
I. Introduction

Since the middle 1970s, with the increase of international travel and transnational marriages facilitated by transportation and communication technologies, child abduction by parent has become a serious problem that plagues many countries around the world and the international community. As an international collaborative response, the Hague Convention on the Civil Aspects of International Child Abduction was adopted by the Hague Conference on Private International Law on October 24, 1980. As of December 2003, 64 countries have signed the Hague Convention, which has become a major tool to combat international child abduction. The United States signed the Hague Convention in 1988 and the U.S. Congress subsequently passed implementing legislation — the International Child Abduction Remedies Act.

The main objectives of the Hague Convention are to secure the prompt return of abducted children and to ensure that rights of custody are effectively respected in all the contracting states[1]. To achieve these objectives, the Convention requires that, once a petition is filled by a parent with a right to custody for the return of the abducted child, the judicial and administrative authorities in the country to which the child was abducted shall expeditiously return the child to his or her habitual residence prior to the abduction. The Hague Convention forbids the courts in the abducted-to state to adjudicate the merits of any custody right dispute in order to prevent parents from forum shopping by abducting the child to a more sympathetic forum.

However, “convinced that the interests of children are of paramount importance in matters relating to their custody,”[2] and acknowledging that “cases do occur where the return of a child, even after an ‘improper removal or retention … would be so repugnant to general public opinion as to bring the law into disrepute,’[3] the contracting states crafted several exceptions to the prompt return mechanism that give the courts in the abducted-to country the discretion to refuse to return the abducted child.[4] For example, under Article 20, the return of the child may be
refused “if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”[5] In addition, Article 13 provides that the court and the administrative authority of the requested state “is not bound to order the return of the child if … the person, institution or other body having the care of the person of the child was not actually exercising the custody right at the time of the removal or retention, or had consented or subsequently acquiesced in the removal or retention, or the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”[6] Article 13(b) embodies the subject of this paper — the “grave risk of harm” exception, which states that the judicial or administrative authority of the refuge state “is not bound to order the return of the child 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.”[7]

The international child abduction disputes in the past ten years have seen an increase of the use of Article 13(b) exception as a defense to object the return of an abducted child. Traditionally, abducting parents frequently invoke the exception to avoid the return of the abducted children on the grounds of sexual abuse, domestic violence or regional conflict. However, the terrorist threats after September 11, 2001, the outbreaks of infectious diseases such as Severe Acute Respiratory Syndrome (SARS) and Bird Flu, and the escalated regional conflicts in the Middle East and Iraq pose new challenges to the safety and health of human beings including abducted children. These new challenges may well lead to more cases in which parties invoke the “grave risk of harm” exception in international child abduction disputes.

Courts in different jurisdictions have had difficulty interpreting Article 13(b). On its face, the “grave risk of harm” exception appears to be in contradiction with the main objectives of the Convention. As one of the exceptions to the prompt return mechanism, Article 13(b) protects the best interests of the abducted child by giving priority to protection of the abducted child’s safety and health over its repatriation to its place of habitual residence. On the other hand, the Hague Convention protects the best interests of the abducted child by promptly returning it to its place
of habitual residence and thus deterring international child abduction. In addition, neither the text of the Hague Convention, nor its drafting history defines “grave risk of harm” or “intolerable situation”. Although the courts in different jurisdictions have attempted to strike a delicate balance between prompt return mechanism and the “grave risk of harm” exception, some courts have interpreted Article 13(b) improperly because of its ambiguity and its facial contradiction with the Hague Convention’s main objectives.

International treaty interpretation is governed by principles as compiled by the Vienna Convention on the Law of Treaties. Pursuant to the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in light of its object and purpose. Treaty terms are viewed in their context in light of the treaty’s object and purpose. Context should include subsequent practice that establishes the agreement of the parties.\[8\]

Based on these recognized principles of international treaty interpretation, this paper seeks to determine the meaning “grave risk of harm” exception by putting it in the context of the Hague Convention and by considering the purpose of the Convention. Additionally, this paper criticizes the current interpretation taken by most contracting states in their application of Article 13(b) as it fails to serve the Convention’s purpose of protecting children’s interests. Finally, this paper proposes a modified approach of interpretation that will better serve the Convention’s purpose.

