

Grave Risk and the Right to Return: A Comparative Study of Judicial Responses to International Child Abduction

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ABSTRACT: This article analyzes the application of the grave risk exception under Article 13(1)(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, comparing approaches in the United States, the European Union, and the Hague Conference on Private International Law (HCCH). With international child abduction cases increasing by about 35% over the past two decades (HCCH, 2021), courts face growing tension between ensuring the prompt return of children and safeguarding their welfare. The study employs a comparative doctrinal and case study methodology, examining legal texts, jurisprudence, and soft-law instruments such as the HCCH Guide to Good Practice, complemented by empirical data from the HCCH Statistical Study (2021) and regional reports. Findings reveal marked divergence across jurisdictions. U.S. courts apply a high evidentiary threshold and defer to trial-level findings, prioritizing return obligations. EU courts, guided by Brussels II bis, integrate structured timelines and protective measures to mitigate potential harm. The HCCH, through soft-law harmonization, encourages consistent interpretation, though implementation remains uneven. Protective tools—such as mirror orders and supervised contact—are most effective when supported by enforceable judicial mechanisms. The article concludes that achieving consistency in grave risk assessments requires legal harmonization, judicial education, and stronger cross-border enforcement frameworks. Policy recommendations include standardized evaluation protocols, enhanced training for judges, and international cooperation to align legal practices with the child's best interests.

Keywords: Grave Risk, International Child Abduction, Hague Convention, Brussels II Bis, Protective Measures, Comparative Law, Child Welfare.



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INTRODUCTION

The increasing frequency of international child abduction cases has become a prominent concern over the past two decades, driven by intensifying global mobility and the growing complexity of transnational family arrangements. While estimates of the annual number of such cases vary significantly, the underlying issue remains serious. Although estimates such as the frequently cited figure of 250,000 annual cases are widely circulated, comprehensive, peer-reviewed data do not

support such claims consistently (Luyt & Swartz, 2023). Nonetheless, the observable rise in cross-border parental disputes and wrongful removals reflects the pressing need for a cohesive international legal response. These disputes typically emerge from custodial disagreements following parental separation, often leading to prolonged jurisdictional conflicts that directly affect the child's welfare.

International legal instruments, notably the 1980 Hague Convention on the Civil Aspects of International Child Abduction (HCCH 1980), have emerged as foundational frameworks to address these complex scenarios. This Convention primarily aims to ensure the prompt return of children wrongfully removed or retained across borders, emphasizing the need to restore the status quo ante. It operates on the presumption that custody decisions should be made in the jurisdiction of the child's habitual residence, thereby discouraging unilateral forum shopping by discontented parents (Maxwell, 2018). Moreover, this prompt return mechanism is designed to shield children from the destabilizing consequences of cross-border abduction, promoting judicial cooperation and legal certainty among contracting states.

However, while the HCCH 1980 Convention advances the goal of procedural regularity, it also acknowledges that not all circumstances merit an unconditional return. Article 13(1)(b) of the Convention introduces a critical exception to the general return obligation, providing that return may be refused if it poses a "grave risk" of exposing the child to physical or psychological harm or placing them in an intolerable situation. This exception is fundamental to reconciling the urgency of returning the child with the moral and legal imperative of ensuring their safety and welfare (Maxwell, 2018). It reflects a necessary safeguard that tempers procedural efficiency with substantive considerations of child protection.

The interpretation of Article 13(1)(b), however, has proven highly variable across jurisdictions, raising concerns about the consistency and fairness of its application. Courts differ significantly in how they define and assess the notion of "grave risk." In some jurisdictions, the threshold is interpreted narrowly and demands a high evidentiary burden; in others, a broader view prevails, particularly when allegations of domestic violence or systemic abuse are raised (Montà, 2021). These inconsistencies are exacerbated by cultural, procedural, and legal differences, which may lead to unpredictable outcomes and, in some cases, inadequate protection for the affected child.

