

**The Seventh Meeting of the Special Commission on the Practical Operation of  
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**[DRAFT] GUIDE TO GOOD PRACTICE ON ARTICLE 13(1)(B) OF THE  
HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION**

**Part V - Article 13(1)(b)**

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## Introduction

### 1. Background to the Guide to Good Practice on Article 13(1)(b)

1. This Guide to Good Practice addresses **Article 13(1)(b)** of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the “1980 Convention” or simply “the Convention”), also known as the “grave risk exception”.<sup>1</sup>

2. Article 13(1)(b) is among the most commonly raised exceptions to the return of a child wrongfully removed or retained abroad, and an exception upon which competent authorities have most commonly relied upon when refusing to return a child under the Convention—sometimes, however, in combination with other exceptions to return.<sup>2</sup> Despite reports that the exception is often raised as a defence to return, judicial decisions for the non-return of a child based on Article 13(1)(b) are relatively rare in practice,<sup>3</sup> underlining the exceptional character of this defence.

3. Article 13(1)(b) reads, in full:

“[1] Notwithstanding the provisions of the preceding Article [12], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –  
[...]

b) 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.”

4. Due in particular to the cross-border and time-sensitive nature of 1980 Convention return proceedings, in combination with the sensitivity of various subject-matters which may be raised under the grave risk exception, Article 13(1)(b)<sup>4</sup> can at times be a challenging provision to apply for competent authorities, namely the courts, in the requested State seized with proceedings for the return of children.<sup>5</sup>

5. Case law from various national jurisdictions<sup>6</sup> shows that the provision may be applied differently among jurisdictions, and also among competent authorities within a given

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<sup>1</sup> Unless provided otherwise, a reference to “grave risk” in this Guide is a reference to “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”. The general exception to return under Art. 13(1)(b) is also referred to as the “grave risk exception” in this Guide.

<sup>2</sup> According to statistics for the year 2008 on the operation of the 1980 Convention, collected in connection with the Sixth Special Commission to review the practical operation of the Convention. See Prel. Doc. No 8 A (update of November 2011), “A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report” drawn up by N. Lowe, p. 6, available at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission meetings”, “Previous Special Commission meetings” then “Sixth Special Commission meeting”. [Statistical information reported in this draft will be updated with more recent data from 2015 cases when available from the current study by Professor Nigel Lowe.]

<sup>3</sup> 15% of all cases reported in 2008 resulted in a judicial decision for non-return, with only 27% of these decisions for non-return based upon Art. 13(1)(b) (sometimes combined with reliance on other exceptions), *i.e.*, about 4% of cases reported in 2008. In the same study it was found that “17% [of non-return cases] were refused following the child’s objections, 15% because the child was not found to be habitually resident in the Requesting State and 13% citing Article 12.” (*ibid.*)

<sup>4</sup> Unless otherwise specified, a reference to an Article in the text or a footnote of this Guide is a reference to an Article of the 1980 Convention.

<sup>5</sup> Unless otherwise specified, a reference to a “competent authority” in this Guide is a reference to the court or other body seized with the proceedings for the return of children under the 1980 Convention. Competent authorities under the Convention may be of a judicial or administrative nature (see Art. 12). The “competent authority” should not be confused with the Central Authority under the 1980 Convention (see Part III of this Guide for a discussion of the latter).

<sup>6</sup> Case law on Art. 13(1)(b) is included in the International Child Abduction Database (INCADAT), available at < [www.incadat.com](http://www.incadat.com) >, which aims to promote the uniform application and interpretation of the 1980 Convention at the global level. See also the INCADAT “Case law analysis Section”, under “Exceptions to Return” then “Grave Risk of Harm”. Case law analysis was prepared by P.E. McEleavy, University of Dundee, United Kingdom.

jurisdiction. A prime motivation of this Guide is that, due to the international character of the 1980 Convention, there is a need to promote, to the extent feasible, consistency in the instrument's application at the global level.<sup>7</sup>

6. Concerns have also been raised in particular at past Special Commissions (see Section 4, below) to review the practical operation of the 1980 Convention that the grave risk exception may not always be applied in a restrictive fashion by competent authorities seized with return cases, as is required under the Convention.<sup>8</sup>

7. Furthermore, certain practices in the application of Article 13(1)(b) may cause undue delay in the resolution of the case, contrary to the Convention's call for expeditious proceedings.<sup>9</sup> Such factors reduce the overall effectiveness of the Convention and result in greater legal uncertainty for children and families.

8. The grave risk exception may be raised in a broad range of situations, for example, a taking parent under Article 13(1)(b) may assert a grave risk of harm to the child resulting from a possible separation from siblings or a primary carer in the case of a return, a situation of domestic violence, sexual or other abuse of the child, or a combination of such factors. A variety of common case scenarios are set out in Part IV of this Guide.

9. The most recent available statistics indicate that international parental child abduction cases involving a sole or joint primary carer as the taking parent are currently the most prevalent.<sup>10</sup> In such instances, the grave risk exception may be raised, for example, if a taking parent is unable to return with the child to the State of habitual residence; the resulting separation from the taking parent may be argued to create a grave risk for the child, particularly if that child is very young.

10. Additionally, since the drafting of the Convention, there have been significant evolutions in the domestic law of many jurisdictions from sole or primary carer models to shared parental responsibility models. Whereas previously it may have been common for mothers to have an order for primary custody or sole parental responsibility and their departure with a child from a given jurisdiction would not raise issues under the 1980 Convention. Now, with many more domestic models of shared parental responsibility, both parents will often have restrictions on their ability to move freely across international borders with their children.

11. Competent authorities may also deal with assertions of grave risk involving domestic violence towards a parent, a child, or towards a parent and child.<sup>11</sup> Domestic violence may include various forms and degrees of physical, psychological, sexual, emotional, and, in some instances, financial abuse. Allegations may involve the child as the "direct victim" or as an "indirect victim" where the child is exposed to or is subjected to the effects of domestic violence directed towards the other parent ("spousal abuse", "spousal violence" or "intimate partner violence").

