decision is particularly challenging given that courts and scholars are now aware of the growing number of abductions that occur to help and protect children.⁴

For example, take Gerardo Bahena Gonzalez’s decision to move his four children from Sinaloa, Mexico to the United States in *Bernal v. Gonzalez*.⁵ Amelia Aguilar Bernal and Gonzalez, both Mexican citizens, married in the

1. *Opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670 (entered into force Dec. 1, 1983) [hereinafter Convention].

2. *Danaipour v. McLarey*, 286 F.3d 1, 4 (1st Cir. 2002). “State of habitual residence” is not defined in the Convention; determining a child’s state of habitual residence is a fact-bound question for the presiding court, and courts have considered a variety of factors to answer this question. *See infra* notes 64–67 and accompanying text.

3. *See* Convention, *supra* note 1, at 8.

4. *See* Christina Piemonte, Comment, *International Child Abduction and Courts’ Evolving Considerations in Evaluating the Hague Convention’s Defenses to Return*, 22 TUL. J. INT’L & COMP. L. 191, 211–12 (2013). Today, a majority of the individuals taking their children across borders in violation of custody agreements are mothers, many of whom are fleeing domestic violence. *See id.* at 198.

5. 923 F. Supp. 2d 907 (W.D. Tex. 2012).

United States in 2003 and had four children while living in the United States.⁶ In 2008, Bernal and Gonzalez moved to Sinaloa with their children and experienced marital problems, eventually separating in 2010.⁷ The couple entered into a valid custody agreement, in which the parties agreed that Gonzalez would pay Mex\$1500 per week in child support and that Gonzalez would have weekend visitation rights but only within Sinaloa.⁸ After the separation, Gonzalez moved back to the United States and followed the conditions of the custody agreement until on or about March 25, 2011.⁹ On that date, Gonzalez picked up his children for his visit and brought them back to the United States without Bernal's permission and ultimately settled in Texas.¹⁰

Bernal initiated a Hague Convention proceeding to have the children returned to Mexico and Gonzalez raised an Article 13(b) defense, arguing that the children should not be returned.¹¹ To support his claim, Gonzalez argued that the Article 13(b) defense was satisfied because cartel violence in Mexico created a zone of war and because the children's living situation with Bernal constituted an abusive environment.¹² Gonzalez's contentions followed the traditional interpretation of Article 13(b), as most U.S. courts hold that the defense primarily arises in two situations: (1) where the return of the child would send him or her to a zone of war, famine, or disease; or (2) in cases of extreme abuse, neglect, or emotional dependence, and the court in the state of habitual residence is unable or unwilling to provide the child with the necessary protection.¹³

To this end, Gonzalez argued that his children's return to Mexico would expose them to a zone of war because cartel violence was overflowing from

6. *See id.* at 911.

7. *See id.*

8. *See id.* at 911–12.

9. *See id.* at 912–13.

10. *See id.*

11. *See id.* at 913–14.

12. *See id.* at 920–23. Gonzalez argued that the children's living situation was abusive because Bernal did not have a job, keep a clean home, provide the children with clothes or shoes that fit them, or rid the children of lice. *See id.* at 922. The court held that this evidence was not sufficient to satisfy Article 13(b) because it did not show "serious neglect or abuse." *Id.*

13. *See Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Salguero v. Argueta*, 256 F. Supp. 3d 630, 636–37 (E.D.N.C. 2017); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999); 1 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 2:38 (3d ed. 2018); Ann Laquer Estin, *Protecting Child Welfare in Abduction and Asylum Proceedings*, 41 N.C. J. INT'L L. 793, 812 (2016); Tracy Bateman Farrell, Annotation, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act*, 42 U.S.C.A. § 11603(e)(2)(A), 56 A.L.R. Fed. 2d Art. 163 § 3 (2011). *But see Baran v. Beaty*, 526 F.3d 1340, 1347 (11th Cir. 2008) (holding that, when a party proves that returning a child to his or her state of habitual residence would expose him or her to a "grave risk of harm," the court retains the discretion to deny the petition for return, regardless of the home state's ability to protect the child). This Note, however, focuses solely on the interpretation of Article 13(b) in the zone of war context.

larger Mexican cities into the small town where his children lived.¹⁴ Moreover, Gonzalez stated that he observed dead bodies floating in the river near his children's home when he visited them.¹⁵ One of Gonzalez's sons further testified that, before Gonzalez brought him to the United States, "he was a passenger in [a car] that was stopped by armed cartel members or thugs" and "an armed man pointed a gun directly at the driver of the vehicle, [his] uncle, while . . . his grandmother, and his cousin were in the vehicle."¹⁶ While Gonzalez's son was unharmed, Gonzalez argued that these experiences together provided evidence that his children's return to Mexico would expose them to a "grave risk of harm" or an "intolerable situation."¹⁷

The court, however, held that Gonzalez failed to establish an Article 13(b) defense proving that the town in Sinaloa, Mexico was a zone of war.¹⁸ While Gonzalez did demonstrate that "the ongoing violence in Mexico pose[d] serious risk," the court concluded that Gonzalez "failed to show that the risk to *the children* [was] grave."¹⁹ In its analysis of the defense, the court focused solely on the "grave risk of harm" prong of Article 13(b) and did not analyze the "intolerable situation" prong of the defense, which provides an independent basis for the court to decline to return a child to his or her state of habitual residence.²⁰ As such, the court held that Gonzalez could not satisfy Article 13(b) because he did not identify a specific threat of danger directed at his individual children.²¹

The court's analysis in *Bernal* is emblematic of how U.S. courts often analyze zone of war claims, in that they focus solely or primarily on the "grave risk of harm" prong of Article 13(b).²² Thus, the party raising the defense is required to show a specific risk of danger directed at his or her own children, even though the children may be endangered through exposure to an "intolerable situation" in the absence of a direct threat.²³

This Note analyzes Article 13(b) of the Convention, focusing on cases where a party contends that the defense is applicable because returning a

14. *See Bernal*, 923 F. Supp. 2d at 920–21.

15. *See id.* at 921.

16. *Id.* Gonzalez's son, who was not a subject of the proceeding due to his age, explained that he believed the armed men were "thugs looking for other people traveling in a similar vehicle." *Id.*

17. *See id.* at 920–21.

18. *See id.* at 921.

19. *Id.* (emphasis added).

20. *See id.* at 920–21 (explaining that, to satisfy Article 13(b), the party opposing a child's return must show that the risk to the child is grave, not just serious, and that the child would be placed in immediate harm or danger on return).

21. *See id.*

22. *See, e.g.,* *Baxter v. Baxter*, 423 F.3d 363, 374 (3d Cir. 2005); *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003); *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369, at *7 (D. Mont. Nov. 7, 2012); *Castro v. Martinez*, 872 F. Supp. 2d 546, 550–51 (W.D. Tex. 2012); *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *5 (N.D. Tex. Jan. 19, 2011); *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 613–14 (E.D. Va. 2002), *aff'd sub nom. Escaf v. Rodriguez*, 52 F. App'x 207 (4th Cir. 2002).

23. *See Baxter*, 423 F.3d at 374; *Silverman*, 338 F.3d at 901; *Sieler*, 2012 WL 5430369, at *7; *Castro*, 872 F. Supp. 2d at 550–51; *Vazquez*, 2011 WL 196164, at *5; *Hazbun Escaf*, 200 F. Supp. 2d at 613–14.

child to his or her state of habitual residence places the child in a zone of war. Part I describes the Convention's creation, objectives, and major provisions. Part II delves deeper into Article 13(b), defining the defense, outlining its scope, and explaining how U.S. courts have traditionally interpreted the defense. Part III analyzes Article 13(b) in the zone of war context, explaining how U.S. courts have traditionally defined zone of war narrowly by focusing exclusively or primarily on the "grave risk of harm" prong of the defense when evaluating such claims. Part IV argues that U.S. courts must disaggregate the two prongs of Article 13(b) to be faithful to the plain meaning of the text of the defense, the intention of the framers of the Convention, and the overarching purposes of the Convention. This Part further concludes that fully analyzing both prongs of Article 13(b) allows U.S. courts to expand the definition of zone of war to include unsafe and unstable circumstances that would place a child in an "intolerable situation," even if a party cannot identify a specific threat of danger directed at the individual child.

I. THE CONVENTION'S FORMATION, GOALS, AND MAJOR PROVISIONS

The Convention establishes a civil remedy for a left-behind parent seeking the return of his or her child after the child has been wrongfully removed to or retained in another state that is also a party to the Convention.²⁴ Part I.A discusses the formation of the Convention and the factors that led the international community to address the problem of international child abductions. Part I.B then analyzes the Convention's major objectives. Part I.C describes the necessary requirements for a child's case to fall within the purview of the Convention, and Part I.D then explains the elements of a Hague case.

A. Formation of the Convention

International child abduction first received attention as an issue requiring an international response in the 1970s because of social, legal, and technological developments that enabled more international travel and international marriages.²⁵ At the same time, the institution of marriage was evolving, as more people were getting divorced and having children outside of marriage.²⁶ As a result of these developments, the number of international custody disputes and child abductions increased significantly.²⁷ However, it was challenging to resolve these disputes, simply because it was difficult to

24. See Piemonte, *supra* note 4, at 193.

25. See PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 2–3 (1999); Tai Vivatvaraphol, Note, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3330–31 (2009).

26. See BEAUMONT & MCELEAVY, *supra* note 25, at 2; Vivatvaraphol, *supra* note 25, at 3331.

27. See Vivatvaraphol, *supra* note 25, at 3331.

locate children across international borders.²⁸ In addition, the proceedings were expensive, lengthy, and complicated—and local and foreign authorities either did not know how or did not want to assist each other.²⁹ These factors led to inconsistent and unreliable international child abduction cases, highlighting the need for an international solution.³⁰

As a result, a Hague special commission was assembled in 1976 to address the growing concerns regarding international child abductions.³¹ The special commission determined that the problem would be dealt with at the fourteenth session of the Hague Conference on Private International Law (the “Hague Conference”),³² an intergovernmental institution that designs treaties on a number of topics.³³ Adair Dyer, then first secretary of the Hague Conference, began conducting research to understand the nature of the problem and to prepare for the conference.³⁴ The special commission met in March of 1979 to discuss the progress of this research and agreed on several principles that would later provide the foundation for the first draft of the Convention.³⁵

Using these foundational principles, the Convention in its current form was prepared during the fourteenth session of the Hague Conference.³⁶ The twenty-three countries present at the conference, including the United States, unanimously adopted the Convention on October 25, 1980.³⁷ The Convention entered into force on December 1, 1983, after it was ratified by France, Canada, and Portugal.³⁸

28. See BEAUMONT & MCELEAVY, *supra* note 25, at 3; Vivatvaraphol, *supra* note 25, at 3331.

29. See BEAUMONT & MCELEAVY, *supra* note 25, at 3; Vivatvaraphol, *supra* note 25, at 3331.

30. See BEAUMONT & MCELEAVY, *supra* note 25, at 3; Vivatvaraphol, *supra* note 25, at 3332.

31. See Andrew A. Zashin, *Bus Bombings and a Baby's Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes*, 21 J. AM. ACAD. MATRIM. LAW. 121, 123 (2008).

