I. INTEREST OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS

The International Academy of Family Lawyers (IAFL) was formed in 1986 to improve the practice of law and the administration of justice in the areas of family law and divorce worldwide. It is an international non-profit association that is legally incorporated in the United States of America. Currently, IAFL has more than 1,020 Fellows from 76 countries, all of whom are recognized by the courts and bar associations of their respective countries as experts and experienced litigators in family law.

IAFL members have made presentations in Europe, North America, Australia and Asia related to legal reforms. IAFL has sent representatives to major international conferences, often as non-governmental experts (NGOs), and has observer status for the Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the Abduction Convention), to all of which it has sent representatives to. In addition, IAFL members have written extensively and lectured extensively on the Abduction Convention and other related topics, such as cross-border relocation of children.

The IAFL website (www.iafl.com) contains, among other things, a list of its partners.

IAFL has filed *amicus curiae* briefs with the U.S. Supreme Court in the cases of *Cahue v. Martinez*, 137 S. Ct. 1329 (2016); *Lozano v. Montoya*, 134 S. Ct. 1224 (2014) and *Monasky v. Taglieri*, No. 18-935 (2019). He has also done so before the Supreme Court of the United Kingdom in the cases *In the Matter of AR,* (Children) (Scotland) UKSC 2015/0048; *In the Matter of NY*, (A Child) UKSC 2019/0145, and before the Court of Cassation of France, in *Bowie v. Gaslain* (No. T 15-26.664). Other *amicus curiae* filings have also been made to lower courts in various other jurisdictions.

IAFL members, who are experienced attorneys practicing in countries around the world, have summarized the relevant law in their jurisdiction for the purposes of this filing as an Amicus.

Questions posed:

1. Is the war zone exception under Article 13b of the Hague Convention on Civil Aspects of Child Abduction properly analyzed by the judgment of the court?

   Is anecdotal testimony of Respondent's supporters, along with general knowledge, as provided by certain news media, sufficient to determine whether the Article 13b exception has been met?

   In determining the war zone defense, is it sufficient for the court to rule on the general security situation in the requesting state or must it analyze the potential danger to the specific situation of the child in question?

2. Is the established principle that defenses are to be interpreted restrictively not applicable to the Article 13b defense?

3. Is the purpose of a Hague Abduction Convention proceeding to determine the international jurisdiction of the court which should determine the child's best interests or is it a custody like proceeding which determines the best interests of the child?

4. Do the provisions of the UN Convention on the Rights of the Child prevail over the Hague Convention in a return application? If so, is only Article 3 of the UN Convention applicable, which calls for the best interests test to apply concerning deliberations on child welfare? Should not equal weight be afforded to Articles 11, which calls for states to promote multilateral agreements to combat the illicit transfer and non-return of children abroad and Article 35, which calls upon the signatures to the UN Convention to implement multilateral agreements to prevent the abduction of children?

5. Can a court consider the child's integration in her new environment despite the fact that the return petition is filed only four months after the unlawful retention?

6. Is there a rebuttable presumption that a 7 year old child is of sufficient age and maturity for the court to consider her opinion?

1. Article 13b War Zone exception

The first reference to a return to a war zone as an Article 13b defense under the Hague Abduction Convention appears in the United States Federal District Court case of Friedrich v. Friedrich 78 F.3d 1060, (6th Cir., 1996), [Friedrich II].

"In any event, even if an emergency forces a parent to take a child to a foreign country, any such emergency cannot excuse the parent from returning the child to the jurisdiction once the return of the child becomes safe". Friedrich II, p. 1065)

The court there held that grave risk of harm for purposes of the Convention can exist in only two situations. "First, there is a grave risk of harm when the return of a child puts the child in imminent danger prior to the resolution of the custody dispute- e.g., returning the child to a zone of war, famine or disease". Friedrich II,p. 1068).

The 2020 Guide to Good Practice under Article 13b published by the Permanent Bureau of the Hague Conference on Private international Law states as follows regarding the grave risk defense:

"*The grave risk analysis associated with the circumstances in the State of habitual residence must focus on the gravity of the political, economic or security situation and its impact on the individual child and on whether the level of such impact is sufficient to engage the grave risk exception, rather than on the political, economic or security situation in the State generally. Assertions of a serious security, political, economic or security situation in the*

State of habitual residence are therefore generally not sufficient to trigger the grave risk exception."