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<sup>7</sup> See for example, Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part II – *Implementing Measures*, Bristol, Family Law (Jordan Publishing Ltd.), 2011 (hereinafter, "Guide to Good Practice on Implementing Measures"). In particular, see Section 1.4 "Consistent implementation and interpretation of the Convention: The provisions of the Convention should be implemented bearing in mind the goal of international consistency in application of the Convention and in its interpretation" and Section 3.4 "A continuing process of implementation: The successful operation of the 1980 Hague Convention requires that the Convention be consistently applied by all States Parties".

<sup>8</sup> See E. Pérez-Vera, "Explanatory Report on the 1980 Hague Child Abduction Convention", in *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982 (hereinafter, "Explanatory Report"), para. 34. In relation to the restrictive application of Art. 13(1)(b), see *infra*, paras 42 *et seq.*

<sup>9</sup> See in particular Arts 2 and 11 of the Convention; see also *infra*, paras 91 *et seq.*

<sup>10</sup> N. Lowe (*op. cit.* note 2), paras 42 and 46-48.

<sup>11</sup> Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on the increase as a litigation or delay tactic on the part of taking parents, due to the limited exceptions available under the Convention. It is for the competent authority hearing the case to assess the substance, veracity and seriousness of any allegations, to the extent required within the limited scope of 13(1)(b) proceedings.



12. Through modern research and experience, more is known about the effects on a child of both direct abuse and exposure to intimate partner violence. It has been found, for example, that psychological harm to the child due to exposure to intimate partner violence may in some instances be as significant as direct abuse (although the impacts on the child must be evaluated on a case-by-case basis). In parallel, more and more States recognise and address the potential impacts of domestic violence and provide programmes and services to support victims (see Annex 3 for more information on domestic violence). In the context of the limited scope of return proceedings where Article 13(1)(b) is raised, it can be difficult for competent authorities to evaluate such circumstances to ascertain whether a grave risk of harm may be present for a child.

13. Moreover, since the adoption of the Convention, there have been changes in international legal frameworks. For example, at the global level, the adoption of the *United Nations Convention on the Rights of the Child of 1989* (hereinafter, the “UNCRC”) has affected such issues as the participation of children in return proceedings under the 1980 Convention (see Annex 4: United Nations Convention on the Rights of the Child (UNCRC), General Comment No. 12 (2009)), including where the Article 13(1)(b) exception is raised.<sup>12</sup> At the regional level, the adoption of the Brussels IIa Regulation<sup>13</sup> within the European Union (EU) has prescribed the way return proceedings ought to be carried out within EU Member States<sup>14</sup> where the Regulation is applicable.<sup>15</sup> To some extent as well, the interpretation of Article 8 (the “Right to respect for private and family life”) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950* (hereinafter, the “ECHR”) by the European Court of Human Rights has also influenced the conduct of return proceedings under the 1980 Convention.<sup>16</sup>

14. Finally, international co-operation tools and practices have greatly developed in recent years. Special Commissions to review the operation of the 1980 Convention have elaborated principles and suggested good practices with respect to the “safe return” of a child, as well as an accompanying parent, where relevant (see Annex 2). Likewise, Central Authorities designated under the Convention (see Parts II.6 and III, below), and judges hearing Hague proceedings, through the use of direct judicial communications and the International Hague Network of Judges (see Part II.5 and Annex 5) and other techniques (see Part II), have developed a range of helpful practices. A corollary goal of the Guide is to encourage closer international co-operation for the optimal operation of the Convention, in the interests of children and families.

## 2. Objectives and scope of this Guide

### i. Promoting consistency

15. Bearing in mind the above background, the objective of this Guide is to promote greater consistency in the application and interpretation of Article 13(1)(b) in accordance with the terms and objectives of the 1980 Convention, taking into account recognised interpretative aids, such as past Conclusions and Recommendations of Special Commissions, the Convention’s Explanatory Report and existing Guides to Good Practice on the 1980 Convention.<sup>17</sup> To achieve

<sup>12</sup> See, e.g., Art. 12 of the UNCRC. See also Part II, Section 6 of this Guide.

<sup>13</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. See in particular Art. 11 of the Regulation.

<sup>14</sup> The Brussels IIa Regulation is directly applicable in all Member States of the European Union with the exception of Denmark, which is not bound by the Regulation, nor subject to its application; see Recital No 31 and Art. 2(3) of the Brussels IIa Regulation.

<sup>15</sup> See *infra*, paras 68 *et seq.*

<sup>16</sup> For summary analysis, see for example, P. Beaumont and L. Walker, “Post *Neulinger* Case Law of the European Court of Human Rights on the Hague Child Abduction Convention”, *A Commitment to Private International Law Essays in honour of Hans van Loon*, Cambridge/Antwerp/Portland, Intersentia, 2013; and P. Beaumont *et al.*, “Child Abduction: Recent Jurisprudence of the European Court of Human Rights”, *International and Comparative Law Quarterly*, Vol. 64, No. 1, 2015.

<sup>17</sup> See for example, Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Section 8. See also the three other existing Guides to Good Practice, all available at < [www.hcch.net](http://www.hcch.net) > under “Publications”: the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I - Central Authority Practice* (Jordan Publishing, 2003) (hereinafter, “Guide to Good Practice on Central Authority Practice”); the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the*

this objective, the Guide offers information and guidance on this Article, in particular, by presenting good practices taken from a variety of jurisdictions, many of which have been shared by members of the Working Group tasked with the development of this Guide.<sup>18</sup>

## ii. Non-specific and non-binding nature of good practices

16. Although addressing interpretative issues from a general perspective, the Guide **is not intended** to direct the interpretation of Article 13(1)(b) in individual cases. This remains “an exclusive matter for the authority competent to decide on the return,”<sup>19</sup> having due regard for the particular facts of each individual case. It is well-known that 1980 Convention cases are highly fact-specific, and competent authorities and others are urged to keep this in mind when consulting this Guide.