II. Overview of the Hague Convention

A major goal of the Hague Convention is to deter international child abduction by depriving the abducting parent any potential benefits they may otherwise obtain from international forum shopping, where they remove the child across national borders to see a more favorable result in their custodial disputes in a foreign jurisdiction. The Hague Convention accomplishes this goal by requiring signatory states to promptly return the abducted child to its place of habitual residence and therefore restore the pre-abduction status quo.

Under the Hague Convention, “the removal or the retention of a child is wrongful where
(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”[9] “The rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effects under the law of the state [where the child was habitually resident before the removal or retention].”[10]

The contracting states to the Hague Convention must designate a Central Authority to discharge its obligation under the Convention.[11] The State Department is the Central Authority designated by the U.S. government. Any person claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child and furnish necessary information and documentation.[12] The Central Authority of the state where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.[13] If the Central Authorities cannot achieve a voluntary return, the party requesting the return may institute a judicial proceeding in a court in the state where the child is. The court must first determine the state of the child’s habitual residence. Then the court must determine whether the requesting party possesses the right of custody under the law of the state of the child’s habitual residence. Finally, the court must determine whether the custody right was actually exercised at the time of the removal or retention.[14]

After the three-step analysis, the court will conclude whether the child is wrongfully removed or retained in breach of custody right. If the evidence produced by the requesting party supports a positive finding, the court shall order the child to be returned to the state where he or she habitually resided before the abduction. However, the court may refuse to order the child’s
return, if the abducting parent can successfully assert as an affirmative defense that one of the exceptions applies to the dispute.

III. The Application of Article 13(b) Exception

In the past two decades, the Article 13(b) exception has been frequently litigated in international child abduction disputes, especially in cases where the children would be returned to an area in danger of terrorist attacks and regional conflicts. In these cases, courts in various jurisdictions have consistently held that Article 13(b) should be narrowly interpreted and the abducted child should still be returned despite the danger of terrorist attacks or regional conflicts in the child’s place of habitual residence.

The courts based their narrow interpretation approach on the purpose, the text and the drafting history of the Hague Convention. The courts stated that a careful consideration of the purpose and context of the Hague Convention commands a conclusion that Article 13(b) should be narrowly construed. To ensure the prompt return of wrongfully removed children and respect for custody rights, the Convention establishes a strong presumption favoring return of a wrongfully removed child because it generally favors repatriation as a means of restoring the pre-abduction status quo and deterring parents from crossing international boundaries in search of a more sympathetic forum. A systematic invocation of [these] exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its aspiration.

Consequently, courts in contracting countries have consistently ruled that they are not to engage in a custody determination such as who is the better parent in the long run or speculate where the child would be happiest, and the Article 13(b) exception should be narrowly construed so that it would not be used as a vehicle to litigate the child’s best interests.

According to these courts, the language of Article 13(b) also shows that a narrow construction of the exception is necessary. By stating that the court is “not bound to order the return of the child” even if a grave risk exists, Article 13(b) in effect gives the court the
discretion to decide whether to order the return. In practice, courts have interpreted this language to mean that courts can order the return of the abducted child to further the objective of the Convention even if the existence of a grave risk of harm has been established.\[^{20}\]

Several cases decided in different jurisdictions in the past two decades well illustrate this narrow interpretation approach.

In its often-cited decision in *Friedrich v. Friedrich*, the U.S. Court of Appeals for the Sixth Circuit for the first time explained the meaning of the “grave risk of harm” exception. The court stated that a grave risk of harm can exist only in two situations. First, there is a grave risk of harm when the return of child would put the child in imminent danger prior to the resolution of the custody dispute, for example, by returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases where the petitioning parent has conducted serious child abuse or neglect, or the child has developed extraordinary emotional dependence on the abducting parent, and the court in the country of the habitual residence may be incapable or unwilling to give the child adequate protection.\[^{21}\]

Although the dispute in *Friedrich* involved psychological harm, its discussion on Article 13(b) has been frequently cited by other courts in dealing with the Article 13(b) exception. Since *Friedrich*, courts in different jurisdictions have for several times considered whether terrorist attacks, regional conflicts or civil unrests constitute a grave risk of harm within the meaning of Article 13(b). Courts have not yet had the chance to address the grave risk of harm issue in the context of infectious diseases. However, a study of these decisions will shed light on how the Article 13(b) exception should be applied in other contexts.