In the case of Silverman vs Silverman, 338 F.3d 88 (8th Cir. 2003), the U.S. Federal Court of Appeals was asked to address the issue of what constitutes a war zone and how to assess whether the circumstances exist in the child's habitual residence to justify the defense. The court determined that it would need to cite specific evidence of potential harm to the individual child (citing Rydder v. Rydder 49 F.3d 369,372 (8th Cir. 1995). As it is an affirmative defense, the burden is on the respondent to produce supporting evidence, which in the United States requires a standard of clear and convincing proof. Other countries, such as Israel, have also adopted the standard of clear and convincing evidence as standards of proof for an affirmative defense.

The court further stated that evidence produced by the respondent mother centered on general regional violence and not on the danger to these specific children in order to justify the war zone defense.

The U.S. Federal District Court in the case of Freier vs Freier, (969 F. Supp. 436, 443 (E.D. Mich. 1996), examined the situation in Israel as it pertained to the specific children who were the subjects of the petition. It found that businesses were open, the schools were not closed and that they were able to travel to and from Israel. Press reports and travel warnings of the Government were held to be insufficient to establish an Article 13b defense.

To put the war zone defense in context of Article 13b, the broader question is whether the return of the child to a specific area would create grave risk of placing the minor in an intolerable situation. The exception of Article 13b must be read as a whole. Therefore, the risk must be grave and the physical harm must be of an intolerable nature. Grave defines the risk while intolerable situation applies to the extent of the harm. The Court of Appeal of the United Kingdom stated that the proper approach when considering a defense alleging a grave risk of exposure to physical or psychological harm should be for the court to consider the grave risk of that harm as a discrete question but then stand back and test the conclusion by looking at the article in the round whether the risk of harm is established to the extent which would lead one to say that the child will be placed in an intolerable situation if returned, Re S(A Child) (Abduction: Grave Risk of Harm, [2002] EWCA Civ 908.

If courts were to examine the probabilities of grave risk to a child in a city such as New York compared to Tel Aviv, the Article 13b defense would either turn into complex statistical studies or depend on the nature of the various media outlets to which the court is exposed. It is thus imperative that the court rely on probative evidence which meets the demanding standards of the Abduction Convention for exceptions to the duty to return.

The Family Division of the High Court of Justice in London recently considered the war zone defense in an application for the return of a minor

child to the Ukraine, M and F, 2024 EWHC 1689 (Fam), July 1, 2024). The court noted the difficulties of a court in evaluating references to media reports or some external bodies or academic commentaries in evaluating the accuracy of the core information.

The court also considered the appropriate weight to be given to governmental travel advisories. It found that the weight they should be afforded is limited. "*It is inevitably the case that foreign travelers face a different and heightened risk from that of Ukrainian nationals who have lived, daily, with the challenges and privations of war for some time and have adapted their lives in response to it. Both …. told me, for example that some people in Kyiv (which M confirmed included her family) had installed generators as a backup during electricity cuts. This makes life much easier and safer. The UK traveler may not have access to such resources*." (par. 44).

"*Though sirens are still sounded, in fact, the citizens of Kyiv rely on and are familiar with mobile phone alerts, generated by government apps. Dr. Yedeliev suggested that these might not always be speedily accessible to foreign travelers or that they might even be unaware of them. There are other obvious challenges, for example, in relation to language. The risk matrix is, therefore, wholly different for UK nationals. The guidance is prepared for an entirely different purpose from the exercise that I am engaged in here."* (paragraph 45).

A recent case of the Higher Regional Court of Stuttgart, Reference number 17 UF 71/24 of May 23, 2024, illustrates the approach to the war zone defense as presented by this brief. The appellate court distinguished between the situation in the Ukraine and the one in Israel. First, it held that the article 13b exception must be interpreted restrictively.

It then enumerated three factors in rejecting the defense.

1. Governmental travel warnings alone are not sufficient to establish a defense under Article 13b. The court gave preference to the security assessments of the Israeli authorities. The Home Front Command of the Israeli Defense Forces showed that the region in question had the lowest alert level and full activity was permitted, (schools and businesses were open, travel was not restricted).

2. The court found that the missile defense system in Israel (The Iron Dome) is highly effective and there is no concrete risk from missile attacks.

3. Third, despite the state of war in the Middle East it not comparable to the situation in the Ukraine from the point of view of danger to individual civilians. While Ukraine is engaged in a conflict on its own territory by an invading power, Israel is conducting the fighting in an area outside its territory. The October 7th incursion was a onetime occurrence which is highly unlikely to be repeated.