32. See BEAUMONT & MCELEAVY, *supra* note 25, at 17; Vivatvaraphol, *supra* note 25, at 3333.

33. JAMES D. GARBOLINO, *THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES* 9 (2d ed. 2015).

34. See BEAUMONT & MCELEAVY, *supra* note 25, at 17; Vivatvaraphol, *supra* note 25, at 3333–34.

35. See BEAUMONT & MCELEAVY, *supra* note 25, at 19. One of the foundational principles that the special commission agreed on was that a state could refuse to order the return of a child if a court in the state where the child was located determined that the return would be “gravely prejudicial to the child’s interests.” *Id.*

36. See *id.* at 22–23. The Hague Conference was held from October 6 to October 25, 1980, in The Hague, Netherlands. *Id.*; see also Stephanie Vullo, *The Hague Convention on the Civil Aspects of International Child Abduction: Commencing a Proceeding in New York for the Return of a Child Abducted from a Foreign Nation*, 14 *TOURO L. REV.* 199, 201 (1997); Vivatvaraphol, *supra* note 25, at 3334.

37. See Theresa A. Spinillo, Note, *The Hague Convention on the Civil Aspect of International Child Abduction: An Analysis of the Grave Risk of Harm Defense*, 14 *N.Y. INT’L L. REV.* 129, 130 (2001); Vivatvaraphol, *supra* note 25, at 3334.

38. See GARBOLINO, *supra* note 33, at 9.

Although the United States adopted the Convention on October 25, 1980, the Convention did not become effective as a matter of U.S. domestic law until April 29, 1988,³⁹ when Congress passed the International Child Abduction Remedies Act⁴⁰ (ICARA), which established the procedures necessary to execute the Convention in the United States.⁴¹ The United States ratified the Convention at The Hague on the same day that Congress passed ICARA, and the Convention officially went into force for the United States on July 1, 1988.⁴²

The Convention has resulted in over 150 appellate decisions and three decisions of the U.S. Supreme Court since its inception in the United States.⁴³ Further, as the world progressively globalizes, the number of Hague cases filed worldwide also continues to increase.⁴⁴

B. Objectives of the Convention

The Convention's primary objective is to prevent the abduction of children across international borders in an attempt to obtain a benefit or advantage in a custody matter.⁴⁵ The Convention aims to protect children internationally from the adverse consequences of being wrongfully removed or retained, to create procedures that ensure a child's prompt return to his or her state of habitual residence, and to secure protection for rights of access.⁴⁶ The

39. Vivatvaraphol, *supra* note 25, at 3339. It took time for the Convention to take effect in the United States because the U.S. Constitution requires the Senate to ratify treaties, and Congress must pass legislation to make non-self-executing treaties, such as the Convention, domestic law. These political processes thus require a significant amount of time and effort. 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*, FAM. L.Q., Spring 1990, at 35, 37–38; Vivatvaraphol, *supra* note 25, at 3339–40, 3340 n.119; see also Vullo, *supra* note 36, at 203–04 (“In order to be bound by the Convention, a signatory must enact a domestic law that adopts the treaty and provides for its execution.”).

40. 22 U.S.C. §§ 9001–9011 (2018).

41. ICARA grants concurrent original jurisdiction to state and federal courts to hear cases that arise under the Convention. See Veronica Torrez et al., *The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction*, 5 WHITTIER J. CHILD & FAM. ADVOC. 7, 32 (2005); Vullo, *supra* note 36, at 204.

42. See Pfund, *supra* note 39, at 38. There are currently 101 signatories to the Convention. See 28: *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [https://perma.cc/Q6ZU-62XH] (last visited Apr. 12, 2020).

43. See GARBOLINO, *supra* note 33, at vii.

44. See *id.* at xvii–xviii. To be more specific, the U.S. Department of State received 334 applications for return from signatory nations in 2013, 352 applications for return from signatory nations in 2014, and opened 427 new Hague cases in 2018. See *id.* at 1; see also U.S. DEP'T OF STATE, INCOMING HAGUE CONVENTION CASES TO THE U.S. CENTRAL AUTHORITY (2018), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/Incoming%20Data%20Page%20-%20202019%20Annual%20Report.pdf> [https://perma.cc/4X2L-FR2N]. The State Department is responsible for executing the duties imposed by the Convention in the United States. See *infra* notes 52–57 and accompanying text.

45. See Farrell, *supra* note 13, § 2.

46. See Convention, *supra* note 1, at 4; SARAH VIGERS, MEDIATING INTERNATIONAL CHILD ABDUCTION CASES: THE HAGUE CONVENTION 7 (2011); Laura W. Morgan, “Grave Risk of Harm” Under Article 13(b) of the Hague Convention on International Child Abduction: What

Convention is a civil remedy designed to promptly return an abducted child to his or her state of habitual residence and allow the local authorities to resolve the custody dispute.⁴⁷

The framers of the Convention were also “firmly convinced that the interests of children are of paramount importance in matters relating to their custody.”⁴⁸ The apparent disparity between these different objectives, with one prioritizing the efficient resolution of Hague cases and the other emphasizing the importance of considering the child’s best interests, has confused courts, especially in the context of Article 13(b).⁴⁹ As a result of this confusion, some courts believe that the Convention’s primary goals are to ensure an abducted child’s prompt return to his or her state of habitual residence and prevent parties from forum shopping in international custody disputes, while other courts believe that the Convention’s goal is to protect the safety and well-being of the child in question.⁵⁰

C. Necessary Requirements for a Child’s Case to Fall Within the Purview of the Convention

For a party to be able to bring a Hague case: (1) the child in question must be below the age of sixteen and “habitually resident” in a contracting state to the Convention immediately prior to the breach of custody or access rights; (2) the person with whom the child had been residing must have actually been exercising custody rights at the time of the wrongful removal or retention; (3) the Convention must have “entered into force” between the two states involved before the party filed the application for the child’s return; and (4) the child’s wrongful removal or retention must have happened after the Convention became effective in both states.⁵¹

Constitutes a War?, DIVORCE LITIG., July 2002, at 133, 133. The Convention defines “rights of access” as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” Convention, *supra* note 1, at 5.

47. See Torrez et al., *supra* note 41, at 8; see also GARBOLINO, *supra* note 33, at 6 (explaining that the Convention is not concerned with “the entry, modification, or enforcement of foreign or domestic child custody orders”); Vullo, *supra* note 36, at 201–02 (clarifying that the Convention is designed to determine a child’s state of habitual residence and allow the courts of that state to decide the custody dispute). As the Convention is a civil remedy, it is not an extradition treaty and does not criminalize the wrongful removal or retention of a child. See *id.* at 203.

48. Convention, *supra* note 1, at 4.; see also Piemonte, *supra* note 4, at 210; Kyle Simpson, Comment, *What Constitutes a “Grave Risk of Harm?”: Lowering the Hague Child Abduction Convention’s Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 842 (2017) (“[T]he 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.”).

49. See Simpson, *supra* note 48, at 843.

50. See *id.* For more information on the apparent conflict between these competing objectives, especially in the context of Article 13(b), and how the best interests of the child should influence an Article 13(b) analysis, see *infra* notes 157–61, 192–95 and accompanying text.

51. See Convention, *supra* note 1, at 5; GARBOLINO, *supra* note 33, at 17–18; VIGERS, *supra* note 46, at 7; Zashin, *supra* note 31, at 123. Whether or not the Convention is “in force” between states depends on whether the states in question are “member states” or “party states.”

If these conditions are met, a party can request the return of a wrongfully removed or retained child through either an administrative request filed with the “central authority”⁵² of the state where the child is located or the state of the left-behind parent or a court proceeding.⁵³ These procedures are not mutually exclusive—a party can choose to apply both to the central authority and to a court for the child’s return.⁵⁴ One factor that a party should consider is that, while the central authority can negotiate for the child’s return with the parties involved, it has no power to compel the child’s return.⁵⁵ As such, in the United States, if these negotiations fail, the party must file an application with the federal district court or state court with jurisdiction where the child is located and have the court compel the child’s return through a court order.⁵⁶ Regardless of the procedure chosen, however, the party must initiate the proceeding within the Convention’s one-year statute of limitations.⁵⁷

Importantly, upon the receipt of a Convention petition for return in any U.S. court, any ongoing state court custody matter must be placed on hold while the court that received the petition decides whether the proceeding has been brought in the correct jurisdiction.⁵⁸ If the state court custody proceeding is not stayed, a federal court may vacate its determination.⁵⁹

GARBOLINO, *supra* note 33, at 17–18. “Member states” are states that were participants in the Hague Conference, and they become bound by the Convention after they ratify it. *Id.* at 18. On the other hand, “party states” did not participate in the Hague Conference when the Convention was approved for adoption, and they must accede to the Convention to become bound by it. *Id.* When a member state ratifies the Convention, the Convention automatically enters into force between that member state and all other member states who have ratified the Convention. *Id.* On the other hand, for the Convention to enter into force between a member state and a party state after the member state ratifies the Convention, the member state must specifically accept the party state’s accession. *Id.* A party state who has previously acceded to the Convention must also expressly accept the accession of a new party state to the Convention for it to enter into force between them. *Id.*

52. All members of the Convention are required to designate a central authority that discharges the duties imposed by the Convention; the Office of Children’s Issues in the Bureau of Consular Affairs in the Department of State is the central authority in the United States. *See* GARBOLINO, *supra* note 33, at 11; Vullo, *supra* note 36, at 208–09.