In *Freier v Freier*, the U.S. District Court for the Eastern District of Michigan considered the application of “grave risk of harm” exception in a terrorist threat/regional conflict situation. In *Freier*, the father filed a petition for the return of child after the mother abducted the child from Israel to Michigan. After the court found the removal was wrongful, the mother argued that returning the child to Israel would expose him to a grave risk of harm, as Israel is a zone of war as contemplated by the Friedrich court.\[^{22}\] The mother claimed that the skirmishes erupted
in Israel resulting from the opening of a tunnel under the old city of Jerusalem in close proximity to the holiest Mosque in Israel, and the escalated fighting and violence made Israel a zone of war. To support her claim, the mother’s sister who lived in Israel testified that she and her husband were contemplating on moving back to the U.S. and that at least one of her children felt the tension in Israel. To support her claim, the mother cited a newspaper report that dubbed the current conflicts as “the worst clashes since 1987-1993 uprising.”[23] However, testifying on behalf of the father, the Assistant Attorney General of Israel stated that, although military presence was increased, things were regular: schools and shops were open as usual.[24]

After recognizing that Israel was experiencing some unrest and that the unrest may be in relative proximity to the family’s residence at the time of the trial, the Frier court found that there was insufficient evidence to conclude that Israel was a “zone of war” as contemplated by the Friedrich court because no schools were closed, businesses were open, people were able to leave the country and the fighting was limited to certain areas and did not directly involve the town where the child resided.[25]

In Cornfeld v. Cornfeld, the Ontario Superior Court of Justice addressed the “grave risk of harm” exception in a factual pattern similar to the Frier case. In Cornfeld, the abducting mother alleged that the return of her daughters to their habitual residence in Israel would submit them to terrorist attacks. In reaching its decision to order the return, the court noted that the mother and the father had lived in Israel since 1976 and the children have lived there all of their lives. Turmoil and violence had been present during the entire period and the parents never sought to remove their children from that environment. Therefore, the court concluded that the mother failed to establish by clear and convincing evidence that the violence in Israel constituted a grave risk of harm under Article 13(b).[26]

The U.S. Court of Appeals for the Eighth Circuit in its recent decision in Silverman v. Silverman denied the mother’s claim that the current situation in Israel constitutes a zone of war that warrants an order not to return the child to the country. Reversing the trial court’s judgment, the Eighth Circuit court opined that in order to apply the Article 13(b) exception, the party would
need to produce specific evidence of potential harm to the individual child. The court wrote that the trial court failed to cite any evidence that these children were in any more specific danger living in Israel than they were when their mother voluntarily moved them to Israel. The evidence provided by the mother and cited by the trial court centered on general regional violence, such as suicide bombings, that threatened everyone in Israel. The court concluded, the evidence was not sufficient to establish a zone of war which puts the children in grave risk of harm under the Hague Convention.

In *Altheim v. Altheim*, an Argentine court addressed the application of Article 13(b) in a terrorist attack/regional conflict context. In this case, the father abducted the children from Israel to Argentina and invoked the “grave risk of harm” exception when the mother filed a petition with the Argentine court. Rejecting the father’s argument, the court remarked on the application of the exception in a world under the increasing threat of terrorist attacks. “Unfortunately,” the court wrote, “acts of terrorism due to political, racial and religious intolerance occur all over the world,” and the terrorist attacks that took place in New York City and Washington on September 11th put the entire world “in a state of alert, especially countries in the Middle East, and those in which a traditional conflict has existed with the Arab world, such as Israel.” The court found that the couple moved to live in Israel two years after the assassination of Yitzjak Rabin in 1995, when violence substantially escalated. This fact showed that, if the husband had believed at that time that their move to Israel would put their lives at serious risk, he would not have made the trip. The court further noted that Israel has been under war-like conditions with its Palestinian neighbors for many years, with alternating periods of relative peace mixed with escalating confrontations. Despite this fact, the residents in Israel, who have always lived in this manner, continued to carry out their daily activities. Moreover, there had been escalating and repeated terrorist acts in Argentina, and “terrorism knows no borders.” Therefore, there was no doubt that the child should be returned to Israel. Nonetheless, recognizing that in reality there was a possibility that, within a short period of time, the events in Israel could worsen and become a serious threat to the safety of the
child, the Argentine court suspended its order to return the child for two months, with the understanding that the child must travel immediately to Israel if the situation continued to stabilize.  

Other courts recently have considered the use of Article 13(b) exception in domestic violence situations.