The United Nations Convention on the Rights of the Child (UNCRC) offers a normative framework that can guide the application of the HCCH 1980 Convention, especially regarding the grave risk exception. Article 3 of the UNCRC mandates that the best interests of the child shall be a primary consideration in all actions concerning children. Article 12 further affirms the child's right to be heard in any judicial and administrative proceedings affecting them. Together, these provisions advocate a child-centered approach to legal interpretation, underscoring the importance of integrating substantive child welfare concerns into procedural decisions. Scholars argue that the grave risk exception serves as a practical embodiment of these principles, providing a counterbalance to the mechanical application of return obligations (Adonteng-Kissi, 2022).

Nonetheless, the relationship between the best interests standard under the UNCRC and the HCCH framework remains underdeveloped in practice. Courts are frequently tasked with navigating competing priorities ensuring prompt return on one hand and mitigating harm on the

other. This judicial balancing act is further complicated when grave risk claims intersect with domestic violence, mental health issues, or unresolved criminal proceedings. In such cases, the decision to return the child can result in revictimization or prolonged trauma, outcomes that directly conflict with the child's holistic welfare (Sudarsan et al., 2022).

To address these challenges, regional instruments such as the Brussels II bis Regulation (now Brussels IIb, Regulation (EU) 2019/1111) within the European Union have sought to clarify and enhance procedural mechanisms surrounding international child abduction. This regulation streamlines jurisdictional rules, strengthens the enforcement of judgments, and imposes strict timelines for return proceedings. It also enhances cooperation between Central Authorities, thereby facilitating more coordinated responses. While these advancements have improved procedural efficiency in EU member states, they have also introduced new layers of complexity. Differences in national implementation practices and varying judicial interpretations of exceptions continue to pose significant obstacles (Luyt & Swartz, 2023).

The divergence in national practices is vividly illustrated through case law, particularly in high-profile decisions such as *Monasky v. Taglieri* (US Supreme Court, 2020). In *Monasky*, the Court adopted a flexible, fact-based standard the "totality of the circumstances" to determine habitual residence. Although the case centered primarily on habitual residence, it also signaled a broader judicial inclination in the United States toward deference to trial court findings, particularly in cases involving complex factual matrices such as those entailing grave risk claims. This deference stands in contrast to the more regulated and coordinated approach seen in EU jurisdictions under Brussels IIb, which imposes deadlines and requires judicial communication across member states to facilitate swift and informed decisions.

Further complexity arises from the practical challenges of implementing protective measures that would enable safe return. Instruments such as mirror orders, undertakings, and supervised contact arrangements are often suggested as risk mitigation tools. However, their effectiveness is contingent on robust enforcement mechanisms and international cooperation, both of which vary across jurisdictions. In the absence of consistent monitoring and cross-border enforceability, these measures may offer only illusory protection. Consequently, reliance on such mechanisms without adequate follow-up can undermine the core objectives of the HCCH and UNCRC.

The legal and policy landscape continues to evolve in response to these multifaceted challenges. Academic and practitioner discourse increasingly emphasizes the need for harmonized standards in applying Article 13(1)(b), particularly in cases involving allegations of abuse. Collaborative frameworks, such as the HCCH Guide to Good Practice on Article 13(1)(b), attempt to fill this gap by offering interpretative guidance, evidentiary recommendations, and procedural best practices. While these guides lack binding authority, they play a crucial role in shaping transnational dialogue and informing judicial reasoning across borders (Montà, 2021).

In conclusion, the rising tide of international child abduction cases reflects not only a global family phenomenon but also a legal system in transition. Instruments like the HCCH 1980 Convention and the UNCRC provide a strong foundation for protecting children's rights across jurisdictions, yet the application of the grave risk exception remains fraught with challenges. Variability in legal interpretation, enforcement capabilities, and procedural frameworks continues to undermine the

uniformity and effectiveness of international child protection law. As more states adopt these conventions and engage with evolving jurisprudence, the centrality of child welfare must remain paramount. Bridging the gap between procedural obligations and substantive protections will require sustained international cooperation, judicial education, and legal refinement to ensure that the return mechanism does not come at the expense of child safety.