53. *See* GARBOLINO, *supra* note 33, at 21.

54. *See* Vullo, *supra* note 36, at 210.

55. *See* GARBOLINO, *supra* note 33, at 21.

56. *See id.*; *see also* Vullo, *supra* note 36, at 210. Federal and state courts in the United States have concurrent original jurisdiction in Hague cases, and a party can choose to initiate the court proceeding in any court “which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.” 22 U.S.C. § 9003(b) (2018).

57. *See* Vullo, *supra* note 36, at 224. *See infra* notes 68–73 and accompanying text for further discussion of the Convention’s statute of limitations.

58. *See* Convention, *supra* note 1, at 9; GARBOLINO, *supra* note 33, at 5; Galit Moskowitz, *The Hague Convention on International Child Abduction and the Grave Risk of Harm Exception: Recent Decisions and Their Implications on Children from Nations in Political Turmoil*, 41 FAM. CT. REV. 580, 582 (2003).

59. *See* *Mozes v. Mozes*, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001); GARBOLINO, *supra* note 33, at 6.

D. Elements of a Hague Case

The Convention's structure is straightforward. After a court determines that a child below the age of sixteen has been wrongfully removed from or retained outside of his or her state of habitual residence, it must order the child's immediate return unless the respondent satisfies one of the defenses available under the Convention.⁶⁰

For the purposes of the Convention, the removal or retention of a child is wrongful where "(a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention" and (b) those rights of custody were being exercised at the time of the removal or retention or they would have been so exercised if the removal or retention had not occurred.⁶¹ In this analysis, "rights of custody" are determined by reference to the law of the state where the child was habitually resident immediately prior to the wrongful removal or retention,⁶² and "custody rights" are defined as more than "mere visitation or 'access' rights."⁶³

The determination of habitual residence is central to a Hague case, as a child's removal or retention is only wrongful if he or she is removed from or retained outside of his or her state of habitual residence.⁶⁴ This is a fact-driven inquiry, and courts consider factors such as "language issues, how well the child has acclimated to his or her new environment, the intentions of the child's parents, the time that the child was physically located in a particular place, and personal issues, such as medical care, schooling, social life, extended family, friends, and age" to decide which state is considered the child's habitual residence.⁶⁵ The relative importance of these factors varies depending on whether the court prioritizes parental intent or child experiences in its habitual residence determination.⁶⁶ Under both of these

60. See Estin, *supra* note 13, at 806; Piemonte, *supra* note 4, at 193. ICARA requires that the petitioning party prove by a preponderance of the evidence that the child is under sixteen years of age, that the child was wrongfully removed from or retained outside of his or her state of habitual residence, and that this removal or retention violated the party's custody rights. See 22 U.S.C. § 9003(e); GARBOLINO, *supra* note 33, at 23–24. The petitioner, however, has to provide only preliminary evidence to establish that his or her custody rights were being exercised. See GARBOLINO, *supra* note 33, at 24. For further discussion of the defenses available under the Convention, see *infra* notes 75–77 and accompanying text.

61. Convention, *supra* note 1, at 5; see also Vullo, *supra* note 36, at 213 ("A removal or retention is wrongful under . . . the Convention if it breaches the custody rights of a person or institution as defined by the laws of the child's habitual residence, and that at the time of the removal or retention, those rights were being exercised or would have been exercised but for the removal or retention.").

62. See Convention, *supra* note 1, at 4–5; GARBOLINO, *supra* note 33, at 7.

63. Radu v. Toader, 463 F. App'x 29, 30–31 (2d Cir. 2012); see also GARBOLINO, *supra* note 33, at 30.

64. See GARBOLINO, *supra* note 33, at 50; see also Vullo, *supra* note 36, at 213 (explaining that "establishing the child's habitual residence is the cornerstone of a successful return petition").

65. GARBOLINO, *supra* note 33, at 51 (collecting cases).

66. See *id.* at 53. While the First, Second, Fourth, Seventh, Ninth, and Eleventh Circuits prioritize parental intent in their habitual residence determinations, the Sixth Circuit focuses

approaches, however, the court focuses on the length of time the child has lived in the state and whether there are objective facts that establish the state as the child's habitual residence.⁶⁷

When a court determines that a child has been wrongfully removed from or retained outside of his or her state of habitual residence, the courts of the state where the child is located must order the immediate return of the child, as long as the party requesting the return commences the proceedings within one year of the date of the wrongful removal or retention and no other defenses available under the Convention apply.⁶⁸

The Convention's one-year statute of limitations begins to run from the date of the wrongful conduct.⁶⁹ A party must file an action in court to commence the proceedings;⁷⁰ an application to the central authority is not sufficient to stop the clock.⁷¹ Even if the party requesting the child's return misses this deadline, however, the courts of the state where the child is located should still order the child's return unless the responding party demonstrates that the child is well settled in his or her new home.⁷² In this context, "settled" has been understood to mean "that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment."⁷³

on the child's experiences, and the Third and Eighth Circuits combine both of these approaches. See LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 15:25 (2019).

67. See Piemonte, *supra* note 4, at 193. In its most recent decision regarding the Convention, the U.S. Supreme Court emphasized that the habitual residence determination is a fact-driven inquiry, holding that "there are no categorical requirements for establishing a child's habitual residence" and that an agreement between an infant's parents is not necessary to establish the infant's habitual residence under the Convention when he or she is too young to acclimate to his or her surroundings. *Monasky v. Taglieri*, 140 S. Ct. 719, 728 (2020).

68. See Convention, *supra* note 1, at 7–8; see also GARBOLINO, *supra* note 33, at 12 (explaining that if a child is not returned to his or her state of habitual residence in under six weeks, authorities can be asked to explain the delay).

69. GARBOLINO, *supra* note 33, at 27–28. When the child is wrongfully removed, the statute of limitations starts running on the day the party unilaterally takes the child from his or her state of habitual residence without the other parent's knowledge or permission. *Id.* at 27. When a child is wrongfully retained, the period begins either on the date the abducting parent fails to return the child, despite the left-behind parent's clear wish to have the child returned, or when the abducting parent's actions are so apparent that the left-behind parent knows, or reasonably should know, that the abducting parent is not returning the child. *Id.*

70. See *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007); GARBOLINO, *supra* note 33, at 94.

71. See *Wojcik v. Wojcik*, 959 F. Supp. 413, 418–19 (E.D. Mich. 1997); GARBOLINO, *supra* note 33, at 94.

72. See Vullo, *supra* note 36, at 212. Factors to consider in deciding whether a child is "settled in its new environment" include: the child's age, the stability of the child's residence and the parent's employment, whether the child has friends and relatives in the area, whether the child attends school or church consistently, and whether the child participates in extracurricular activities. *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd sub nom. Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014).

73. *Lozano*, 697 F.3d at 56.

II. ARTICLE 13(B): DEFINITION, SCOPE, AND CURRENT INTERPRETATION

Article 13(b) is the most frequently cited defense available under the Convention that allows a court to refuse to order the return of an abducted child to his or her state of habitual residence.⁷⁴ Part II.A defines Article 13(b), outlines its scope, and explains what evidence courts are allowed to consider when analyzing the defense. Part II.B describes the current interpretation of Article 13(b) by U.S. courts and identifies the circumstances where there is a consensus regarding its applicability. It then explores the court-created concept of undertakings, a unique aspect of the current application of the defense.

A. Definition and Scope of Article 13(b)

The Convention identifies several defenses to the immediate return of a child who is wrongfully removed from or retained outside of his or her state of habitual residence.⁷⁵ As the most commonly used of these defenses, Article 13(b) is often considered the most important defense available under the Convention.⁷⁶ It stipulates that a state is not bound to order the return of an abducted child if the party opposing the child's return shows that "there is a grave risk that his or her return would expose the child to physical or psychological harm *or otherwise* place the child in an intolerable situation."⁷⁷ Importantly, a party raising Article 13(b) must prove the defense by clear and convincing evidence.⁷⁸

74. See Anastacia M. Greene, *Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction*, 13 U. MIAMI INT'L & COMP. L. REV. 105, 116 (2005); Sharon C. Nelson, Note, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 676; Piemonte, *supra* note 4, at 211.

75. See Convention, *supra* note 1, at 7–9. In addition to Article 13(b), the Convention also provides that courts are not obligated to order the return of a child if: (1) "the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"; (2) the child objects to the return and it is appropriate to consider his or her opinion because of his or her age and maturity; (3) the return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms"; or (4) the petitioning party missed the one year statute of limitations and the child is "settled" in his or her new environment. *Id.* These defenses are all fascinating areas of research, but they are outside the scope of this Note.

76. See Greene, *supra* note 74, at 116; Nelson, *supra* note 74, at 676; Piemonte, *supra* note 4, at 211.

77. Convention, *supra* note 1, at 8 (emphasis added). When U.S. courts address Article 13(b), they consider it to be a mixed question of fact and law, and they review it de novo on appeal. See *Silverman v. Silverman*, 338 F.3d 886, 896 (8th Cir. 2003); GARBOLINO, *supra* note 33, at 109.

78. See 22 U.S.C. § 9003(e)(2)(A) (2018); *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 919 (W.D. Tex. 2012); GARBOLINO, *supra* note 33, at 87. ICARA likely requires Article 13(b) to be proven by clear and convincing evidence, not by a preponderance of the evidence, because of the stereotype of abductors at the time Congress passed ICARA. See *generally* Simpson, *supra* note 48. When Congress passed ICARA, it believed most child abductors were foreign-born fathers who took the children of American women back to their home countries. See *id.* at 847. Thus, Congress wanted to ensure that it would not be too easy for these fathers to

Article 13(b), like all of the Convention's defenses, is construed narrowly,⁷⁹ as there is "an overriding preference" to return a wrongfully removed or retained child to his or her state of habitual residence.⁸⁰ To this end, two international studies conducted in 1999 and 2003 showed that 74 percent of Hague cases that went to court in 1999 and 79 percent of Hague cases that went to court in 2003 resulted in the court ordering the child's return.⁸¹ Along the same lines, U.S. courts rarely find that an Article 13(b) defense has been proven.⁸² The defense is infrequently successful because courts have interpreted it narrowly and imposed a heightened burden of proof out of a fear that it would be exploited by parents attempting to forum shop in international custody disputes.⁸³ Moreover, even if all of the conditions for a defense under the Convention are met, a court can still exercise its discretion and choose to return the child to his or her state of habitual residence if doing so would advance the aims of the Convention.⁸⁴ This policy also originates from the desire to interpret the defenses narrowly so that they do not undermine the Convention's objective of promptly returning abducted children to their states of habitual residence.⁸⁵

Due to the narrow construction of Article 13(b), courts cannot consider information that would be proper in a plenary custody hearing,⁸⁶ engage in a custody determination, or address who would be the better parent in an Article 13(b) analysis.⁸⁷ Even so, the court must allow the party raising an

argue that returning the child to his or her mother would expose him or her to a "grave risk of harm" or an "intolerable situation." *See id.*

79. *See Nicolson v. Pappalardo*, 605 F.3d 100, 107 (1st Cir. 2010); *Bernal*, 923 F. Supp. 2d at 919; GARBOLINO, *supra* note 33, at 88; Farrell, *supra* note 13, § 8.