17. Further, it is important to emphasize that nothing in this Guide may be construed to be binding upon Contracting States to the 1980 Convention or to other Hague Conventions and their judicial or other authorities. The good practices described in this Guide are purely advisory in nature, and are subject to national laws and procedures, including differences due to legal tradition. Moreover, the Guide is not intended to describe the legal position in all Contracting States and reference to jurisprudence and comparative law is largely confined to footnotes.<sup>20</sup>

18. All Contracting States are encouraged to review their own practices in the application of Article 13(1)(b) and, where appropriate and feasible, to improve them.

## iii. For whom the Guide is intended: judicial and other competent authorities, Central Authorities and other system actors

19. The information in this Guide is intended to assist judges or other competent authorities seized of return proceedings, in their function of assessing the grave risk exception when it is raised before them, as the competent authority hearing a return application and deciding on the merits of the case.<sup>21</sup>

20. The Guide also contains information about the role of Central Authorities designated under the Convention.<sup>22</sup> It offers good practices that should assist Central Authority personnel in dealing with incoming and outgoing cases where the Article 13(1)(b) exception is raised and held to be of relevance by the competent authorities, thereby contributing to achieving efficient and expeditious proceedings.

21. Finally, the Guide may serve as an information tool for other authorities and persons involved in child abduction cases, *e.g.*, child welfare officers, child psychologists and other experts, as well as private practitioners. Among other things, the Guide may enable a better

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*Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2005) (hereinafter, “Guide to Good Practice on Preventive Measures”); and the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010) (hereinafter, “Guide to Good Practice on Enforcement”).

<sup>18</sup> See *infra*, note 24.

<sup>19</sup> “Report of Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012)” (hereinafter, “Report of Part II of the Sixth Special Commission”).

<sup>20</sup> Such information is given by way of example, and competent authorities and others are referred to their national case law and INCADAT (see Part II.2, *infra*) for further information and updates as to how competent authorities may be handling various issues in relation to Art. 13(1)(b).

<sup>21</sup> The Convention envisages that the proceedings related to the return of the child be conducted in the State to which the child has been removed or in which the child is being retained (the “requested State”). In the great majority of the Contracting States to the 1980 Convention, Hague return cases lie within the purview of the judiciary; only in very few States are these cases entrusted to an administrative authority (*e.g.*, in Armenia, The former Yugoslav Republic of Macedonia). Useful information about the process is provided in the Country Profiles completed by individual Contracting States available at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Country Profiles” then “Responses”. See also the Report of Part II of the Sixth Special Commission (*op. cit.* note 19), para. 49.

<sup>22</sup> See Art. 6 of the 1980 Convention.

understanding of how Article 13(1)(b) cases are dealt with by the judiciary and other competent authorities.

#### iv. Mutually-supporting nature of the 1980 Convention and the 1996 Convention

22. Although the Guide focuses on Article 13(1)(b), other provisions of the 1980 Convention and other international instruments are discussed to the extent that they may play a role in the application of this article. In particular, where it is in force among States, the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, the "1996 Convention"), may facilitate the safe return of children where the grave risk exception has been raised.<sup>23</sup>

#### v. Acknowledgment

23. The Permanent Bureau would like to thank the many experts whose knowledge and experience have contributed to this Guide. Particular thanks are due to the members of the Working Group on the development of the Guide, which consisted of judges, government officials (in particular Central Authority personnel), academic / cross-disciplinary experts and private practitioners from various jurisdictions.<sup>24</sup>

<sup>23</sup> See *infra*, paras 147 *et seq.* on measures of protection under Art. 11 of the 1996 Convention.

<sup>24</sup> Judges: The Honourable Diana Bryant (Australia), Chair, Dra. María Lilián Bendahan Silvera (Uruguay), Mag. Oscar Gregorio Cervera Rivero (Mexico), The Honourable Jacques Chamberland (Canada), The Honourable Bebe Pui Ying Chu (China, Hong Kong SAR), The Honourable Martina Erb-Klünemann (Germany), Judge Yetkin Ergün (Turkey), The Honourable Judge Francisco Javier Forcada Miranda (Spain), The Honourable Ramona A. Gonzalez (United States of America), The Right Honourable Lady Hale (United Kingdom), Judge Torunn E. Kvisberg (Norway), Ms Annette C. Olland (Netherlands), Judge Belinda Van Heerden (retired) (South Africa), Mr Hironori Wanami (Japan); Government officials: Ms Aline Albuquerque (Brazil), Mr Hatice Seval Arslan (Turkey); Dr Frauke Bachler (Germany), Mrs Gonca Gülfem Bozdog (Turkey), Ms Natália Camba Martins (Brazil), Ms Marie-Alice Esterhazy (France), Mrs Victoria Granillo Ocampo (Argentina), Mr Christian Höhn (Germany), Ms Leslie Kaufman (Israel), Mr Francisco George Lima Beserra (Brazil), Ms Jocelyne Palenne (France), Ms Marie Riendeau (Canada), Ms Andrea Schulz (Germany), Ms Petunia Itumeleng Seabi-Mathope (South Africa), Mr Agris Skudra (Latvia), Mr Daniel Trecca (Uruguay), Ms Kumiko Tsukada (Japan), Mr Yuta Yamasaki (Japan), Mr Juan Francisco Zarricueta Baeza (Chile); Academic / cross-disciplinary experts and private practitioners: Prof. Nicholas Bala (Canada), Mr Stephen J. Cullen (United States of America), Ms Mikiko Otani (Japan), Dr Heidi Simoni (Switzerland), Ms Zenobia Du Toit (South Africa).

### 3. How to Use this Guide

This Guide, in general, is not intended to be read in one sitting, from cover to cover. Certain Parts are intended for specific authorities, and certain issues which may be relevant for a particular case, but not others, are contained in the Guide's various Sections and under relevant sub-headings. The below overview is meant to assist users of the Guide to navigate the various resources it contains.