METHOD

This chapter outlines the research methods employed in examining the comparative legal treatment of the grave risk exception under Article 13(1)(b) of the Hague Convention on the Civil Aspects of International Child Abduction. The methodology combines doctrinal legal research and comparative analysis, emphasizing the interpretation and application of international and regional legal instruments, judicial reasoning in landmark case law, and soft-law instruments. This structured approach enables a comprehensive understanding of how different legal systems respond to child protection challenges in abduction scenarios.

The research focuses on primary sources such as the HCCH 1980 Convention and Brussels IIb Regulation (EU), complemented by key jurisprudence including *Monasky v. Taglieri* (US Supreme Court, 2020), to reveal how the principles of prompt return and exceptions operate in practice.

The comparative component of the methodology identifies how different legal systems interpret and apply the same legal concept grave risk in international child abduction cases. This includes analyzing judicial decisions from US federal courts, EU member states under Brussels IIb, and other contracting states to the HCCH Convention. Bueso (2019) emphasizes that comparative legal research helps contextualize legal doctrines and enhances understanding of how legal systems evolve in response to transnational challenges.

Comparative legal analysis focuses on three main dimensions:

1. Legal interpretation standards (e.g., totality of the circumstances vs. prescriptive models)
2. Evidentiary burdens and threshold standards for proving grave risk
3. The role and enforceability of protective measures such as mirror orders and undertakings

The study of legal divergence and harmonization informs recommendations on best practices and highlights areas needing international coordination.

Case law serves as a vital primary source for doctrinal and comparative studies. *Monasky v. Taglieri*, for instance, represents the US approach to habitual residence and the appellate review standard for grave risk assessments. By analyzing how different courts interpret the same legal provisions under varying procedural norms, the research reveals trends in judicial reasoning and the flexibility or rigidity of legal applications (Svirin et al., 2020).

Case summaries from the INCADAT database are systematically reviewed to extract recurring themes, including the interpretation of “grave risk,” judicial use of protective measures, and

decisions to refuse return. This method enables cross-jurisdictional mapping of legal reasoning and outcomes, helping identify patterns and anomalies in the use of Article 13(1)(b).

Another key methodological aspect is the analysis of soft-law instruments, particularly the HCCH Guide to Good Practice on Article 13(1)(b) (2020). This guide provides interpretive assistance to courts and Central Authorities by recommending standards for assessing grave risk and implementing protective measures. According to Ramadani et al. (2021), these instruments, though non-binding, have significant normative influence.

The study applies qualitative analysis to evaluate how the Guide's recommendations align with actual judicial decisions and whether they are referenced in court reasoning. Content analysis is used to extract key themes, such as the proportionality of return, evidence requirements, and suggestions for coordinated child protection across jurisdictions. While lacking legal force, these documents shape expectations and promote soft harmonization of legal standards.

While primarily doctrinal, the research incorporates empirical data to support legal arguments. Data from the HCCH Statistical Study (2021) and the ICMEC Regional Report (2023) provide quantitative insights into return application trends, frequency of grave risk claims, and median case durations. This empirical foundation strengthens the doctrinal analysis by contextualizing how often and under what circumstances the grave risk exception is invoked.

The methodology also acknowledges the value of interdisciplinary perspectives. As Yussoff & Nordin (2021) argue, integrating socio-legal insights into doctrinal studies enhances understanding of the real-world effects of legal norms. For example, the intersection of child protection concerns with judicial efficiency is explored to assess whether legal processes uphold the best interests of the child in practice.

To evaluate the impact of soft law and harmonization efforts, doctrinal comparison is used to assess how HCCH guidance is incorporated into national practice. Systematic content analysis of legal texts and judicial decisions reveals the extent to which states adopt non-binding standards into enforceable practice. Putera et al. (2022) note that this method helps capture the dynamic interaction between soft law, judicial discretion, and legal implementation.

Comparative doctrinal analysis is particularly useful in identifying:

- Jurisdictional divergence in defining grave risk
- Variability in the adoption of protective measures
- Gaps in enforceability across borders

This method highlights inconsistencies that may compromise the uniform application of child protection standards under international law.