80. Zashin, *supra* note 31, at 125.

81. *See VIGERS*, *supra* note 46, at 7–8.

82. *See BEAUMONT & MCELEAVY*, *supra* note 25, at 140; HARALAMBIE, *supra* note 13, § 2:38.

83. *See BEAUMONT & MCELEAVY*, *supra* note 25, at 140; Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 33 I.L.M. 225, 241 (1994) ("Most experts reported that in their jurisdictions Article 13 *b* is given a very narrow interpretation and that therefore few defences based upon this argument are successful."); *see also Estin*, *supra* note 13, at 808 (explaining that Article 13(b) is interpreted narrowly out of fear that it will swallow the Convention's general rule to promptly return an abducted child to his or her state of habitual residence and because the defense must be proven by clear and convincing evidence).

84. *See Walsh v. Walsh*, 221 F.3d 204, 221 n.17 (1st Cir. 2000); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); GARBOLINO, *supra* note 33, at 89; Estin, *supra* note 13, at 808. For further explanation of how U.S. courts use undertakings to implement this policy, *see infra* notes 108–26 and accompanying text.

85. *See Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,509–10 (Mar. 26, 1986).

86. *See Farrell*, *supra* note 13, § 2; *see also Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (explaining that evidence relevant to a custody proceeding is not appropriate in an Article 13(b) hearing).

87. *See Whallon v. Lynn*, 230 F.3d 450, 459 (1st Cir. 2000); BEAUMONT & MCELEAVY, *supra* note 25, at 140–41; *see also ELROD*, *supra* note 66, § 15:30 ("Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate issue and should be determined by the appropriate tribunal in the place of habitual residence.").

Article 13(b) defense the opportunity to submit evidence, including expert testimony, that supports the defense, as well as the opportunity to question the petitioner's witnesses.⁸⁸ In addition, the relevant authority must consider any information that the government of the child's habitual residence provides about the child's social background.⁸⁹ Importantly, courts must consider the existence of a "grave risk of harm" or an "intolerable situation" at the time the petition is heard—not at some unidentifiable point in the future.⁹⁰

B. Current Interpretation of Article 13(b) by U.S. Courts

Since its inception, courts and scholars have found it challenging to define the scope of Article 13(b).⁹¹ Reports from the Hague Conference do not clarify the purview of the defense, as they acknowledge that the exact phrasing of Article 13(b) was the result of a delicate compromise among the participating states but otherwise provide no guidance on its interpretation.⁹²

Despite this, U.S. courts agree that Article 13(b) is primarily available in two situations: (1) where the return of the child would send him or her to a zone of war, famine, or disease; and (2) in cases of extreme abuse, neglect, or emotional dependence where the state of habitual residence is unable or unwilling to provide the child with the necessary protection.⁹³ Using this framework, U.S. courts have held that the defense is not satisfied in cases of poverty, unfavorable living conditions, or limited educational opportunities.⁹⁴ Further, most courts agree that the defense similarly fails when the abducting party asserts that the return of the child will result in

88. See *Noergaard v. Noergaard*, 197 Cal. Rptr. 3d 546, 559–60 (Ct. App. 2015); HARALAMBIE, *supra* note 13, § 2:38.

89. See Convention, *supra* note 1, at 8.

90. See BEAUMONT & MCELEAVY, *supra* note 25, at 141.

91. Estin, *supra* note 13, at 811.

92. See *id.*; see also *Explanatory Report by Elisa Pérez-Vera*, in 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 426, 461 (1982) ("Each of the terms used in [Article 13(b)] is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation." (footnote omitted)).

93. See *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Salguero v. Argueta*, 256 F. Supp. 3d 630, 636–37 (E.D.N.C. 2017); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999); HARALAMBIE, *supra* note 13, § 2:38; Estin, *supra* note 13, at 812; Farrell, *supra* note 13, § 3. *But see* *Baran v. Beaty*, 526 F.3d 1340, 1347 (11th Cir. 2008) (holding that when a party proves that returning a child to his or her state of habitual residence would expose him or her to a "grave risk of harm," the court has the discretion to deny the petition for return, regardless of the home state's ability to protect the child).

94. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364–65 (M.D. Fla. 2002); BEAUMONT & MCELEAVY, *supra* note 25, at 136; GARBOLINO, *supra* note 33, at 111; see also *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010) (holding that homes without running water or indoor plumbing do not satisfy Article 13(b) because "[b]illions of people live in" comparable environments).

psychological harm to the child because of his or her separation from the abductor.⁹⁵ The harm to the child must be greater than what is normally to be expected when a child is taken away from one parent and passed to another parent.⁹⁶ Recent case law also clarifies that the physical, sexual, or emotional abuse of a child by a parent satisfies an Article 13(b) defense.⁹⁷

Domestic violence sometimes constitutes a “grave risk of harm” or an “intolerable situation” that satisfies Article 13(b).⁹⁸ Some courts require that the child himself or herself be a direct victim of the abuse for the defense to be met,⁹⁹ while other courts allow the defense even if the child was not the subject of the abuse.¹⁰⁰ Commentators contend that this split exists because the term “domestic violence” is “all-inclusive” and encompasses “minor and isolated incidents on one end and high degrees of lethality and death on the other.”¹⁰¹

In *Simcox v. Simcox*,¹⁰² the Sixth Circuit categorized different levels of domestic violence and explained how these categories relate to an Article 13(b) analysis. For example, when the abuse is “relatively minor,” the court held that Article 13(b) is likely not satisfied.¹⁰³ On the other hand, when the violence is severe, with evidence of sexual abuse or death threats, Article 13(b) is almost certainly satisfied, and the court should deny the petition for return unless it is sure that the children will be protected when they arrive in their states of habitual residence.¹⁰⁴ For situations that fall in between these two extremes, the court must conduct a fact-driven inquiry to decide whether the defense is satisfied, considering the frequency of the violence, the likelihood that the abuse will recur, and whether the court can implement any

95. See *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000); *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995); *Mendez Lynch*, 220 F. Supp. 2d at 1364; GARBOLINO, *supra* note 33, at 112.

96. *Walsh*, 221 F.3d at 218. This is true because, to satisfy Article 13(b), the risk to the child must be grave, not just serious. See *Simcox v. Simcox*, 511 F.3d 594, 607–08 (6th Cir. 2007).

97. See *Baran*, 526 F.3d at 1352; *Danaipour v. McLarey* 286 F.3d 1, 15 (1st Cir. 2002); Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986); GARBOLINO, *supra* note 33, at 113; Piemonte, *supra* note 4, at 196. In this analysis, courts consider the sexual and physical abuse of a child to be equally harmful. See *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 WL 1611123, at *17 (S.D. Ohio Aug. 16, 2000); *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 462 (D. Md. 1999); James Alfieri, *Trauma, Recovery, and Transnational Child Abduction: Posttraumatic Stress Disorder as Psychological Harm Under the Hague Convention on the Civil Aspects of International Child Abduction*, 5 OR. REV. INT’L L. 40, 48 (2003).

98. See GARBOLINO, *supra* note 33, at 114; HARALAMBIE, *supra* note 13, § 2:38.

99. See *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000); *McManus v. McManus*, 354 F. Supp. 2d 62, 70 (D. Mass. 2005); *Aldinger v. Segler*, 263 F. Supp. 2d 284, 289 (D.P.R. 2003); GARBOLINO, *supra* note 33, at 114; see also *Estin*, *supra* note 13, at 813 (explaining that many courts have held that domestic violence, especially when directed at children, satisfies Article 13(b)).

100. See *Walsh*, 221 F.3d at 219–21; *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 553–55 (E.D. Pa. 2010); GARBOLINO, *supra* note 33, at 114–15.

101. GARBOLINO, *supra* note 33, at 114.

102. 511 F.3d 594 (6th Cir. 2007).

103. *Id.* at 607.

104. See *id.* at 607–08.

conditions to adequately protect the children.¹⁰⁵ As such, domestic violence is most likely to satisfy Article 13(b) when the abuse is extreme and the court does not believe that any undertakings can properly protect the child.¹⁰⁶ Undertakings are conditions implemented to protect the child until the custody matter is resolved in the child's state of habitual residence.¹⁰⁷

To this end, one particularly unique aspect of how U.S. courts currently interpret Article 13(b) is the use of undertakings.¹⁰⁸ There is a circuit split over the correct course of action a court should take once it determines that a "grave risk of harm" or an "intolerable situation" exists.¹⁰⁹ After the court decides that Article 13(b) is satisfied, the Second, Third, and Seventh Circuits require the court to consider whether ameliorative measures exist that can nevertheless allow the court to order the return of the child.¹¹⁰ On the other hand, the First, Sixth, and Eleventh Circuits hold that a court may consider whether there are alternatives that allow the court to order the return of a child but that the court is not required to examine such alternatives.¹¹¹ Regardless of whether the consideration is required or discretionary, virtually all U.S. courts now consider "the full panoply of arrangements that might allow the children to be returned" to their state of habitual residence after an Article 13(b) defense has been recognized.¹¹² However, the Convention does not require this analysis,¹¹³ and the additional step makes it more burdensome to raise the defense.¹¹⁴

After considering the ameliorative measures, a court may order a child's return with undertakings. A nonexhaustive list of undertakings includes:

105. *See id.* at 608.