1. The **Introduction** sets out background to the Guide, including its **objectives and scope**, and an important **disclaimer**
2. If you are a **Judicial or Administrative** authority (a "**Competent Authority**") hearing return proceedings:
  - Part I: Interpretative background**
    - a. Sets out Article 13(1)(b) within the framework of the 1980 Convention (Section 1)
    - b. Sets out main interpretive principles of Article 13(1)(b) itself (Section 2)
    - c. Mentions two related regional instruments in Europe and Latin America (Section 3)
  - Part II: The core part of the Guide for Competent Authorities sets out practical issues and approaches relevant to 13(1)(b) proceedings**
    - a. Section 1 provides an overview of good practice in the application of Article 13(1)(b)
    - b. Section 2 describes the INCADAT global case law database
    - c. Section 3 covers the general principles which should be applied to 13(1)(b) proceedings, including the limited scope of the proceedings, and the need for expedition and judicial case management
    - d. Section 4 identifies two common approaches to analysing the grave risk exception
    - e. Sections 5 and 6 deal with direct judicial communications and Central Authority assistance
    - f. Section 7 covers "safe return" and protective measures
    - g. Section 8 deals with evidence and information, including, if applicable, expert opinion
    - h. Section 9 covers involvement of the child in return proceedings
    - i. Section 10 deals with mediation
    - j. Section 11 covers other practical matters in return proceedings
  - Part IV: Case Scenarios / Fact Patterns**  
Identifies common fact patterns which arise in 13(1)(b) cases and possible approaches to deal effectively with the issues raised
3. **Annexes** to the Guide contain additional important information, including on: **safe return** of a child and an accompanying parent, where relevant (Annex 2); **domestic violence** (Annex 3); information on the right of the child to be heard under the **UNCRC** (Annex 4); and **Principles on Direct Judicial Communications** (Annex 5)
4. If you are an official in a **Central Authority**, **Part III** shares ways that Central Authorities can be of assistance in 13(1)(b) cases
5. **Part V** of the Guide makes suggestions for **further resources and training** on the operation of the 1980 Convention and 13(1)(b) cases

Further information, interpretative aids and the full text of the 1980 Convention are available at: [www.hcch.net](http://www.hcch.net), under "Child Abduction"

For international case law on the application of the 1980 Convention, see INCADAT: [www.incadat.com](http://www.incadat.com)

#### 4. Discussion of Article 13(1)(b) at Special Commission meetings to review the 1980 Convention

24. Article 13(1)(b) has been the subject of discussion at Special Commission meetings convened to review the practical operation of the 1980 Convention.

25. In 1997, experts at the Third Meeting of the Special Commission to review the operation of the 1980 Convention noted in discussion that Article 13(1)(b) “form[ed] a sensitive part of the Convention”. They stressed the need to interpret Article 13(1)(b) in a restrictive way as “if misused, it could destroy the effectiveness of the Convention” and stressed that “the courts of the child’s habitual residence [were] the most appropriate to adjudicate custody and related claims”. Some experts argued, however, that “courts should show greater sensitivity to the dangers a child may face upon return”. Nevertheless, it was emphasized that “courts should not commence a detailed social enquiry solely on the basis of an allegation that the child would be harmed if returned, as such proceedings hold the danger of leading to a decision on the merits of the case”.<sup>25</sup>

26. In 2001, experts at the Fourth Meeting of the Special Commission noted that the Article 13(1)(b) exception “ha[d] generally been narrowly construed by courts in the Contracting States” as statistics had shown a relatively small number of return applications which were refused on the basis of this exception. The meeting concluded that “it [was] in keeping with the objectives of the Convention, as confirmed in the Explanatory Report [...], to interpret this defence in a restrictive fashion”.<sup>26</sup> This conclusion was reaffirmed at the Fifth Meeting of the Special Commission in 2006.<sup>27</sup>

27. In 2011, at Part I of the Sixth Meeting of the Special Commission, discussion concerning the grave risk exception gave some focus to domestic violence allegations and return proceedings, which some had observed were more common as taking parents were now more frequently mothers.<sup>28</sup> It was also noted that “a large number of jurisdictions [were] addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training”. It was concluded that “[...] the allegation of domestic violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of the grave risk exception”.<sup>29</sup>

28. The discussion on the issue of domestic violence in return proceedings continued at Part II of the Sixth Meeting of the Special Commission in 2012 where it was concluded that “the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1)(b)), including allegations of domestic violence, [were] an exclusive matter for the authority competent to decide on the return, having due regard to the aim of the 1980

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<sup>25</sup> See the “Report on the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)”, available at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission meetings” and “Previous Special Commission meetings”, Question 27, para. 58.

<sup>26</sup> “Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001)” (hereinafter, “Conclusions and Recommendations of the Fourth Special Commission”), para. 4.3, available at < [www.hcch.net](http://www.hcch.net) > (path indicated *ibid.*).

<sup>27</sup> “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October - 9 November 2006)”, para. 1.4.2, available at < [www.hcch.net](http://www.hcch.net) > (path indicated in note 25).

<sup>28</sup> See the “Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)” (hereinafter, “Report of Part I of the Sixth Special Commission”), paras 92 *et seq.* See also “Domestic and family violence and the Article 13 ‘grave risk exception’ in the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: a reflection paper”, drawn up by the Permanent Bureau, Prel. Doc. No 9 of May 2011. Both documents are available at < [www.hcch.net](http://www.hcch.net) > (path indicated in note 25).

<sup>29</sup> See “Conclusions and Recommendations of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention” (hereinafter, “Conclusions and Recommendations of the Sixth Special Commission”), available at < [www.hcch.net](http://www.hcch.net) > (path indicated in note 25), paras 35 and 36.

Convention to secure the prompt and safe return of the child”.<sup>30</sup> The experts suggested that further work should be conducted to promote a consistent interpretation of Article 13(1)(b) and some noted that a consistent application of this exception was important to ensure the safety of the child.<sup>31</sup>

29. The majority of experts considered that any future work should not be limited to allegations of domestic and family violence within the context of Article 13(1)(b), but should include the range of situations where a “grave risk of harm” may be asserted. Several experts explained that limiting the examination of Article 13(1)(b) to domestic violence could lead to a different standard being applied to cases where domestic violence is alleged.<sup>32</sup> It should therefore be stressed from the outset that although the Guide perhaps contains more extensive discussion of claims related to domestic violence than to other heads of grave risk of harm (due to the reasons outlined above), claims relating to domestic violence must be considered by the same standard as any other claim under Article 13(1)(b), subject to the same burden and standard of proof.