The Stuttgart Court therefore rejected the grave risk defense and ordered the child's return to Israel.

A recent United Kingdom case also rejected the war zone defense and order the summary return to Israel. The mother raised the Article 13b defense due to the military conflict which resulted from the October 7 terrorist attack from Gaza. The High Court held that the evidence must demonstrate a particular risk to the children involved.

A general claim of a real possibility of being killed or seriously injured by the war was not sufficient proof to establish the war zone defense. The court found that a letter from the minor's school which affirmed classes being conducted as usual carried more weight than the unsubstantiated claims of possible grave risk. GL v. HL, High Court of Justice, Family Division, [2004] EWHC 1879, July 9, 2024.

The case law is clear that Article 13b defenses must be given a restrictive interpretation as in all defenses to a return order and in some jurisdictions an even higher standard must be met. The case law also focuses on the potential grave risk to the individual child and not on the general security situation of the country involved. Such assessments need to be based on probative evidence and not merely media reports or governmental travel advisories.

Concerning the separation between the abducting parent and the return of the child creating a grave risk, the courts have consistently held that the abducting parent cannot benefit from the abduction by claiming that the return will place the child in grave risk of psychological harm.

"*A removing parent must not be allowed to abduct a child and then-when brought to court-complain that the child has grown used to the surroundings to which they were abducted"*. Friedrich, ibid, p.1067

The High Court of South Africa, Cape of Good Hope, Provincial Division court held that an abductor should not be entitled to create a psychological situation and then rely on it as a defense. This is in line with established case law in the other contracting states. Family Advocate Cape Town and Chirume v. Chirume, Case no. 6090/05, December, 2005.

It is the abduction that causes the disruption which accompanies the subsequent return. It is not a vehicle to be used by abductors to litigate the child's best interests.

2. Is the established principle that defenses are to be interpreted restrictively not applicable to the Article 13b defense?

As the official Convention rapporteur, Prof. Elisa Perez-Vera stated in paragraph 34 of her Explanatory Report, " *To conclude our consideration of the problems with which this paragraph deals (*Article 13, amicus

authors*), it would be necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter*."

The United States District Court for the second circuit held that all the defenses, or exceptions, to the obligation to order a child's return are "*to be construed narrowly*". Ermini v Vittori, 758 F.3d 153, 161 (2nd Cir. 2015).

The South African Court in Chirume (ibid.), noted that courts in other contracting states had adopted a restrictive interpretation in applying Article 13(1)b and followed suit.

3. Purpose of a Hague Abduction Convention proceeding - determination of international jurisdiction or custody ruling

Courts have held that the exceptions to the Abduction Convention "*do not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent."* Blondin v. Dubois, 189 F.3d 240, 246 (2d Cir. 1999), U.S. federal appeals court.

The District Court of Ohio stated that " *… in proceedings under the Convention, the court's role is not to make traditional custody decisions. It is to determine in what jurisdiction the child should be physically located, so that the proper jurisdiction can make custody decisions*." Ciotola v. Fiocca, 86 Ohio Misc. 2d 24.

*"Pursuant to Article 19 of the Convention and section 2(b)(4) of the Act, (*the **United States International Child Abduction and Remedies Act**, amicus brief note) *a United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim."*, Friedrich v Friedrich, 983 F.2d 1396 (6th Cir. 1996) (Friedrich I).

4. Do the provisions of the UN Convention on the Rights of the Child prevail over the Hague Convention in a return application?

The United Nations Convention on the Rights of the Child contains two articles that address international child abduction. According to Article 11 of the UN Convention, declares:

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 35 of the UN Convention States calls upon the Parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

The Hague Abduction Convention itself provides for a stay of any custody proceedings initiated prior to a return petition until the court hearing the Hague proceeding has reached its conclusion. (Article 16 of the Hague Convention).

Furthermore, the summary proceedings in which Hague cases are to be conducted indicate that those proceedings are to be given priority over other child related proceedings (Article 11, providing for a six - week period).

In some jurisdictions, such as Israel, the implementing Hague AbductionConvention legislation specifically gives priority to the Hague Convention over all other proceedings, (Hague Convention Act, (Return of Abducted Children) 5751-1991, paragraph 2).

No reported case law suggests that the UN Convention on the Rights of a Child should take priority over a Hague Abduction Convention proceeding. Even if it were held that the UN Convention takes priority, there is nothing to support the notion that Article 3 of the UN Convention takes priority over Articles 11 and 35 of that Convention.