106. *See id.*

107. *See HARALAMBIE, supra* note 13, § 2:38. Undertakings can also be defined as "promises offered, or in certain instances imposed upon, an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child." BEAUMONT & MCELEAVY, *supra* note 25, at 158. Undertakings are most frequently used in common-law states. GARBOLINO, *supra* note 33, at 137.

108. *See GARBOLINO, supra* note 33, at 137–47.

109. *See Estin, supra* note 13, at 813.

110. *See In re Adan*, 437 F.3d 381, 395–96 (3d Cir. 2006); *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999); *Luis Ischii v. Gomez Garcia*, 274 F. Supp. 3d 339, 354–55 (D. Md. 2017); GARBOLINO, *supra* note 33, at 143.

111. *See Baran v. Beaty*, 526 F.3d 1340, 1346–52 (11th Cir. 2008); *Simcox*, 511 F.3d at 608; *Danaipour v. McLarey*, 386 F.3d 289, 303 (1st Cir. 2004); GARBOLINO, *supra* note 33, at 143.

112. *Blondin*, 189 F.3d at 242. The court further held that "it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation." *Id.* at 248. Interestingly, a few courts have held that undertakings are appropriate even when an Article 13(b) defense has not been established as a way to ensure that the child is safely returned. *See Kufner v. Kufner*, 519 F.3d 33, 41 (1st Cir. 2008); *Wilchynski v. Wilchynski*, No. 3:10-CV-63-FKB, 2010 WL 1068070, at *8–11 (S.D. Miss. Mar. 18, 2010); *Krefter v. Wills*, 623 F. Supp. 2d 125, 136–38 (D. Mass. 2009).

113. *See Estin, supra* note 13, at 813; *see also Simpson, supra* note 48, at 861 (explaining that "there is no authority for the use of undertakings in the Convention's language").

114. *See Hannah Loo, Comment, In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum*, 17 CHI. J. INT'L L. 609, 620 (2017).

requiring the petitioner to allow reasonable visitation by the other parent after the child's return, ensuring that the petitioner does not seek an order that requires the child to be removed from his or her primary caretaker before the final custody determination, requiring the petitioner to pay the cost of transportation back to the state of habitual residence or provide monetary support for a period of time, and ensuring that the child is returned under the supervision of the nonoffending parent or a third party when there have been reports of child abuse or domestic violence.¹¹⁵ Courts can tailor specific undertakings to each individual case.¹¹⁶ Moreover, a petitioner sometimes offers to provide certain undertakings in connection with the return because he or she believes the court will be more agreeable to the petition.¹¹⁷

Proponents contend that undertakings are justified because courts retain discretion to order the return of an abducted child even if a defense is satisfied, as long as the return furthers the goals of the Convention.¹¹⁸ In this sense, those who support undertakings see them as a compromise that balances the Convention's goals of promptly returning an abducted child, preventing forum shopping in international custody disputes, and protecting the child's best interests.¹¹⁹ Advocates for undertakings believe in the fairness and impartiality of the authorities in the other signatories to the Convention and trust that they will honor the undertakings.¹²⁰

Critics of undertakings are wary of the protective conditions because there is no remedy if the petitioner violates an undertaking after the child is returned to his or her state of habitual residence, as the court that ordered the undertaking no longer has jurisdiction over the case.¹²¹ In other words, the state to which the child is returned dictates whether undertakings are

115. See *Blondin*, 189 F.3d at 248; *Turner v. Frowein*, 752 A.2d 955, 976 (Conn. 2000); *BEAUMONT & MCELEAVY*, *supra* note 25, at 158–59; *GARBOLINO*, *supra* note 33, at 137, 142–43; *HARALAMBIE*, *supra* note 13, § 2:38. One restriction that courts have placed on undertakings is that they cannot be too “unrealistic” or “onerous,” such as undertakings that are beyond the control of the party who has to execute them. *GARBOLINO*, *supra* note 33, at 140–41. An example of such an undertaking is requiring the petitioner to prove that the criminal charges against the respondent in the state of habitual residence have been dismissed and that the respondent is under no threat of prosecution if he or she returns. See *Maurizio R. v. L.C.*, 135 Cal. Rptr. 3d 93, 115 (Ct. App. 2011). Whether the respondent is liable for criminal charges is subject to the discretion of the state of his or her habitual residence and is not within the petitioner's control. See *id.*

116. See *BEAUMONT & MCELEAVY*, *supra* note 25, at 159.

117. See *GARBOLINO*, *supra* note 33, at 137. Voluntary undertakings also “provide some comfort for the abductor and child” and make the return to the state of habitual residence easier. *BEAUMONT & MCELEAVY*, *supra* note 25, at 164.

118. See *Simpson*, *supra* note 48, at 861–62.

119. See *id.*

120. See Jeanine Lewis, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 *TRANSNAT'L LAW* 391, 428 (2000); Piemonte, *supra* note 4, at 203; see also *BEAUMONT & MCELEAVY*, *supra* note 25, at 170 (acknowledging that the enforcement of undertakings depends on “goodwill”).

121. See *Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002); *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000); *HARALAMBIE*, *supra* note 13, § 2:38; Piemonte, *supra* note 4, at 202; *Simpson*, *supra* note 48, at 861.

enforced.¹²² To this end, one scholar argues that, after an Article 13(b) defense has been proven, children should not be returned to their states of habitual residence unless local authorities are aware of this fact and are willing and able to protect the child.¹²³

Courts can mitigate this enforceability problem by structuring undertakings so that they must be performed before the child is returned to his or her state of habitual residence.¹²⁴ For example, if one of the undertakings requires the petitioner to pay for the child's transportation back to his or her state of habitual residence, the court can further stipulate that the respondent receive that payment before the return occurs.¹²⁵

Despite the enforceability issue, undertakings are now an accepted part of an Article 13(b) analysis, and U.S. courts use them to condition a child's return to his or her state of habitual residence on certain protective measures after they have held that the defense has been satisfied.¹²⁶

III. U.S. COURTS SYSTEMATICALLY FAIL TO ANALYZE BOTH PRONGS OF ARTICLE 13(B)

U.S. courts consistently administer an incredibly narrow legal interpretation of Article 13(b), especially in the zone of war context. This interpretation is driven primarily by the courts' failure to analyze both the "grave risk of harm" and "intolerable situation" prongs of the defense. Part III.A further analyzes the typical application of Article 13(b) in the zone of war context. It demonstrates through case law that U.S. courts have traditionally rejected the zone of war argument in Hague cases and evaluate such claims only or primarily under the "grave risk of harm" prong of the defense. Part III.B explores the rejection of the "intolerable situation" prong of Article 13(b) by U.S. courts. Part III.C responds to potential objections to broadening the scope of Article 13(b) and argues that critics misunderstand

122. Lewis, *supra* note 120, at 428; *see also* BEAUMONT & MCELEAVY, *supra* note 25, at 161 (reiterating that there is no guarantee that undertakings will be enforced in the child's state of habitual residence); GARBOLINO, *supra* note 33, at 139 (explaining that undertakings designed to be performed in the child's state of habitual residence are unenforceable because courts have no obligation to honor promises made to foreign courts). This enforceability issue is particularly problematic in cases of domestic violence and child abuse because, if unenforced, the undertaking does nothing to protect against continued violence and abuse. *See* Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005); HARALAMBIE, *supra* note 13, § 2:38; Estin, *supra* note 13, at 813; *see also* Simpson, *supra* note 48, at 861 (explaining that undertakings "open the door for the abuser to continue to manipulate and control the abductor" in domestic violence situations).

123. *See* Estin, *supra* note 13, at 831; *see also* Kufner v. Kufner, 519 F.3d 33, 41 (1st Cir. 2008) (holding that an undertaking is reversible if it is "insufficient to mitigate [the] grave risk of harm" that has been established); BEAUMONT & MCELEAVY, *supra* note 25, at 165 (arguing that if Article 13(b) is satisfied, the court should not decide to return the child unless it can guarantee the enforcement of the undertakings).

124. *See* GARBOLINO, *supra* note 33, at 139–40.

125. *See id.* at 140.

126. *See id.* at 143; *see also* Blondin v. Dubois, 189 F.3d 240, 242 (2d Cir. 1999); BEAUMONT & MCELEAVY, *supra* note 25, at 158; HARALAMBIE, *supra* note 13, § 2:38.

the overarching purposes of the Convention and overstate the potential for Article 13(b) to be misused.

A. Traditional Application of Article 13(b) in the Zone of War Context

U.S. courts agree that one of the two situations in which Article 13(b) may be raised is when returning a child to his or her state of habitual residence will place him or her in a zone of war.¹²⁷ Limiting Article 13(b) in this way makes the defense extremely narrow and “goes well beyond the text and history of the Convention.”¹²⁸ This is especially true because, when assessing a zone of war claim, U.S. courts only or primarily analyze the “grave risk of harm” prong of Article 13(b) and ignore or de-emphasize the “intolerable situation” prong of the defense.¹²⁹ To this end, most courts require that the party raising an Article 13(b) defense provide “specific evidence of potential harm to the child upon his return” to prove that returning the child to his or her state of habitual residence will place him or her in a zone of war.¹³⁰

The following cases provide examples of this traditional application of zone of war by U.S. courts, showing that they analyze such claims only or primarily under the “grave risk of harm” prong of Article 13(b) and require the party raising the defense to identify a specific risk of harm directed at the individual child in question.¹³¹

In *Silverman v. Silverman*,¹³² the Eighth Circuit held that Israel did not constitute a zone of war for purposes of an Article 13(b) defense because there was no “specific evidence of potential harm to the individual children” in question.¹³³ The rationale for this decision hinged on the fact that the “evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel.”¹³⁴ The court further pointed out that no other court had found that Israel, or any other state, is a zone of war for purposes of Article 13(b).¹³⁵ In so holding, the Eighth Circuit overruled the district court, which had held that Israel was a zone of war for purposes of

127. *See supra* note 93 and accompanying text.

128. Estin, *supra* note 13, at 812; *see also* BEAUMONT & MCELEAVY, *supra* note 25, at 142 (acknowledging that this conception of Article 13(b) “appear[s] somewhat extreme, almost ruling out entirely the possibility of the exception being invoked”).