The doctrinal-comparative approach is justified by the complexity and diversity of legal responses to international child abduction. However, certain limitations must be acknowledged. Variations in legal terminology, procedural laws, and reporting standards may affect the comparability of sources. Additionally, reliance on publicly available case law may exclude confidential or unpublished decisions.

Nonetheless, by triangulating normative texts, case law, soft-law instruments, and empirical data, this methodology achieves a high level of analytical depth and contextual relevance. It provides a robust foundation for evaluating the effectiveness of grave risk exceptions and contributes to discussions on harmonization in private international law.

RESULT AND DISCUSSION

Legal Interpretation

The interpretation of “habitual residence” and “grave risk” under Article 13(1)(b) of the HCCH 1980 Convention reveals significant jurisprudential variation across jurisdictions, influenced by distinct legal traditions and procedural norms.

In the United States, the Supreme Court’s decision in *Monasky v. Taglieri* redefined the approach to habitual residence by rejecting rigid criteria and favoring a fact-intensive inquiry based on the totality of the child’s circumstances. The decision marked a shift toward contextual evaluation over parental intention alone, with courts instructed to consider the child’s lived experience and degree of integration in a specific environment (Trimmings & Momoh, 2021). By contrast, the European Union under the Brussels II bis framework tends to adopt a more formalistic approach, emphasizing structured legal and factual assessments of residence to ensure procedural consistency across member states (Freeman & Taylor, 2023).

Interpretation of “grave risk” similarly diverges. While the Convention articulates that return may be refused if there is a grave risk of exposing the child to physical or psychological harm or placing them in an intolerable situation, Courts demonstrate considerable variation in applying this standard, reflecting differing judicial philosophies toward balancing child protection and return obligations. This divergence highlights the tension between maintaining the prompt return principle and addressing legitimate safety concerns.

The coordination mechanisms under Brussels II bis enhance judicial cooperation among EU member states and with HCCH instruments. These mechanisms promote timely processing of return applications and facilitate the exchange of legal information to align practices (Župan et al., 2020). Meanwhile, the HCCH Guide to Good Practice on Article 13(1)(b) urges the harmonization of judicial standards through educational resources, professional training, and the exchange of best practices (Sandiford, 2019).

Evidentiary Thresholds

The evidentiary burden required to substantiate a grave risk claim varies significantly. In the United States, claimants must provide clear and convincing evidence of imminent harm. Courts rely heavily on documented incidents, psychological evaluations, and credible witness testimony (Parisi et al., 2021). This high threshold reflects a legal culture that values evidentiary precision and judicial discretion.

In EU jurisdictions, although the burden still rests with the claimant, courts may accept a wider range of evidence, including social services reports and multidisciplinary expert opinions (“Ben El Mahi and Others v. Denmark,” 2018). This flexibility permits a more holistic assessment of the child’s context and potential risk factors.

Appellate review standards also differ. In the US, appellate courts are typically deferential to trial-level findings unless there is a demonstrable error in legal interpretation or evidentiary assessment (Parisi et al., 2021). EU appellate courts, in contrast, may take a more supervisory role, particularly when interpreting grave risk in light of established EU jurisprudence (Župan et al., 2020).

The HCCH Guide encourages multidisciplinary and collaborative approaches to gathering evidence, promoting coordination among legal, psychological, and social services professionals (Trimmings & Momoh, 2021; Sandiford, 2019). Such approaches are essential in mitigating inconsistencies and ensuring fact-based, child-sensitive adjudication.

Protective Measures

Protective measures serve as crucial tools in reconciling the obligation to return with the need to safeguard children. Mirror orders and undertakings are commonly used mechanisms to ensure compliance across jurisdictions. Mirror orders replicate judicial decisions in the receiving jurisdiction, promoting enforceability and consistency (Milej, 2018). Undertakings typically involve legally binding commitments by the requesting parent, such as providing housing, financial support, or restricting access to the child until further court review (Sandiford, 2019).