5. Can a court consider the child's acclimation in her new environment despite the fact that the petition for return was filed only four months after the unlawful removal or retention?

The purpose of the Hague Abduction Convention is to return a minor child who has been wrongfully removed or retained to his or her country of habitual residence as swiftly as possible. It is an instrument to determine jurisdiction, not custody. The Hague Abduction Convention therefore does not apply a best interests test but rather determines which country is the appropriate forum to determine the child's best interests.

The attempt to evaluate the child's integration into the new surroundings is another way of implementing a best interests test into what should be a purely jurisdictional question.

The Hague Abduction Convention draws a clear distinction between petitions that are filed within twelve months of the unlawful removal or retention and those that are filed subsequent to that period, (Article 12 of the Convention). The purpose of this distinction is to prevent a situation where the return of the child to his or her habitual residence might be as

traumatic as the original abduction. As with any cut- off point, one could make an argument that there is a certain arbitrariness to it. However, the Convention is clear that in cases where the petition for return is filed within twelve months, the court must order the return, unless one of the narrow defenses can be proven.

The Hague Abduction Convention does not provide for an evaluation of the child's acclimation to the new surroundings in cases where the Convention is filed within the twelve month period. Once it has been determined that there was no parental intent to change the child's habitual residence, there is no need for the court to consider whether or not the child has acclimated to the new surroundings.

There are two distinct reasons why the child's acclimation should not be an element in determining a defense to a wrongful removal or retention.

The first reason is the nature of the proceedings. A petition under the Hague Abduction Convention is a summary proceeding, one which is envisioned to conclude within six weeks. An investigation of a child's acclimation to the new surroundings requires reports of psychologists or social workers who examine the child's development in the new state, including performance in school, making of new friends, acquisition of language skills and other factors that could determine acclimation. Such an examination is another way of stating that a best interests test is to be performed, which is contrary to the Convention goal of a prompt return.

The second reason relates to deterrence. In order for a parent contemplating the removal of a child to recognize whether such an act would be unlawful, there needs to be criteria that are recognizable at the time the removal is contemplated. While there may be a factual dispute as to whether or not consent was given, it is at least an issue that can be analyzed before making a move. The possible acclimation of a child is highly speculative and can only be determined after the removal has already occurred. A parent who believes that their child will quickly acclimate may believe that their otherwise unlawful removal will be justified.

Finally, the Hague Abduction Convention strives for uniformity in its implementation. By assessing the acclimation of a child in determining habitual residence, courts may be reaching opposite decisions on identical fact patterns, the difference in the outcome being determined by how well one child makes new friends or learns a new language as opposed to another child.

6. **Is there a rebuttable presumption that a seven year old child is of sufficient age and maturity for the court to consider her views?**

As an affirmative defense, the party claiming that the child is of sufficient age and maturity has the burden of proving that claim. The United States statute adopting the Hague Convention spells it out clearly: In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing… by a preponderance of the evidence that any exception set for the in Article 12 or 13 of the Convention applies. (22 U.S.C. Sec. 9003(e)(2)(B).

The Swiss Federal Supreme Court rejected the claim of the abducting father that the views of his thirteen year old son should be considered. The Court ruled that despite his age, the minor lacked the ability to understand the proceedings and had internalized the paternal views instilled in him in a manipulative manner. Decision number 5A-952/2021, January, 2022.

While there are rare cases in which a seven year old's objections were taken into account, there is no presumption that a child of any age is sufficiently mature for their views to be considered.

Respectfully submitted,

IAFL Amicus Curiae Committee:

Edwin Freedman, Chair
Tel Aviv, Israel
edwin@edfreedman.com

Jacqueline Renton
London, England
jcr@4pb.com

Tim Amos
London, England
t.amos@qeb.co.uk

Tim Scott
London, England
tscott@29br.co.uk

Ian Kennedy
Melbourne, Australia
Ian.kennedy@kennedylaw.com.au

Alice Meier-Bourdeau
Paris, France
a.meierbourdeau@gmail.com

Rahima Nato-Kalfan
Paris, France
mk@bwg.law

Melissa Kucinski
Washington, D.C.
melissa@mkfamily.law

Richard Min
New York, NY
rmin@gkmrlaw.com

Konstantinos Rokas
Athens, Greece
konstantinosrokas@yahoo.com

Karabo Ozah
University of Pretoria
South Africa
karabo.ozah@up.ac.za

215\2\44