129. *See generally* *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003); *Bernal v. Gonzalez*, 923 F. Supp. 2d 907 (W.D. Tex. 2012); *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369 (D. Mont. Nov. 7, 2012); *Castro v. Martinez*, 872 F. Supp. 2d 546 (W.D. Tex. 2012); *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164 (N.D. Tex. Jan. 19, 2011). *But see* *Avendano v. Smith*, 806 F. Supp. 2d 1149, 1176 (D.N.M. 2011) (“Although Mexico is more dangerous than the United States at this time, intolerable situation was not meant to encompass return to a home where living conditions are less palatable.”).

130. *Baxter v. Baxter*, 423 F.3d 363, 374 (3d Cir. 2005); *see also Silverman*, 338 F.3d at 900; *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 608 (E.D. Va. 2002), *aff’d sub nom.* *Escaf v. Rodriguez*, 52 F. App’x 207 (4th Cir. 2002).

131. *See supra* note 129 (collecting cases).

132. 338 F.3d 886 (8th Cir. 2003).

133. *Id.* at 900.

134. *Id.* at 901.

135. *See id.*

the defense because of the escalating violence and deadly bombings near Ra'anana, the region where the children lived, as well as the U.S. State Department's travel warnings for Israel, the West Bank, and Gaza.¹³⁶

Cartel cases have spurred furious debate within the district courts, though the consensus has been that "evidence of general drug cartel violence" does not satisfy Article 13(b).¹³⁷ For example, in *Castro v. Martinez*,¹³⁸ the court held that Article 13(b) was not satisfied even though Monterrey, the Mexican region where the child lived, was under the influence of multiple competing cartels; the child was fascinated with guns and violence, likely because of his witnessing of violent acts; and some of petitioner's relatives were possibly cartel members.¹³⁹ In so holding, the court "stressed that the risk of harm must truly be grave. The respondent must present clear and convincing evidence of this grave harm [to the individual child] because any more lenient standard would create a situation where the exception would swallow the rule."¹⁴⁰

In *Rodriguez v. Sieler*,¹⁴¹ Sieler raised an Article 13(b) defense because drug cartel activity had increased violence in Nayarit, the Mexican state where the children lived.¹⁴² Sieler alleged that Nayarit was under military control because of cartel activity; that dead bodies hung off of overpasses; that there were random shootings in the area; that his sister-in-law was caught in a grocery store shooting in which eight people died and many others were injured; that this same sister-in-law was later robbed at knifepoint in her house; that the home in which the sister-in-law was robbed was close to the children's grandparents' house where the children spent a lot of time; that his brother-in-law may be in a cartel; and that there was a "drug house" across the street from the family's home.¹⁴³

However, the court held that the defense was not satisfied because Sieler proved only "general regional violence"¹⁴⁴ and did not identify "specific evidence of potential harm to the individual children."¹⁴⁵ The court further held that Sieler's "sincere but speculative concerns for his children's safety . . . do not demonstrate a 'grave risk' of 'immediate' physical or psychological harm."¹⁴⁶

136. See *Silverman v. Silverman*, No. CIV. 00-2274 (JRT), 2002 WL 971808, at *9–10 (D. Minn. May 9, 2002), *rev'd*, 338 F.3d 886 (8th Cir. 2003).

137. Estin, *supra* note 13, at 812–13. See generally *Bernal v. Gonzalez*, 923 F. Supp. 2d 907 (W.D. Tex. 2012); *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369 (D. Mont. Nov. 7, 2012); *Castro v. Martinez*, 872 F. Supp. 2d 546 (W.D. Tex. 2012); *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164 (N.D. Tex. Jan. 19, 2011). See *supra* notes 5–21 and accompanying text for an analysis of Gonzalez's Article 13(b) claim in *Bernal*.

138. 872 F. Supp. 2d 546 (W.D. Tex. 2012).

139. See *id.* at 550–51.

140. *Id.* at 557 (quoting *Norinder v. Fuentes*, 657 F.3d 526, 535 (7th Cir. 2011)).

141. No. CV 12-167-M-DLC, 2012 WL 5430369 (D. Mont. Nov. 7, 2012).

142. See *id.* at *7.

143. *Id.* The petitioner claimed that some of the violence alleged by the respondent occurred a few hours away from the family home. See *id.*

144. *Id.* (quoting *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003)).

145. *Id.* (quoting *Silverman v. Silverman*, 338 F.3d 886, 900 (8th Cir. 2003)).

146. *Id.* at *8 (quoting *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005)).

Finally, in *Vazquez v. Estrada*,¹⁴⁷ the court held that Estrada had not met the Article 13(b) standard because he failed to prove that Monterrey, Mexico, the region where the child lived, was a zone of war, despite evidence of surging violence and murders in the child's neighborhood and previous school.¹⁴⁸ The court held that Estrada had "failed to establish by clear and convincing evidence that a grave risk of physical harm exists."¹⁴⁹

These cases underscore that U.S. courts have traditionally been unwilling to recognize a zone of war argument in the Article 13(b) context.¹⁵⁰ To this end, they consistently hold that "evidence of general drug cartel violence" does not satisfy Article 13(b), even when the evidence shows that a child has witnessed violence, that his or her relatives are likely involved in a cartel, or that there are dead bodies floating or hanging in his or her neighborhood.¹⁵¹

B. The Failure to Disaggregate the Two Prongs of Article 13(b) and Acknowledge That the Defense Has Two Alternative Bases upon Which to Refuse Return

Even though the "grave risk of harm" and "intolerable situation" prongs of Article 13(b) can each serve as an independent basis upon which to refuse to return an abducted child to his or her state of habitual residence, the two prongs are rarely independently addressed.¹⁵² Instead, they are often "employed collectively as a unified formula."¹⁵³ As a result, U.S. courts have traditionally ignored the "intolerable situation" prong when analyzing Article 13(b) claims.¹⁵⁴

Some experts theorize that Article 13(b) has been interpreted in this way because of a U.S. State Department report that conflated the two prongs of the defense by providing child sexual abuse as an example of an "intolerable situation."¹⁵⁵ Sex abuse also poses a "grave risk of harm" to a child, so using that as an example of an "intolerable situation" made it appear that there is no distinction between the two prongs of the defense, even though they are separate and a "grave risk of harm" is not required for an "intolerable situation."¹⁵⁶

147. No. 3:10-CV-2519-BF, 2011 WL 196164 (N.D. Tex. Jan. 19, 2011).

148. *See id.* at *5.

149. *Id.*

150. *See Estin, supra* note 13, at 812.

151. *Id.* at 812–13.

152. *See* BEAUMONT & MCELEAVY, *supra* note 25, at 139.

153. *Id.*

154. *See* Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 345 (2008).

155. *See* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986) (explaining that an example of an "intolerable situation" is when a parent sexually abuses the child and that, if the other parent removes the child to protect him or her from that abuse, the court may deny the petition for return because Article 13(b) is satisfied); *see also* Weiner, *supra* note 154, at 345–46.

156. *See* Weiner, *supra* note 154, at 345–46. To understand why the failure to disaggregate the two prongs of Article 13(b) is not consistent with the plain meaning of the text of the defense, the intent of the framers, and the overarching purposes of the Convention, *see infra* notes 180–95 and accompanying text.

C. Plausible Challenges to Disaggregating the Prongs of Article 13(b) and Creating a Broader Definition of Zone of War

A potential criticism of this Note's argument to disaggregate the two prongs of Article 13(b) is that doing so creates an "unwieldy standard" in contravention of the Convention's goal to promptly return abducted children to their states of habitual residence.¹⁵⁷ In other words, such critics argue that broadening Article 13(b) in this way and requiring U.S. courts to do an in-depth "intolerable situation" analysis makes Hague cases more time-consuming, expensive, and difficult, and prevents the immediate and efficient return of an abducted child.¹⁵⁸

While one of the Convention's goals is to promptly return a wrongfully removed or retained child to his or her state of habitual residence, the Convention also recognizes that the interests of children are extremely important in custody matters.¹⁵⁹ To this end, the Convention's explanatory report clarifies that protecting a child from a "grave risk of harm" or an "intolerable situation" is more important than promptly returning the child.¹⁶⁰ In this way, Article 13(b) recognizes unique situations where the goals of deterring international child abduction and promoting the efficient return of wrongfully removed or retained children are outweighed by the best interests of the child.¹⁶¹

A second potential objection to the expansion of the scope of Article 13(b), and "zone of war" in particular, is that parties will use the broader definition to exploit political conflict or regional instability for their own benefit as a tool to gain custody of their children.¹⁶² One scholar, Andrew Zashin, argues that courts should use the "clean hands" doctrine to prevent parties from acting in this way.¹⁶³ By clean hands doctrine, Zashin means that a party who voluntarily moves to a state where there is known violence, instability, or safety concerns cannot later exploit such fears for personal gain and raise an Article 13(b) defense in a Hague case.¹⁶⁴ To raise Article 13(b) in such a case, the party would have to prove either that the move was not voluntary, or that he or she was ignorant of the dangers associated with the state in question and immediately sought relocation after learning of the safety concerns.¹⁶⁵

157. Piemonte, *supra* note 4, at 211.

158. *See id.* at 212.

159. *See* Convention, *supra* note 1, at 4.

160. *See* Simpson, *supra* note 48, at 858–59; *see also* Piemonte, *supra* note 4, at 210 (explaining that a child's interest in not being removed from his or her state of habitual residence gives way to the child's interest in not being exposed to a "grave risk of harm" or placed in an "intolerable situation").

161. *See* Estin, *supra* note 13, at 809; *see also* Lozano v. Montoya Alvarez, 572 U.S. 1, 15–16 (2014) (holding that the Convention's goals of deterring child abduction and promptly returning abducted children may be overcome by Article 13(b) concerns).

162. *See* Zashin, *supra* note 31, at 126.

163. *See id.* at 138–39.

