

Article 13(b) Grave Risk Defense in the Context of Civil Unrest or War

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Article 13(b) of the Hague Convention allows a court to refuse the return of a child if it finds that the return would expose the child to a grave risk of physical or psychological harm or otherwise place them in an intolerable situation. A grave risk of harm defense that meets the Article 13(b) standard can arise in two situations: “(1) where returning the child means sending him to a zone of war, famine, or disease; or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.” *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013). Thus, in cases where the respondent asserts the grave risk defense based on claims that the child’s habitual residence has become unsafe due to civil unrest or war, they must be able to establish that the conditions in the country reach the level of a zone of war. As the cases below exemplify, this requires precise and substantiated claims of immediate danger upon the child’s return.

There is no precedent defining what a zone of war means for the purposes of 13(b), and there only appears to be one case in the United States indicating a country is a zone of war sufficient to establish the 13(b) defense. In *Tereshchenko v. Karimi*, the court concluded that there was a grave risk of harm precluding the return of the children to western Ukraine, as it was in the midst of an invasion and subject to repeated missile attacks. *Tereshchenko v. Karimi*, 102, 30-34 F.4th 111 (2d Cir. 2024). In reaching this conclusion, the court relied on evidence that (1) L’viv, the city the children would be returned to, had experienced a missile strike that killed 10 civilians and injured 48; (2) the U.S. Department of State advised that U.S. citizens should “not travel to Ukraine due to active armed conflict,” and one of the children is a U.S. citizen; (3)

Petitioner testified that life in western Ukraine was dangerous; (4) both parties agreed to remove the children from Ukraine because of the danger posed by the Russian invasion; and (5) Russia was actively bombing western Ukrainian cities. *Id.* However, despite establishing a grave risk of harm, the court still granted the petition, ordering the children returned to the father in France rather than Ukraine as an ameliorative measure. *Id.*

Grave Risk Defense Based on Violence and Civil Unrest in Israel

In *Freier v. Freier*, Respondent argued that the child would face a grave risk of harm if returned to Israel due to violent clashes following the opening of a tunnel near the Al-Aqsa mosque in Jerusalem. *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996). Respondent presented evidence that the violence was occurring 15 to 90 minutes away from the marital home, and provided newspaper articles describing the fighting as the worst since the 1987-1993 intifada. *Id.* Respondent also testified about random acts of violence that she had heard about, such as car and bus bombings. *Id.* However, an Assistant Deputy Attorney General in Israel testified that things remained normal, and the only change resulting from the unrest was an increased military presence. *Id.* The court concluded that the proximity of the home to the unrest was insufficient to constitute a zone of war, reasoning that schools and businesses remained open and Respondent was able to travel to and from Israel. *Id.* The court emphasized that the fighting was limited to certain areas, which did not include the city in which the child would reside upon return. *Id.*

Similarly, in *Silverman v. Silverman*, the court rejected Respondent's claim that violence and unrest in Israel constituted a zone of war. *Silverman v. Silverman*, 338 F.3d 886, 900 (8th Cir. 2003). Respondent failed to provide sufficient evidence that the children would be in heightened danger upon returning to Israel as compared to their initial move there in 1999. *Id.*

The court echoed *Freier*, noting that schools and businesses were open. *Id.* The court concluded that Respondent failed to prove the children would face a grave risk of harm, placing great weight on the fact that “the evidence centered on general regional violence,” that threatened “everyone in Israel.” *Id.*

Grave Risk Defense Based on Violence and Civil Unrest in Other Countries

The grave risk claims based on civil unrest have not been much more successful when asserted regarding other countries. In order to establish the defense, the courts appear to require very specific and particularized danger. In *Salame Ajami v. Tescari Solano*, Respondent claimed that Venezuela was a zone of war and famine, citing humanitarian and political crises, protests, criminal violence, and shortages of essential supplies. *Salame v. Tescari*, 29 F.4th 763, 769-770 (6th Cir. 2022). However, Petitioner demonstrated that the children would be returning to a home with sufficient shelter, food, water, and medical care. *Id.* Acknowledging Venezuela’s severe political and socioeconomic crises, the court nonetheless concluded that the particular circumstances the children would face did not constitute a grave risk of harm. *Id.*

Similarly, in *De Aguiar Dias v. De Souza*, Respondent argued that the child would face a grave risk of harm if returned to Brazil due to the dangerous areas surrounding the child’s neighborhood, controlled by drug traffickers. *De Aguiar Dias v. De Souza*, 212 F. Supp. 3d 259, 270-271 (D. Mass. 2016). However, Petitioner testified that the child would remain under adult supervision when outside, and it was uncontested that their home was in a calm, middle-class neighborhood. *Id.* The court concluded that Respondent did not provide sufficient evidence linking the generalized violence in other areas to a direct risk of harm to the child. *Id.*

In contrast to the previous cases, the grave risk defense was established in *Velasquez v. De Velasquez*. *Velasquez v. De Velasquez*, 102 F. Supp. 3d 796, 812-813 (E.D. Va. 2015).

Respondent was able to prove by clear and convincing evidence that the children would face a grave risk of exposure to harm if returned to their father in El Salvador. *Id.* The court's conclusion relied on the fact that, in addition to El Salvador being widely regarded as an extremely violent nation, there had been at least two specific threats of physical violence concerning Respondent and the children. *Id.* In one of these instances, three armed gang members held a machete to Respondent's sister's throat and threatened to kill Respondent if she ever went back to El Salvador. *Id.* The court characterized this as "a specific threat of violence that represents a grave risk of physical harm to [Respondent] and her daughters should they return to El Salvador." *Id.* Additionally, the court found that the threats should be treated seriously, as Petitioner's daughter from a previous marriage had been kidnapped in the past and held for ransom until she was rescued by the military. *Id.*

Conclusion

The application of the Article 13(b) grave risk exception in cases involving civil unrest and war appears to be heavily dependent on the specificity and immediacy of the danger presented. Courts require clear and convincing evidence that the conditions in the child's habitual residence pose a direct and particularized threat to the child's safety. Generalized violence and instability generally do not meet this standard, as it is crucial to provide evidence tailored to the child's circumstances and conditions in their immediate environment. While *Tereshchenko* underscores the potential for invoking this defense in the context of armed conflict, the bar for proving such risk remains high, as the court placed great weight on the missile attack on the city the child would be returned to, as opposed to a city or neighborhood nearby.