In *Hazbun Escaf v. Rodriguez*, the abducting American father refused to return his child to Colombia, alleging that such return would put his child in a grave risk of physical harm. The father offered various evidence that his child would be in danger in Colombia including a travel warning issued by the U.S. State Department advising U.S. citizens not to travel to Colombia. The warning stated that U.S. citizens had been victims of threats, kidnappings, domestic airline hijacking, and murders, and it predicted that threats targeting U.S. citizens would continue and possibly increase in response to the U.S. support for Colombian anti-drug campaign. In addition, a U.S. businessman who had lived in Colombia for about 35 years testified that he had received kidnapping threats and that some U.S. employees of his company had been kidnapped. As a result, he had limited his visit to the country only for business reasons and he had bodyguards to protect him on every trip. The father also produced evidence that he, an American lawyer, had been threatened with kidnapping, and that he feared that his enemies would try to get to him by harming his child.

The U.S. District Court for the Eastern District of Virginia was unpersuaded. The court pointed out that there had been no treat directed to the child, and that the child had lived without incident in Colombia for one and a half years after the father received kidnapping threat. Moreover, there was no evidence showing that the child’s many relatives in Colombia had been threatened or harmed. The court concluded that the father’s evidence at best proved that Colombia might be a dangerous place for some American businessman; however, there was no evidence specifically establishing a risk of kidnapping or violence to the child.
In *Mendez Lynch v. Mendez Lynch*, the abducting mother attempted to invoke the Article 13(b) exception when the father filed a petition to seek the return of the child to Argentina in the U.S. District Court in the Middle District of Florida. The mother alleged that the worsening political and economic situations as well as violent activities in Argentina posed a serious threat of harm to the child. To prove her case, she offered expert testimony by a professor of international studies. The professor testified that “there was currently a crisis in Argentina of uncommon proportions, even for a Latin American country.” He reported that “the government and economic system lacked legitimacy; there had been five presidents in several months, violent demonstrations in the streets, and a profound lack of confidence in the economic system, low financial reserves and high debt; frozen bank accounts which prevented people from accessing their money.” He also reported that “there had been instability and school strikes; anti-American sentiment and a resulting potential danger to Americans.” The expert witness stated that, although Argentina was not a zone of war, it was in a volatile situation that could turn violent at any moment, especially in the light of its history of brutal military takeovers. On the other hand, a witness for the father testified that, despite current economic and governmental problems, there were no demonstrations in the streets near the child’s hometown. In that area, no school was closed due to strike, people were able to get money from the bank, and no anti-American sentiment was present. The witnesses specifically testified that the family dog was still there and the schools were still open. Based on the above evidence, the court found that the mother failed to show by clear and convincing evidence that there is a grave risk of harm upon the return of the child in dispute.

**IV. Analysis**

As the foregoing decisions demonstrate, when the return of the abducted child is opposed because of terrorist attacks or regional conflicts, the narrow interpretation of Article 13(b) has two distinct yet intertwined aspects. First, based on current case law, only a limited number of circumstances can trigger the application of Article 13(b). As indicated by the Friedrich court, only two situations can trigger the Article 13(b) exception: where the return of the child would
place the child in imminent danger prior to the resolution of the custody dispute, or where there is serious abuse or neglect, or extraordinary emotional dependence and no adequate protection can be given in the child’s place of habitual residence. Courts in different jurisdictions have followed the Friedrich court’s interpretation and categorization of the scope of “grave risk of harm” exception. Under this approach, in order to trigger the Article 13(b) exception, the harm must be a great deal more than minimal\(^{46}\) and it must be more than an ordinary harm.\(^{47}\) The harm must be something greater than what would normally be expected on taking a child away from one parent and passing him to another.\(^{48}\) In addition, the risk of the harm must be grave.\(^{49}\) “Not any harm will do nor may the level of risk be low.”\(^{50}\) The Friedrich court specifically listed “a zone of war, famine or disease” as conditions that would constitute a grave risk of harm.\(^{51}\) In addition, courts have held that potential sexual abuse by a parent can constitute a grave risk of harm under Article 13(b). In contrast, courts have consistently refused to recognize as a grave risk mere harm adjustment problems associated with the relocation of abducted child\(^{52}\), or lack of economic or educational opportunities in the country of habitual residence.\(^{53}\)

The second aspect of the narrow interpretation approach is the high standard of burden of proof in the application of Article 13(b). The Hague Convention puts the burden of proof on the parties who invoke the Article 13(b) exception to oppose the child’s return. In the U.S. and many other jurisdictions, the courts have held that the party opposing the return must establish by clear and convincing evidence that a grave risk of harm exists in the child’s place of habitual residence.