164. *Id.*

165. *See id.*

Applying this doctrine to the cases cited in this Note's introduction and Part III.A,¹⁶⁶ in *Bernal v. Gonzalez*, Bernal and Gonzalez voluntarily moved to Mexico together with their children.¹⁶⁷ The court, however, acknowledged that this was "a difficult case" and that Gonzalez "had rational reasons for taking his children" from Mexico to the United States.¹⁶⁸ As such, it does not appear that the court thought that Gonzalez was attempting to exploit the instability in Mexico for his personal gain.¹⁶⁹ Similarly, in *Rodriguez v. Sieler*, Rodriguez and Sieler also moved voluntarily to Mexico together.¹⁷⁰ The court again characterized Sieler's concerns for his children's safety as "sincere," indicating that the court did not believe that he raised Article 13(b) for self-serving reasons.¹⁷¹

In *Vazquez v. Estrada*, Vazquez and Estrada, born in Mexico, lived with their children in Dallas, Texas, until Vazquez was deported.¹⁷² Similarly, in *Castro v. Martinez*, while Castro lived in Mexico with their child, Martinez was a resident of San Antonio, Texas, and it does not appear from the facts that he ever lived in Mexico.¹⁷³ As such, the "clean hands" doctrine does not seem to apply to the respondents in those cases, as they did not voluntarily move with their families to Mexico.¹⁷⁴

While the "clean hands" doctrine is a useful tool to ensure that parties do not exploit political instability or regional violence for personal gain, the objective standard established in Part IV.B.2 of this Note would also accomplish the same goal.¹⁷⁵ This standard ties the existence of an "intolerable situation" to specific factors, such as the endangerment of the child when he or she is held at gunpoint, familial participation in a cartel or close proximity to cartel activity, and exposure to multiple dead bodies hanging from overpasses or floating in rivers near the child's home.¹⁷⁶ In other words, a party still has to prove the existence of objective factors that create an "intolerable situation" for a child, thus ensuring that Article 13(b) is not used to exploit political instability, unfairly target impoverished states, or "encompass situations such as return to a home where money is in short supply, or where educational or other opportunities are more limited than in the new country."¹⁷⁷

166. See *supra* notes 5–21, 138–49 and accompanying text.

167. *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 911 (W.D. Tex. 2012).

168. *Id.* at 930.

169. See *id.*

170. *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369, at *1 (D. Mont. Nov. 7, 2012).

171. *Id.* at *8.

172. *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *1 (N.D. Tex. Jan. 19, 2011). After Vazquez was deported, the children lived with Vazquez in Mexico and visited Estrada in the United States during their winter and summer breaks. *Id.*

173. See *Castro v. Martinez*, 872 F. Supp. 2d 546, 550 (W.D. Tex. 2012).

174. See *id.*; see also *Vazquez*, 2011 WL 196164, at *1.

175. See Zashin, *supra* note 31, at 139; see also *supra* Part IV.B.2.

176. See *infra* notes 215–16 and accompanying text.

177. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364–65 (M.D. Fla. 2002).

Thus, expanding the scope of Article 13(b) does not contravene the purposes of the Convention, as the Convention recognizes that “the interests of children are paramount” in custody determinations, and it better serves an abducted child’s interests to ensure that he or she is not exposed to a “grave risk of harm” or an “intolerable situation” than to promptly return him or her to his or her state of habitual residence.¹⁷⁸ Further, the objective standard defined in Part IV.B.2 should prevent parties from exploiting a more expansive Article 13(b) for their personal gain.¹⁷⁹

IV. THE TWO PRONGS OF ARTICLE 13(B) SHOULD BE DISAGGREGATED TO ALLOW ZONE OF WAR TO COVER UNSAFE AND UNSTABLE SITUATIONS

To adequately protect the children involved in Hague cases, U.S. courts must disaggregate the two prongs of Article 13(b) and fully analyze the “intolerable situation” prong of the defense. This allows courts to expand the definition of zone of war to include unsafe and unstable situations, even if a party cannot identify a specific risk of harm directed at an individual child. Part IV.A highlights the textual and theoretical reasons why U.S. courts must disaggregate the two prongs of Article 13(b), and Part IV.B demonstrates through case law why conducting an “intolerable situation” analysis allows courts to expand the definition of zone of war.

A. U.S. Courts Must Disaggregate the Two Prongs of Article 13(b) to Better Serve the Text and Purposes of the Convention

It is critical that U.S. courts universally disaggregate the “grave risk of harm” and “intolerable situation” prongs of Article 13(b). Part IV.A.1 explains that the plain meaning of the text of the article requires that courts conduct both a “grave risk of harm” and an “intolerable situation” analysis. Part IV.A.2 provides evidence that the framers of the Convention intended for the two prongs of Article 13(b) to be distinct and for the “intolerable situation” prong to cover situations that the “grave risk of harm” prong does not. Part IV.A.3 then analyzes how the Convention’s goal of protecting children and consideration their best interests also requires courts to disaggregate the prongs of Article 13(b).

1. Disaggregating “Grave Risk of Harm” and “Intolerable Situation” Is Required by the Text of Article 13(b)

The analysis in a Hague case must start with the text of the Convention.¹⁸⁰ In *Abbott v. Abbott*,¹⁸¹ the Supreme Court identified four sources that courts should use to help them decide a Hague case: (1) the text of the Convention; (2) the objectives of the Convention; (3) the views of the U.S. Department of

178. Convention, *supra* note 1, at 4.; *see also* Estin, *supra* note 13, at 809; Piemonte, *supra* note 4, at 210; Simpson, *supra* note 48, at 858–59.

179. *See infra* notes 215–16 and accompanying text.

180. *See Abbott v. Abbott*, 560 U.S. 1, 9–10 (2010); GARBOLINO, *supra* note 33, at 12.

181. 560 U.S. 1 (2010).

State, especially opinions of the Office of Children's Issues; and (4) the decisions of other signatory states to the Convention.¹⁸² The Court further held that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."¹⁸³ Grounding a Hague case in the text of the Convention ensures that all of the signatories to the Convention are consistent in their interpretation of the treaty.¹⁸⁴

The text of Article 13(b) provides that a court is not obligated to order the return of a child where "there is a grave risk that his or her return would expose the child to physical or psychological harm *or otherwise* place the child in an intolerable situation."¹⁸⁵ The plain language of the text demonstrates that Article 13(b) requires courts to consider whether returning the child would expose him or her to a "grave risk of harm" *or* place him or her in an "intolerable situation."¹⁸⁶

As such, the failure to disaggregate the two prongs of Article 13(b) causes courts to misinterpret the plain meaning of the text of the defense and "unnecessarily limit[s]" its scope;¹⁸⁷ a situation may create an "intolerable situation" for a child but not expose him or her to a "grave risk of harm."¹⁸⁸

2. The Framers of the Convention Intended the Two Prongs of Article 13(b) to Be Separate and Distinct

When drafting the Convention, the framers intended the two prongs of Article 13(b) to be independent and distinct, with the two prongs covering different scenarios.¹⁸⁹ As the U.K. delegate to the Hague Conference explicitly recognized, the "intolerable situation" prong of the defense was meant to protect children in cases where their return would not necessarily expose them to a "grave risk of harm" but would nonetheless place them in an unsafe or unbearable environment.¹⁹⁰ To this end, one scholar, Merle Weiner, explicitly theorizes that returning a child to a zone of war is an example of a circumstance where the child's return may place him or her in an "intolerable situation" but not necessarily expose him or her to a "grave risk of harm."¹⁹¹

182. *See id.* at 9–10.

183. *Id.* at 10 (quoting *Medellin v. Texas*, 552 U.S. 491, 506 (2008)).

184. *See* GARBOLINO, *supra* note 33, at 15; *see also* Courtney E. Hoben, Comment, *The Hague Convention on International Parental Kidnapping: Closing the Article 13(b) Loophole*, 5 J. INT'L LEGAL STUD. 271, 276–77 (1999) ("If courts within and between Contracting States are interpreting the language of the [Convention] differently, [it] cannot be an effective tool for combating the problem of international parental kidnapping.").

185. Convention, *supra* note 1, at 8 (emphasis added).

186. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002); *see also* HARALAMBIE, *supra* note 13, § 2:38 (noting that the "intolerable situation" prong of Article 13(b) is independent from the "grave risk of harm" prong of the defense).

187. Weiner, *supra* note 154, at 348; *see also* *Pliego v. Hayes*, 843 F.3d 226, 232–33 (6th Cir. 2016) (explaining that the ordinary meaning of Article 13(b) "suggests that an 'intolerable situation' must be different from 'physical or psychological harm,' but nevertheless serious").

188. *See* Weiner, *supra* note 154, at 348–49.

189. *See* BEAUMONT & MCELEAVY, *supra* note 25, at 151.

190. *See id.* at 136, 151.

191. *See* Weiner, *supra* note 154, at 349.

3. Disaggregating the Two Prongs of Article 13(b) Better Serves the Overarching Purposes of the Convention

While the Supreme Court in *Abbott* held that any analysis in a Hague case should start with the text of the Convention, the Court also emphasized that U.S. courts should consider the objectives of the Convention when deciding a Hague case.¹⁹² To this end, as explained in Part III.C, the Convention recognizes that the interests of children are “of paramount importance” in custody determinations.¹⁹³ In other words, protecting the best interests of children is an overarching goal of the Convention, and it is therefore more important that a child not be exposed to a “grave risk of harm” or placed in an “intolerable situation” than it is that a child be promptly returned.¹⁹⁴ As such, the extremely narrow interpretation of Article 13(b), and zone of war in particular, that is currently employed by U.S. courts misunderstands the true purposes of the Convention; it is not in a child’s best interest to return to an environment that is objectively “intolerable” simply because the party raising an Article 13(b) defense is unable to identify a specific threat of harm directed at the individual child.¹⁹⁵

B. A Broader Definition of Zone of War

Disaggregating the two prongs of Article 13(b) allows for a broader definition of zone of war. Part IV.B.1 evaluates how the courts that have conducted an in-depth analysis of “intolerable situation” define and apply the prong. Part IV.B.2 applies the principles evident from this limited case law to the cartel cases discussed in Part III.A. This section argues that analyzing the “intolerable situation” prong of Article 13(b) broadens the definition of zone of war to include volatile and unstable situations and identifies specific and objective factors that indicate the existence of such an environment.

1. The Limited “Intolerable Situation” Case Law Allows Courts to Consider the Environment to Which a Child Will Be Returned

The word “intolerable” is commonly defined as unbearable, unendurable, and excessive.¹⁹⁶ In the context of the Convention, “intolerable” was meant

192. *Abbott v. Abbott*, 560 U.S. 1, 9–10 (2010); *see also* GARBOLINO, *supra* note 33, at 14 (“When a court wrestles with interpreting a particular provision of the Convention, deference should be given to the purposes of the Convention.”).