30. As a result of this discussion, the experts recommended that “further work be undertaken to promote consistency in the interpretation and application of Article 13(1)(b) including, but not limited to, allegations of domestic and family violence” and that “the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b) with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice”.<sup>33</sup>

31. In response to these recommendations, the 2012 Council on General Affairs and Policy of the Hague Conference decided “to establish a Working Group, composed of a broad range of experts, including judges, Central Authorities and cross-disciplinary experts, to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b) of the 1980 Child Abduction Convention, with a component to provide guidance specifically directed to judicial authorities”.<sup>34</sup> This decision constitutes the mandate for the development of this Guide.

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<sup>30</sup> *Ibid.*, para. 80.

<sup>31</sup> See the Report of Part II of the Sixth Special Commission (*op. cit.* note 19), paras 43 *et seq.*

<sup>32</sup> *Ibid.*, at para. 50.

<sup>33</sup> See the Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), paras 81-82.

<sup>34</sup> See para. 6 of the Conclusions and Recommendations of the 2012 Council on General Affairs and Policy, available at < [www.hcch.net](http://www.hcch.net) > under “Governance” then “Council on General Affairs and Policy”.



## PART I: Interpretative background

### 1. Article 13(1)(b) within the normative system of the 1980 Convention

#### 1. Objectives and underlying principles of the 1980 Convention and the UNCRC

32. The 1980 Convention is premised on the principle that the interests of children are of paramount importance in matters relating to their custody, as stated in the Convention's Preamble. Based on this conviction, the Convention was drafted to protect children internationally from the harmful effects of their wrongful removal or retention in a foreign State and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.<sup>35</sup>

33. The two principal articulated objectives of the Convention are:

- to secure the prompt return of children wrongfully removed to, or retained in, any Contracting State; and
- to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.<sup>36</sup>

34. To implement these objectives, the Convention creates a system of close co-operation among the judicial and administrative authorities of the Contracting States<sup>37</sup> and requests Contracting States to use the most expeditious procedures available under their own laws for Convention proceedings.<sup>38</sup>

35. The terms of the Convention reflect the basic assumption that the wrongful removal or retention of a child is generally prejudicial to the child's welfare<sup>39</sup> and that, in the majority of cases, it will be in the best interests of the child to return to the State of habitual residence where any issues regarding custody of or access to the child, including the right of a parent to relocate with the child to another State, should be resolved.<sup>40</sup> The prompt return of the child also answers the desire to re-establish a situation unilaterally altered by the taking parent (*i.e.*, to restore the *status quo ante*).<sup>41</sup>

36. The 1980 Convention furthers important provisions of the UNCRC related to the rights of children, including Articles 9(3) and 10(2) which establish the right of the child to maintain personal relations and direct contacts with both parents and Article 11 which seeks to combat illicit transfer and non-return of children abroad. The 1980 Convention also gives effect to Article 35 of the UNCRC, which aims, *inter alia*, to prevent the abduction of children.

<sup>35</sup> See the Preamble of the 1980 Convention.

<sup>36</sup> See Art. 1.

<sup>37</sup> See the Explanatory Report (*op. cit.* note 8), paras 35 *et seq.*

<sup>38</sup> See Art. 2. For more information on the use of expeditious procedures, see, *infra*, paras 91 *et seq.*

<sup>39</sup> The fact that international child abduction has detrimental effects on the child's welfare has been confirmed in various studies, *e.g.*, by M. Freeman, *International Child Abduction: the Effects*, Reunite International Child Abduction Centre, 2006 and *Parental Child Abduction: The Long-Term Effects*, International Centre for Family Law, Policy and Practice, 2014; G.L. Greif, "The long-term aftermath of child abduction: Two case studies and implications for family therapy", *American Journal of Family Therapy*, Vol. 37, 2009, pp. 273–286.

<sup>40</sup> See the Explanatory Report (*op. cit.* note 8), paras 20–26. In para. 24, it is stated that the philosophy of the Convention can be defined as follows: "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."

<sup>41</sup> See the Explanatory Report (*ibid.*), para. 17.

## ii. Duty to secure the prompt return of the child: Article 12

37. Article 12 sets out the duty to secure the prompt return of the child. It provides that the competent authority of the Contracting State to which the child has been wrongfully removed or where the child is being wrongfully retained, is required to order the return of the child forthwith where, at the date of the commencement of the proceedings before the requested competent authority, a period of less than one year has elapsed from the date of the wrongful removal or retention.<sup>42</sup> The competent authority also has an obligation to order the return even where the proceedings have been commenced after the expiration of the period of one year, unless it is demonstrated that the child is now settled in the new environment.<sup>43</sup>

38. In line with the Convention's objective to secure the *prompt* return of children,<sup>44</sup> Article 12(1) obliges the competent authority in the requested State to order the return "*forthwith*".<sup>45</sup> This obligation is reinforced by Article 11 which requires that judicial and administrative authorities should act expeditiously in proceedings for the return of children and that, if a decision has not been reached within six weeks from the commencement of the proceedings, the applicant or the Central Authority of the requested State (on its own initiative or if asked by the Central Authority of the requesting State) has the right to request a statement of the reasons for the delay.<sup>46</sup>

39. Although the Preamble to the Convention refers to the return to the "State of habitual residence", there is no such reference in Article 12 or in other Articles of the Convention. This omission is intentional and enables the competent authority in some circumstances to order the return of the child, where appropriate, to a place other than the State of habitual residence prior to the wrongful removal or retention, for example, in the case where an applicant no longer resides in that State.<sup>47</sup>

40. The Convention also does not specify to *whom* the child should be returned. In particular, it does not provide for the return of the child to the care of the *left-behind parent*. This flexibility reflects the underlying premise that the issue of who will care for the child upon the child's return is determined by a competent authority in the State of habitual residence in accordance with the law governing rights of custody including any order that may apply as between the parents or other interested persons.