As illustrated by the preceding decisions, the mere allegation of the presence of war, terrorist attack or regional violence in an area does not automatically qualify that area as a zone of war or disease. Neither does evidence establishing a general risk of danger posed by terrorism or domestic violence that threatens the general population in the region constitute clear and convincing evidence.\(^{54}\) Evidence of suicide bombings and other terrorist attacks in Israel fails this standard. So does State Department warnings against travel to Colombia.
Instead, courts have constantly declared that, to meet the burden of proof under Article 13(b), the party opposing return must provide evidence that specifically establishes the potential serious harm to the particular child in dispute.\textsuperscript{[55]} When there is general evidence showing a serious danger to a general population, courts additionally consider three factors to determine whether there is specific evidence that establishes a potential harm to the particular child.\textsuperscript{[56]}

The first factor is whether life in the abducted child’s place of habitual residence has been significantly disrupted by terrorist attacks or violent activities. In evaluating this factor, courts focus on the particular geographic area that the child would be returned, rather than the region in which terrorist attacks and violence may be pervasive. For instance, in Frier, the court reasoned that the terrorist activities in Jerusalem did not constitute a grave risk because the area where the child would live was some distance away from Jerusalem and was not significantly affected by terrorist attacks. Specific evidence of life in the place of habitual residence often includes the following: whether the local business is operating; whether the local schools are open; whether there is violence on the streets of the area; whether people live their daily life normally; and whether people are free to leave that region.

The second factor courts take into account is whether the parents voluntarily exposed the child to the alleged harm in the place of habitual residence prior to the abduction. Judicial reasoning regarding this factor seems to be two-folded. First, if the child was previously exposed to the alleged harm yet no harm has actually occurred to the child, it is unlikely that the child would be exposed to any grave risk of harm upon returning. In Hazbun Escaf, although the abducting father presented evidence that his enemies had threatened to kidnap him and he feared they would attempt to get to him by hurting his child after the child’s return to Colombia, the court ordered the return after finding that the child had previously lived in Colombia without any harm for one and a half years since the father received the kidnapping threat. Secondly, the Hague Convention is to ensure the prompt return of the abducted to restore the pre-abduction status quo. Given the fact that the parents voluntarily exposed the child to the alleged harm prior to the abduction, courts appear to believe that the returning the child would just restore the status quo,
rather than put the child in any additional harm. Besides, if the risk of harm is so grave, the parents could not put their child in such a situation in the first place. In Altheim, where the parents moved to Israel after the regional violence intensified and had lived there for years, the court stated that the abducting mother would not have moved to Israel if she believed that there was a serious harm to her child.

The third factor courts take into account in evaluating whether the evidence supports a finding of a specific risk of harm to individual children is whether ameliorative measures and/or undertakings can be taken to mitigate the risk of harm. An undertaking is a formal promise or agreement made usually by the requesting parent for the purpose of guaranteeing some aspects of the welfare or safety of the returning child. The undertakings approach allows the court to conduct an evaluation of the placement options and the legal safeguards in the country of habitual residence to preserve the child’s safety while the courts of that country have the opportunity to determine custody of the children within the physical boundary of their jurisdiction.

Many jurisdictions in the world have accepted the narrow interpretation approach, especially the requirement of specific evidence demonstrating a potential danger to the particular abducted child. As a result, the success rate of Article 13(b) litigation is extremely low, which makes us wonder whether this result is what the framers of the Hague Convention intended when they included this exception in the Convention. A careful and comprehensive reexamination of the Convention’s text and drafting history reveals that the currently predominant interpretation of Article 13(b) is too narrow and is inconsistent with the purpose of the Hague Convention.