193. Convention, *supra* note 1, at 4.; *see also* Simpson, *supra* note 48, at 859 (“[A]lthough the objects of the [Convention] are to secure the return of a child who was wrongfully removed, and to respect the custody laws of the child’s home country, the interest of the child is overriding.” (footnote omitted)).

194. *See supra* notes 157–61 and accompanying text.

195. *See infra* notes 211–16 and accompanying text; *see also* Simpson, *supra* note 48, at 849.

196. *Intolerable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intolerable> [<https://perma.cc/P9SR-3ETU>] (last visited Apr. 12, 2020); *see also* Weiner, *supra* note 154, at 352 (discussing definitions of “intolerable”).

to “evoke an objective sense that return was unwarranted” for physical, psychological, or moral reasons.¹⁹⁷

With those definitions in mind, when U.S. courts do conduct an in-depth analysis of Article 13(b)’s “intolerable situation” prong, they hold that such analysis “must encompass some evaluation of the people and circumstances awaiting that child in the [state] of his [or her] habitual residence.”¹⁹⁸ In other words, analyzing the “intolerable situation” prong of the defense allows courts to “consider the environment in which the child will reside upon returning” to his or her state of habitual residence.¹⁹⁹ As such, courts conduct a more well-rounded analysis when they consider the “intolerable situation” prong of Article 13(b), as they are not limited to simply looking for a specific threat of harm directed at the individual child.²⁰⁰

These principles were evident in *Wilchynski v. Wilchynski*²⁰¹ and *Krefter v. Wills*,²⁰² two recent cases where the courts performed “intolerable situation” analyses. In these cases, the courts considered whether “desperate financial conditions” constituted an “intolerable situation.”²⁰³ While both courts acknowledged that poverty alone does not usually establish an “intolerable situation,” they held that the severity of the economic difficulties to which the children would be returning allowed them to impose undertakings on the children’s returns so that no potential harms could manifest.²⁰⁴ Specifically, the courts ordered the parties petitioning for the children’s return to pay several months of child support and the cost of the airfare to fly back to the state of habitual residence in advance of the children’s return.²⁰⁵ This undertaking allowed the opposing parties to live in the state of habitual residence while the custody dispute was resolved.²⁰⁶

These examples show how an “intolerable situation” analysis works in practice, with courts evaluating the nature of the environment to which the child will be returned and implementing undertakings to make that environment more tolerable for the child, thus promoting the child’s best interests.²⁰⁷ All U.S. courts should conduct similar “intolerable situation” analyses, especially in the zone of war context, to better protect the children involved in Hague cases.²⁰⁸

197. Weiner, *supra* note 154, at 352.

198. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002); *see also Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (holding that an “intolerable situation” analysis requires an in-depth evaluation of the state of habitual residence’s political stability and ability to hear the custody dispute).

199. *Mendez Lynch*, 220 F. Supp. 2d at 1364.

200. *See id.*; *see also Nunez-Escudero*, 58 F.3d at 377; *Silverman v. Silverman*, No. CIV. 00-2274 (JRT), 2002 WL 971808, at *8 (D. Minn. May 9, 2002), *rev’d*, 338 F.3d 886 (8th Cir. 2003).

201. No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. Mar. 18, 2010).

202. 623 F. Supp. 2d 125 (D. Mass. 2009).

203. GARBOLINO, *supra* note 33, at 113.

204. *See Wilchynski*, 2010 WL 1068070, at *8–11; *Krefter*, 623 F. Supp. 2d at 136–38.

205. *See Wilchynski*, 2010 WL 1068070, at *10–11; *Krefter*, 623 F. Supp. 2d at 136–38.

206. *See supra* note 205.

207. *See supra* note 205.

208. *See supra* note 205.

2. The Application of the Principles Identified from the Limited “Intolerable Situation” Case Law to the Zone of War Context

It is possible to evaluate how the courts in the cases discussed in the introduction and Part III.A would have analyzed the zone of war claims differently if both prongs of Article 13(b) had been fully considered, which would have better served the plain meaning of the text of the defense, the intent of the framers of the Convention, and the purposes of the Convention. As explained above, disaggregating the two prongs of Article 13(b) allows the court to consider the nature of the environment to which the child would be returned.²⁰⁹ Thus, evaluating both prongs of Article 13(b) allows courts to expand the definition of zone of war to include volatile and unsafe situations that are objectively “physically, mentally, or morally ‘intolerable.’”²¹⁰

To this end, in *Bernal v. Gonzalez*, Gonzalez testified that the cartel activity was ratcheting up in his children’s neighborhood and that he saw dead bodies floating in a river near the family home.²¹¹ Gonzalez’s son further testified he was stopped at gunpoint by “thugs.”²¹² Similarly, in *Rodriguez v. Sieler*, Sieler testified that, among other things, the region the children lived in was under military control because of drug cartel activity, dead bodies hung off of overpasses in the children’s neighborhood, his brother-in-law may be involved with the cartel, and the house across the street from where the children lived was a “drug house.”²¹³ In addition, in *Castro v. Martinez*, Martinez also testified that one or more of Castro’s relatives may have been sympathetic to or active participants in the cartel.²¹⁴

When there is objective evidence that returning children would expose them to multiple dead bodies in their neighborhoods, force them to be around cartel activity, or place them in the same environments where they were previously held at gunpoint, the “intolerable situation” prong of Article 13(b) is satisfied.²¹⁵ Even if there is no specific threat of harm directed at the individual children in these cases, the unsafe and volatile environments in which they would be forced to live upon their returns constitute intolerable situations.²¹⁶

209. See *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002); *Silverman v. Silverman*, No. CIV. 00-2274 (JRT), 2002 WL 971808, at *8 (D. Minn. May 9, 2002), *rev’d*, 338 F.3d 886 (8th Cir. 2003).

210. Weiner, *supra* note 154, at 352.

211. *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 920–21 (W.D. Tex. 2012).

212. *Id.* at 921.

213. *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369, at *7 (D. Mont. Nov. 7, 2012).

214. *Castro v. Martinez*, 872 F. Supp. 2d 546, 550–51 (W.D. Tex. 2012). Martinez provided “a photograph of [Castro’s] relatives allegedly flashing a gang sign.” *Id.* at 551 n.8.

215. See *id.*; see also *Bernal*, 923 F. Supp. 2d at 920–21; *Sieler*, 2012 WL 5430369, at *7.

216. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364–65 (M.D. Fla. 2002).

Even if a court ultimately decides to return the child in cases similar to the ones described above, the court can use the existence of an “intolerable situation” to condition the child’s return on undertakings.²¹⁷ For example, the court could allow the child’s return on the condition that the child neither interact with nor be placed in the care of any relatives in a cartel; that the petitioner increase security measures in his or her home if the family home is located near a drug house or cartel activity; or that the child is placed in therapy so that he or she can talk through his or her exposure to violence and death.²¹⁸ These undertakings are specifically designed to protect children in circumstances that would otherwise constitute an “intolerable situation.”²¹⁹

In contrast to the cases discussed above, in *Vazquez v. Estrada*, Estrada provided evidence that the neighborhood where the child lived was violent, but he did not identify a specific situation where the child had been endangered, provide evidence that a family member of the child is in a cartel and that the child would therefore be exposed to cartel activity if returned, or testify to the prevalence of dead bodies in the child’s neighborhood.²²⁰ As such, Estrada did not prove that an “intolerable situation” existed;²²¹ the identification of the objective factors described above are necessary to ensure that courts do not hold that Article 13(b) is satisfied simply because of unfavorable living conditions or general regional violence.²²²

Even though Article 13(b) should not be available in cases that do not present any of the objective factors listed above, a few courts allow for the use of undertakings even in cases where the defense is not met.²²³ Thus, a court may require that a child returning to a violent region be placed in therapy or that the petitioner add security measures to the child’s home, even if the respondent did not describe any of the objective factors identified above.²²⁴

CONCLUSION

U.S. courts must analyze Article 13(b) claims under both prongs of the defense to properly interpret the plain meaning of the text of the article, honor the intention of the framers of the Convention, and better serve the purposes of the Convention.²²⁵ Conducting an “intolerable situation” analysis of zone

217. See GARBOLINO, *supra* note 33, at 137–38; HARALAMBIE, *supra* note 13, § 2:38.

218. See GARBOLINO, *supra* note 33, at 137, 142–43; HARALAMBIE, *supra* note 13, § 2:38.

219. See BEAUMONT & MCELEAVY, *supra* note 25, at 163. Of course, the issues with the enforcement of undertakings discussed in Part II.B are still applicable. See *supra* notes 121–25 and accompanying text.

220. See *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *5 (N.D. Tex. Jan. 19, 2011).

221. See *id.*

222. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364–65 (M.D. Fla. 2002); GARBOLINO, *supra* note 33, at 111.

223. See *Kufner v. Kufner*, 519 F.3d 33, 41 (1st Cir. 2008); *Wilchynski v. Wilchynski*, No. 3:10-CV-63-FKB, 2010 WL 1068070, at *8–11 (S.D. Miss. Mar. 18, 2010); *Krefter v. Wills*, 623 F. Supp. 2d 125, 136–38 (D. Mass. 2009); GARBOLINO, *supra* note 33, at 137–38.

224. See GARBOLINO, *supra* note 33, at 137, 142–43; HARALAMBIE, *supra* note 13, § 2:38.

225. See *supra* notes 180–95 and accompanying text.

of war claims, and thus evaluating the environment to which the child will be returned, allows courts to expand the definition of zone of war to include unsafe and unstable situations, regardless of whether the party raising the defense identifies a specific risk of harm directed at the individual child.²²⁶ Children are a particularly vulnerable population, and U.S. courts must fully analyze both the “grave risk of harm” and “intolerable situation” prongs of Article 13(b) to ensure that they are adequately protected in Hague cases and are not returned to an unbearable environment.²²⁷ In other words, U.S. courts must fully evaluate both prongs of Article 13(b), as being exposed to an “intolerable situation” can cripple the health, development, and well-being of children, the group whose interests the Convention recognizes as being “of paramount importance.”²²⁸

226. *See supra* notes 196–224 and accompanying text.

227. *See supra* notes 192–95 and accompanying text.

228. Convention, *supra* note 1, at 4.