41. The duty to secure the prompt return of the child is reinforced by Article 18, which states that the provisions of Chapter III of the Convention ("Return of children", Arts 8-20) do not limit the power of a judicial or administrative authority to order the return of the child at any time. It authorises the court seized with the return proceedings to order the child's return by invoking other provisions more favourable to the attainment of this end.<sup>48</sup>

<sup>42</sup> See Art. 12(1). For more information on Art. 12, see the Explanatory Report (*ibid.*), paras 106 *et seq.*

<sup>43</sup> See Art. 12(2). While the first paragraph of Art. 12 sets out the situations in which the authorities of the requested State are obliged to order the return of the child, the second paragraph provides for an exception to the obligation to return. It recognises that in certain cases where a long period of time has elapsed and the child has become settled in the requested State, the return of the child to the State of habitual residence may not serve the objective of protecting the best interests of the child by restoring the *status quo*, but will instead lead to further distress for the child. See for more information, *e.g.*, R. Schuz, *The Hague Child Abduction Convention – A critical analysis*, Oxford and Portland, Oregon, Hart Publishing, 2013, pp. 225 *et seq.*

<sup>44</sup> See the Preamble and Art. 1(a). The importance of securing a "prompt" return is also referred to in Art. 7(1).

<sup>45</sup> Unlike Art. 12(1), Art. 12(2) speaks merely about "return", not "return forthwith", considering that in the circumstances to which this provision applies, the return of the child would take place more than one year after the wrongful removal or retention; see the Explanatory Report (*op. cit.* note 8), para. 109.

<sup>46</sup> See in this context, *infra*, para. 96.

<sup>47</sup> See the Explanatory Report (*op. cit.* note 8), para. 110.

<sup>48</sup> See *ibid.*, paras 106 and 112.



### iii. Exceptions to the duty to secure the prompt return of the child

42. In Articles 12 (see above), 13 and 20, the Convention provides for limited exceptions or “defences” to return where, when raised and argued successfully to the appropriate standard of proof, the competent authority of the requested State is not bound to order the return of the child.<sup>49</sup>

#### *Other exceptions to return*

##### **1. Article 12**

- If 12 months have elapsed since the return proceedings were initiated and it is demonstrated that the child has settled in his or her new environment, the court may refuse to order the return of the child.

##### **2. Article 13(1)(a)**

- If it is established that the left-behind parent was not actually exercising his or her custody rights at the time of the removal or retention, a court is not bound to order the return of the child.
- Similarly, if it is established that the left-behind parent consented to or subsequently acquiesced in the removal or retention, a court is not bound to order the return of the child.

##### **3. Article 13(2)**

- The court may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

##### **4. Article 20**

- The return of the child may be refused if ordering the return would breach the fundamental principles of the requested State related to the protection of human rights and fundamental freedoms.

43. Through the enumerated exceptions, the Convention recognises that the wrongful removal or retention of a child can sometimes be justified by objective reasons which have to do either with the child’s person or with the environment with which the child is most closely connected and / or to which it is requested that he or she be returned.<sup>50</sup> The general assumption that a prompt return is in the best interests of the child can therefore be rebutted in the individual case.

44. The Explanatory Report states that the exceptions “must be applied only so far as they go but no further”, thus “in a restrictive fashion if the Convention is not to become a dead letter”.<sup>51</sup> It further warns that “a systematic invocation of the [...] 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 inspiration”.<sup>52</sup>

45. In relation to the exception in Article 13(1)(b), another danger is that a court may apply the exception so as to turn the proceedings on the return of the child into an adversarial contest

<sup>49</sup> See *supra*, note 10 (citing Prel. Doc. No 8 A para. 17 and paras 100 *et seq.*), which describes the last available global statistics analysing judicial reliance on the various exceptions. Concerning the relationship between the exceptions, see, *infra*, paras. 48 *et seq.*

<sup>50</sup> See the Explanatory Report (*op. cit.* note 8), para. 25.

<sup>51</sup> See in this context para. 4.3 of the Conclusions and Recommendations of the Fourth Special Commission (*op. cit.* note 26) which was confirmed again in the Conclusions and Recommendations of the Fifth meeting of the Special Commission (*op. cit.* note 27) available at < [www.hcch.net](http://www.hcch.net) > (path indicated in note 25).

<sup>52</sup> See, *ibid.*, para. 34. During the drafting process, a significant number of delegates acknowledged that if the exceptions were too broad, or were interpreted too broadly, they could effectively undermine the entire Convention. *E.g.*, the German delegation stated “The wider and vaguer the provision is worded, the greater the margin for the ‘abductor’ successfully to resist the return of the child. In the interest of an effective ‘functioning’ [...], the exceptions should be restricted as closely as possible and only the situations really worthy of an exception should be provided for.” See *Proceedings of the Fourteenth Session*, Tome III, *Child Abduction* (*op. cit.* note 8), p. 216.

on the merits of the custody question.<sup>53</sup> The court must avoid creating a form of jurisdiction which enables it to deal with questions that are for the State of habitual residence to decide.<sup>54</sup>

46. While, as noted in the Explanatory Report, a too broad application of the exceptions would undermine the Convention, the same would apply to an *overly* restrictive application. The Convention acknowledges in Articles 13 and 20 that there may be circumstances in which a return would be so detrimental to the interests of an individual child that it would be contrary to the objectives of the Convention to order the return of that child. A restrictive application of these Articles should therefore not mean that they should never be applied at all.<sup>55</sup> It is inevitable that in some cases the appropriate order would be to refuse to return the child.

47. It is also important to note that while return proceedings should be swift, the return mechanism under the 1980 Convention does not apply in an automatic manner. If grave risk has been established under Article 13(1)(b) and there are no adequate measures of protection available, a judge may decide to refuse the return of a child. This provision is the result of one of the delicate compromises reached by the drafters of the Convention.