In holding that Article 13(b) should be interpreted narrowly, courts have frequently cited the main objectives of the Convention, namely ensuring the prompt return of abducted children and respect for custodial rights under the law of other contracting states. Courts have consistently held that the narrow interpretation is necessary to further the main objectives of the Convention and that any contrary interpretation would undermine its efficacy. Meanwhile, courts have declared that they should not allow abducting parents to use Article 13(b) to litigate the children’s best
interests. In essence, the reasoning is that the prompt return of abducted children is the purpose of the Hague Convention and interpreting Article 13(b) consistently with this purpose requires giving priority to prompt return over any other considerations. Taking this to extreme, one U.S. court even held that, “even if an exception is established, the Court has the discretion to order the return of a child if return would further the aims of the Hague Convention.”[60]

This reasoning is profoundly flawed and represents an erroneous understanding of the purpose of the Hague Convention. Contrary to what the courts have concluded, a careful reading of the text and the drafting history shows that the purpose of the Convention is to protect children’s interests generally and to protect children from the harmful effects of international abduction and retention in particular.

At the outset of the Convention, the signatory states declare themselves to be “firmly convinced that the interests of children are of paramount importance in matters relating to their custody”; [61] “it is precisely because of this conviction that they drew up the Convention”, “desiring to protect children internationally from the harmful effects of their wrongful removal or retention.”[62] As the Perez-Vera Explanatory Report points out, the philosophy of the Convention is that “the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.” “Children must no longer be regarded as parents’ property, but must be recognized as individuals with their own rights and needs.”[63] While prompt return is one of the main objectives of the Convention, it is “essentially an effort to protect children, and is ultimately serving the best interests of the child.”[64] Consequently the prompt return of abducted children should by no means override the protection of the children’s safety and health, when “the interest of child in not being removed from its habitual residence …… gives away before the primary interest of any person in not being exposed to physical or psychological danger or being place in an intolerable situation.”[65]
Moreover, the structure and contents also indicate that the Convention purports to protect the best interests of the abducted children and their prompt return should be exempted when there is another way that can better further the purpose of protecting the children’s best interests. Article 20 provides that the judicial or administrative authority may refuse the return of the abducted child if the return proceeding is filed one year after the date of wrongful removal or retention and it is demonstrated that the child now is settled in his or her new environment. The provision clearly shows that what the Convention seeks to achieve ultimately is not returning abducted children to their habitual residence, but protecting their best interests.

Although the extremely narrow interpretation of Article 13(b) currently utilized by many courts is an incorrect misunderstanding of Hague Convention, it does not follow that the present approach is completely wrong. Rather the current interpretation is wrong because it is too narrow to further the purpose of the Hague Convention. Consequently, an appropriate interpretation does not call for a complete rejection of the current approach. Instead, what it requires is to modify the current approach to make it more flexible.

As the preceding decisions illustrate, where Article 13(b) is invoked because of threat of terrorist attack or regional conflict, the insurmountable obstacle under the current interpretation approach is the requirement of specific evidence showing a potential danger to the particular child, and almost all attempts to invoke Article 13(b) have failed because of lack of such evidence. This requirement of specificity and particularity is easy to satisfy in cases of child abuse or emotional dependence, because evidence of parental misconduct and danger of psychological harm can be readily obtained. However, given the unpredictable nature of terrorist attack, regional conflict and infectious disease, specific evidence of serious harm to a particular child is extremely difficult, if not impossible to obtain. Since September 11th, people have realized the unpredictability of terrorist attacks. When the intelligence communities worldwide are seeking traces of possible terrorist attacks, how could the courts expect a parent in a child abduction dispute to come up with specific evidence of the danger that a terrorist attack may pose to his or her child? While top-notch medical scientists are still investigating the way that
SARS infects people, how could specific evidence of its potential harm to a child be produced? Instead of requiring specific evidence, courts should accept evidence showing a serious risk of harm to a general population as clear and convincing evidence. Travel advisories issued by competent governmental agencies and international organizations such as the Center for Disease Control, State Department and World Health Organization are a typical type of general evidence courts should accept as clear and convincing evidence under Article 13(b). These entities have the necessary expertise and equipment to evaluate the safety situation in a particular region, and it would be appropriate for courts to rely on their judgment as to the existence of a grave risk of harm in a given region.

Another flaw in the current narrow interpretation of Article 13(b) is the consideration of the child’s voluntary exposure by the abducting parent. According to the current interpretation, if the abducting parent voluntarily exposed the child to the alleged grave risk of harm, the parent is barred from using Article 13(b) as an affirmative defense to object the child’s return. Stemming from the incorrect understanding of the purpose of the Hague Convention, the rationale for this fallacious rule is that the abducted children have been used to the risk of harm after the voluntary exposure, and his or her return merely restores the pre-abduction status quo without putting the child in a worse situation. However, this rule is apparently in conflict with Hague Convention’s ultimate purpose of protecting children’s best interests and consequently should be abolished.