Supervised contact and structured return protocols further support safe transitions. These may include court-monitored visitations, police escorts, or temporary custody arrangements with neutral parties. They are especially relevant in cases involving prior abuse or allegations of violence (Milej, 2018).

Under Brussels II bis, these protective tools are formally integrated into the cross-border enforcement framework. The Regulation facilitates mutual recognition and execution of protection orders, thereby enhancing the legal infrastructure necessary for safe returns (Župan et al., 2020). Courts are increasingly called upon to balance procedural obligations with the child’s best interests, demanding sophisticated judicial reasoning and risk analysis (Trimmings & Momoh, 2021).

Case Outcomes and Trends

Empirical findings from the HCCH Statistical Study (2021) and the ICMEC Regional Report (2023) provide a data-driven perspective on the use and outcomes of Article 13(1)(b).

- Out of 3,456 total return applications globally, 21% involved grave risk claims.
- Approximately 15% of these resulted in non-return orders.
- Median case duration for return orders was 170 days; for non-return cases, 235 days.

These statistics illustrate that while the grave risk exception is not frequently invoked successfully, it remains a critical area of legal contention.

Regional differences are stark. Brussels II bis jurisdictions average faster resolution times (120 days vs. 210 days for non-EU states) and exhibit greater reliance on protective measures (used in 32% of Brussels IIb cases). These efficiencies are attributable to structured cooperation mechanisms and dedicated judicial networks (Župan et al., 2020).

Jurisdictions also vary in their receptiveness to grave risk claims. Some courts are more inclined to accept claims supported by credible evidence, while others favor return orders unless harm is clearly substantiated (Milej, 2018). These trends complicate international cooperation, emphasizing the need for aligned evidentiary standards and clearer judicial guidelines.

Cases involving grave risk also tend to be more protracted due to the necessity of extensive evidentiary hearings, third-party assessments, and procedural safeguards. This delay challenges the prompt return objective of the Convention and may exacerbate trauma for the involved child.

Finally, courts that actively employ protective measures are more likely to issue return orders, suggesting that safeguarding arrangements can mediate judicial reluctance in high-risk cases (Trimmings & Momoh, 2021). Such findings support the growing call for integrated protective protocols as standard practice in return proceedings.

The application of grave risk exceptions in international child abduction cases remains deeply influenced by the prevailing legal cultures and procedural norms within each jurisdiction. The differences in how legal systems interpret and operationalize Article 13(1)(b) of the HCCH 1980 Convention are not merely technical but reflect broader philosophical and systemic distinctions. Common law and civil law traditions approach evidentiary standards and judicial discretion in fundamentally different ways, which leads to significant divergence in outcomes when assessing claims of grave risk (Trimmings & Momoh, 2021).

In common law jurisdictions such as the United States, the evidentiary threshold for grave risk tends to be more stringent, often demanding clear and convincing proof of harm. Courts in these settings are inclined to prioritize procedural integrity and parental rights, sometimes at the expense of nuanced risk factors. The *Monasky v. Taglieri* decision illustrates a parent-centric inclination that, while deferential to trial-level findings, may fail to fully capture the psychological and emotional dimensions of risk to the child. By contrast, courts in European Union member states operating under Brussels II bis exhibit a more structured, child-centered framework, guided by a blend of regulatory standards and social welfare considerations (Freeman & Taylor, 2023). This divergence can result in inconsistent outcomes, even where the factual matrix is similar, thereby undermining predictability and fairness in return proceedings.

Legal culture also affects the integration of soft-law instruments, particularly the HCCH Guides to Good Practice. While these guides are crafted to promote uniform interpretation and application of the Convention, their effectiveness is constrained by cultural and institutional inertia. Jurisdictions that heavily prioritize formal legal sources may resist the adoption of non-binding guidance, perceiving it as lacking authoritative weight (ÇAMI, 2023). This limits the Guides' influence on harmonizing grave risk interpretations, especially in courts that emphasize

precedent or statutory rigidity. Furthermore, divergent national philosophies concerning parental autonomy, state intervention, and child welfare exacerbate inconsistencies in the practical application of the grave risk exception (Milej, 2018).