#### **iv. Relationship between Article 13(1)(b), other exceptions to return and other case elements**

48. The exceptions set out in Articles 12, 13 and 20 apply discretely and are therefore examined separately by the court in the event that the taking parent or other body objecting to return raises more than one exception.<sup>56</sup>

49. In contrast, there may be instances where the exception set out in Article 13(2), relating to the objection of a child to return, has led to a consideration of the grave risk exception. For example, an older sibling may object to being returned under Article 13(2) and the court considers exercising its discretion to refuse to order the return of that child, finding that he or she has attained an age and degree of maturity at which it is appropriate to take account of the child's views. It may be asserted that if the older sibling does not return, a younger sibling (who does not object or who has not attained an age and degree of maturity at which it is appropriate to take account of the child's views), if returned, would be placed in an "intolerable situation" under Article 13(1)(b) due to the separation from the older sibling.<sup>57</sup>

50. Additionally, some research and case law has noted that dynamics of domestic / family violence may be relevant to the issue of habitual residence (under Arts 3 and 4) where, for example, family members are coerced or deceived into a move.<sup>58</sup>

<sup>53</sup> See, *e.g.*, the contributions from the United States of America during the drafting process stating, *i.a.*, that "broad exceptions will tend to turn virtually every return proceeding into an adversary contest on the merits of the custody question. No abductor's lawyer would fail to raise one or more of the exceptions"; see the *Proceedings of the Fourteenth Session*, Tome III, *Child Abduction (ibid.)*, pp. 242 and 301.

<sup>54</sup> Statement from the Irish delegation during the drafting process, see *ibid.*, p. 302.

<sup>55</sup> See in this sense, *e.g.*, the decision from the House of Lords, United Kingdom in *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 [INCADAT Reference: HC/E/UK 880], para. 51.

<sup>56</sup> For information on Art. 20, see, *e.g.*, the Explanatory Report (*op. cit.* note 8), paras 31-33 and para. 118. See also P.R. Beaumont and P.E. McEleavy, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, pp. 172 *et seq.* In *Re K. (Abduction: Psychological harm)* [1995] 2 FLR 550 [INCADAT Reference: HC/E/UK 96], the Court of Appeal of England and Wales (UK) noted that there is objection to adopting a construction of Art. 20 that would have the effect of overriding, or materially altering, the scope of any of the other Articles and in particular Art. 13(1)(b).

<sup>57</sup> See, *infra*, paras 279 *et seq.* in relation to the separation of the child from the child's sibling(s) upon return.

<sup>58</sup> See, for example, the study of Lindhorst & Edleson in which in 40% of the cases the taking parent stated that the move to the State from which they later departed was accomplished coercively through threats or dissimulation, T. Lindhorst and J.L. Edleson, *Battered Women, Their Children, and International Law*, Boston, Northeastern University Press, 2012, pp. 58-63. See also the following case law in which courts ruled that children's habitual residence was not established due to the coercive nature of the move, the United States District Court for the Eastern District of Washington in *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp.2d 1045 (E.D. Wash. 2001) [INCADAT Reference: HC/E/USf 482]; the United States District Court for the District of Utah, Central Division in *In re Ponath*, 829 F. Supp. 363 (D. Utah 1993) [INCADAT Reference: HC/E/USf 144]; and the United States District Court for the Southern District of Ohio, Western Division in *Ostevoll v. Ostevoll*, 2000 WL 1611123 (S.D. Ohio 2000) [INCADAT Reference: HC/E/USf 1145].

## 2. Scope of Article 13(1)(b)

51. According to Article 13(1)(b), the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes the child's return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". The grave risk exception derives from a consideration of the interests of the individual child, taking into account "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation".<sup>59</sup>

### i. The child as the focus of Article 13(1)(b)

52. The wording of Article 13(1)(b) ("that his or her return would expose the child") clarifies that the issue is whether the return of the child would subject the *child* to a grave risk, and not whether the return would place another party's safety at grave risk. Thus, it is the situation of the child which should be the prime focus of the inquiry.

53. However, Article 13(1)(b) does concern itself with the predicament of, for example, a taking parent, to the extent that the situation of the taking parent has an impact on the child. In a situation where there is evidence of a serious risk of harm to the taking parent upon his / her return with the child to the State of habitual residence, which cannot be adequately addressed by protective measures in that State, and which, if it occurred, would expose the *child* to a grave risk in accordance with Article 13(1)(b), the grave risk exception may be established.<sup>60</sup>

### ii. The "forward-looking" aspect of Article 13(1)(b)

54. The words used in Article 13(1)(b) ("grave risk that his or her return") also indicate that the exception is "forward-looking" in that it focuses on the circumstances of *the child upon return* and on whether those circumstances would expose the child to a grave risk.

55. Therefore, the examination of the grave risk exception cannot be limited to or primarily focused on an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. Rather, it requires a look to the future, *i.e.*, at the circumstances as they would be if the child were to be returned forthwith. The examination would then also include, when considered necessary, consideration of the availability of adequate and effective measures of protection that have been, or that could be, put into place in the State of habitual residence to ensure the safe return of the child, and an accompanying parent if relevant, to that State.<sup>61</sup>

56. In relation to the examination of the availability of adequate and effective measures of protection, mention can be made of two different approaches.<sup>62</sup> Some courts consider the availability of adequate and effective protective measures before or at the same time as examining whether the taking parent has established that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>63</sup> Other courts examine protective measures as an exercise of discretion under Article 13(1)(b), in a step that is made after the court has found that a grave risk is established.<sup>64</sup> Whether the court takes one or the other approach in an individual case does not lead to a different outcome as to whether the court will order the child's return or not, but may have an effect on the procedure, including its expedition.

<sup>59</sup> See the Explanatory Report (*op. cit.* note 8), para. 29. See also *supra*, para. 43.

<sup>60</sup> See Part II Section 7(iii) of this Guide. See also the Case Scenarios in Part IV of this Guide, as well as Annex 3.