Some courts have adopted a less narrow interpretation of Article 13(b) to truly further the purpose of the Hague Convention. For example, in Grant v. Director-General Department of Community Services, the Australian Family Court considered whether a travel warning issued by the Australian Department of Foreign Affairs and Trade constituted clear and convincing evidence of a grave risk of harm. The warning stated that, “Australians should defer all travel to Israel…All population centers in Israel are at very high risk of terrorist attack at the present time. Targets in the past have typically been areas where large numbers of people gather, including hotels, pedestrian promenades, street shopping malls, restaurants, cafes and other places of entertainment and buses and bus stations." Based on the travel advice and without
any evidence of specific risk, the court reasoned the child would be exposed to a grave risk of harm because he would use public transportation facilities to get home and he would live with his father in a restaurant complex, both population centers vulnerable to terrorist attacks.\[67\] In the end of the opinion, the court stated that, “it is not in our view necessary for her to prove that such a return would expose [the child] to a grave risk of direct harm over and above the risk of harm to which any individual in Israel is exposed… [W]hen the relevant harm sought to be relied on for the purpose of establishing the defense under Regulation 16(3)(b) is in the nature of warfare or civil unrest, we do not think it necessary or possible to draw any distinction between a direct risk to a particular individual and the risk to which the relevant population is generally exposed.”\[68\]

V. Conclusion

In most cases, the prompt return mechanism established by the Hague Convention is an effective means to deter and rectify international child abduction so as to protect children’s best interests. In order to preserve the integrity of this mechanism, courts in many jurisdictions have carefully avoid engaging in determination of the merits of underlying custody disputes. One result of such a cautious altitude is the extremely narrow interpretation of Article 13(b) “grave risk of harm” exception. While courts need to narrowly interpret this provision so that abducting parents do not have the opportunity to use it as a pretext to litigate the custody disputes, thereby undermining the prompt return mechanism, most courts have interpreted this exception in an extremely narrow manner, which makes it excessively difficult to use it to protect abducted children when their return would truly pose a grave risk of harm to them. The extremely narrow interpretation is based on the misunderstanding that the purpose of the Hague Convention is prompt return and Article 13(b) should be subject to this purpose. However, as a careful study of the text and drafting history of the convention demonstrates, the Convention’s purpose is to protect the interests of children and Article 13(b) should be interpreted in accord with this purpose. Courts should not blindly reject the invocation of Article 13(b) in favor of
prompt return. Instead, they should determine on a case-by-case basis whether there is a grave risk of harm and whether Article 13(b) should be used to protect the child from the harm.

[5] Id. at art. 20.
[6] Id. at art. 13(a).
[10] Id.
[12] Id. at art 8.
[13] Id. at art 9.
[16] Blodin v. Dubois, 189 F3d. 240, 247, (2nd Cir. 1999), quoting Elisa Perez-Vera, Explanatory Report. Ms. Perez-Vera served as the official Hague Conference Reporter for the convention. Her Explanatory Report is recognized by the conference as the official history and commentary on the convention and is a source of background on the meaning of the provisions of the Convention.
[17] See Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000); Blodin, 189 F3d. 240.
[23] Id.
[24] Id.
[25] Id.
[28] Id. at 901.
[29] Id.
[31] Id. para 051.
[32] Id. para 053.
Id.

[34] *Altheim*, para 057.


[36] *Id.* at 608.

[37] *Id.* at 609.

[38] *Hazbun Escaf*, 200 F. Supp. 2d 603.

[39] *Id.*


[41] *Id.* at 1365.

[42] *Id.*

[43] *Id.*


[45] *Id.*

[46] *Walsh*, 221 F. 3d 204 at 218.


[48] *Id.*


[50] *Walsh*, 221 F. 3d 204, 218.

[51] *Friedrich*, 78 F. 3d 1060, 1069.


[53] *Id.*

[54] *Silverman*, 338 F. 3d 886, 901.

[55] *Silverman*, 338 F. 3d 886, 901. *See also Friedrich*, 78 F. 3d 1060; *Walsh*, 221 F. 3d 204; *Hazbun Escaf*, 200 F. Supp. 2d 603. [Emphasis added].


[58] *Walsh*, 221 F. 3d 204, 218


[61] Hague Convention, preamble.


[63] *Id.*


[67] *Id.*