These challenges are compounded by disparities in national enforcement of return orders. Although the Hague Convention envisions a seamless and cooperative system of international child protection, the reality is often more fragmented. Member states differ in how they interpret and execute return obligations, leading to a patchwork of compliance. For example, some jurisdictions might prioritize swift return based on a formalistic interpretation of habitual residence, while others might invoke additional procedural delays to investigate potential harm claims (Župan et al., 2020). The inconsistent enforcement undermines the credibility of the Convention and risks protracted litigation, further destabilizing the affected child's environment.

Addressing these inconsistencies necessitates structural and procedural reforms. One key recommendation is the establishment of standardized frameworks for grave risk evaluations. These would provide courts with consistent guidelines on the types of evidence required, the appropriate threshold for non-return decisions, and the role of protective measures in mitigating potential harm ("R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs," 2019). By clarifying these expectations, such frameworks would improve transparency, reduce judicial discretion disparities, and enhance confidence among litigants and practitioners (Trimmings & Momoh, 2021).

Another critical area for reform is judicial education. Judges often operate within culturally and institutionally entrenched paradigms, which can shape their understanding of child welfare and parental rights. Training programs that highlight the cross-cultural dimensions of grave risk, the psychological aspects of child trauma, and the interpretive scope of international instruments could significantly improve adjudication quality. These programs should be tailored not only to emphasize legal knowledge but also to encourage sensitivity to the human realities underlying abduction cases.

In addition, regular international dialogue is essential for building consensus on contested legal interpretations. Forums organized by the HCCH, international legal associations, and regional bodies can provide platforms for judges, academics, and policymakers to share experiences and explore innovative practices. For instance, case study reviews, mock appellate panels, and collaborative workshops can facilitate mutual learning and reveal underlying assumptions that influence judicial reasoning. These exchanges are especially valuable in cultivating a shared understanding of grave risk, which is vital for ensuring consistent and fair application of the Convention ("R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs," 2019).

Moreover, the role of protective measures in resolving grave risk disputes must be further institutionalized. Courts that effectively use mirror orders, undertakings, and safe-return protocols are better positioned to issue return orders with confidence that the child's welfare will not be compromised. As shown in numerous EU and US cases, the successful implementation of protective frameworks often determines whether the return is ordered. Thus, efforts to codify the use of such tools and ensure their enforceability across jurisdictions are central to harmonizing outcomes.

Ultimately, while the HCCH 1980 Convention provides a robust foundation for addressing international child abduction, its long-term efficacy depends on reconciling the disparities in grave risk application. Legal convergence does not necessitate uniformity but requires functional equivalence in outcomes. The well-being of the child articulated in both the UNCRC and the HCCH frameworks must remain the guiding principle. To achieve this, international law must be accompanied by domestic reforms that prioritize child safety, judicial competence, and procedural justice. Cross-border collaboration, soft-law innovation, and policy harmonization together form the cornerstone of a more effective and humane system of international child protection.

CONCLUSION

The grave risk exception under Article 13(1)(b) of the 1980 Hague Convention continues to represent a pivotal yet inconsistently interpreted safeguard in international child abduction law. This comparative analysis reveals that disparities among jurisdictions rooted in differing evidentiary thresholds, legal traditions, and enforcement mechanisms create uneven protections for children. While the Convention's core objective is the prompt return of abducted children, the study underscores that procedural uniformity must not override the paramount principle of child welfare. Bridging the divide between procedural compliance and substantive protection requires harmonized interpretive guidance, reliable enforcement, and the consistent integration of child-centered principles.

To achieve coherence in the application of Article 13(1)(b), states must strengthen judicial training, institutionalize protective measures such as mirror orders and supervised contact, and enhance international dialogue under the auspices of the HCCH. The incorporation of interdisciplinary perspectives—including child psychology and trauma-informed adjudication—will ensure that legal determinations reflect the lived realities of affected children. Ultimately, safeguarding the child's best interests demands not only legal harmonization but also an empathetic, evidence-based approach that aligns international obligations with humane judicial practice.

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