<sup>61</sup> See, *infra*, paras 137 *et seq.* on protective measures in Article 13(1)(b) cases.

<sup>62</sup> See in this context the "Process Maps", *infra*, paras 107 *et seq.*

<sup>63</sup> In particular, courts applying the Brussels IIa Regulation consider the availability of adequate and effective measures of protection as part of the examination of whether a grave risk has been established due to Art. 11(4) of the Regulation, see, *infra*, paras 68 *et seq.*

<sup>64</sup> See *infra*, para 66.

### iii. “Grave risk”

57. The term “grave risk” reflects the intention of the drafters of an application of the exception in a restrictive fashion.<sup>65</sup> In fact, during the drafting process, the demands for a restrictive approach led to a narrower wording of Article 13(1)(b) than initially suggested. The initial term used in the exception was “substantial risk” which was replaced with “grave risk” since the word “grave” was a more intensive qualifier.<sup>66</sup>

58. Whether or not the asserted risk can be considered as “grave” depends on the facts of the individual case. Case law reflects, in general, that most courts across various jurisdictions have confirmed that the level of risk required to trigger the Article 13(1)(b) exception is high and have applied the exception in a restrictive way, in line with recommendations of past Special Commissions.<sup>67</sup>

### iv. Exposure to physical or psychological harm, or placement in an intolerable situation

59. Article 13(1)(b) contains the following three different categories of risk:

- a grave risk that the return would expose the child to physical harm;
- a grave risk that the return would expose the child to psychological harm; or
- a grave risk that the return would otherwise place the child in an intolerable situation.

60. While the three categories constitute distinct exceptions, they are inter-linked in that the term “otherwise” indicates that the physical or psychological harm is harm to an extent that also amounts to an intolerable situation.<sup>68</sup>

61. The term “intolerable” indicates that the exception requires that the potential physical or psychological harm to the child or the potential situation, in which the child would be placed upon return, be of such a degree that the child cannot reasonably be expected to tolerate it.<sup>69</sup>

62. Each category can be raised independently to justify an exception to the duty to secure the prompt return of the child and, therefore, depending on the facts of the individual case, the three categories have been raised in proceedings, each in its own right.<sup>70</sup> However, although separate, these categories are often employed together and courts have not always clearly distinguished between them in their judgments.<sup>71</sup>

### v. Burden of proof

63. The introductory *chapeau* of Article 13(1) provides that the burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation rests on the person, institution or other

<sup>65</sup> See, *supra*, paras 44-46.

<sup>66</sup> See *Proceedings of the Fourteenth Session*, Tome III, *Child Abduction* (*op. cit.* note 8), p. 362.

<sup>67</sup> See discussion of past Special Commissions discussed in Section 4 of the Introduction, above, and *e.g.*, the case law analysis section and relevant case law in INCADAT (*op. cit.* note 6). See also, *e.g.*, R. Schuz (*op. cit.* note 43), p. 273.

<sup>68</sup> See, *i.a.*, the Supreme Court of Canada in *Thomson v. Thomson* [1994] 3 SCR 551, 6 RFL (4th) 290 [INCADAT Reference: HC/E/CA 11] and the Supreme Court of the United Kingdom in *Re E. (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 A.C. 144 [INCADAT Reference: HC/E/UK 1068], para. 34.

<sup>69</sup> See, *e.g.*, the House of Lords of the United Kingdom in *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 [INCADAT Reference: HC/E/UK 880], para. 52 and the Supreme Court of the United Kingdom in *Re E. (Children) (Abduction: Custody Appeal)* (*ibid.*); see also OLG Karlsruhe, Germany, decision of 16 December 2014 – 2 UF 266/14 [not yet on INCADAT].

<sup>70</sup> See for information how the categories have been applied by courts, *e.g.*, P.R. Beaumont and P.E. McElevay (*op. cit.* note 56), pp. 138 *et seq.* and R. Schuz (*op. cit.* note 43), pp. 274 *et seq.*

<sup>71</sup> See, for example, M.H. Weiner, “Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases”, *American University Law Review*, Vol. 58, 2008.

body which opposes the child's return.<sup>72</sup> Thus, in practice in most cases, the burden of proof rests on a taking parent.

64. In order, among other things, to compensate for the burden of proof placed on a taking parent or another individual or body objecting to return, Article 13(3) states that the court seized with the return proceedings shall take into account information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence, which should be best placed to provide such information.<sup>73</sup>

## vi. Discretion to order or refuse return

65. The words "is not bound to order the return" in the introductory *chapeau* of Article 13(1) make clear that the judicial or administrative authority, upon the establishment of one of the exceptions, has discretion to order or to refuse to order the return of the child. Therefore, the exceptions contained in Article 13, when established, do not apply automatically in that they do not invariably result in the non-return of the child,<sup>74</sup> for example, when there are sufficient, concrete safeguards available in the State of habitual residence that effectively ameliorate a grave risk.

66. In the context of Article 13(1)(b) proceedings, as mentioned *supra*,<sup>75</sup> some courts view the examination of the availability of adequate and effective protective measures as part of exercising discretion, and thus as a step that is made after the court has found that a grave risk is established.

## 3. Application of Article 13(1)(b) in relation to regional instruments

67. In relation to the application of Article 13(1)(b), mention should be made of two important, related regional instruments, the Brussels IIa Regulation<sup>76</sup> and the *Inter-American Convention on the International Return of Children* (hereinafter, the "Inter-American Convention").<sup>77</sup>

### i. Article 11 of the Brussels IIa Regulation

68. For international child abduction cases between Member States of the European Union, with the exception of Denmark,<sup>78</sup> the 1980 Convention applies and is complemented by certain provisions of the Brussels IIa Regulation.<sup>79</sup> Relevant, in particular, is Article 11 of the Brussels IIa Regulation and pertinent jurisprudence from the Court of Justice of the European Union.<sup>80</sup>

<sup>72</sup> See the Explanatory Report (*op. cit.* note 8), para. 114 where it is stated, *i.a.*, that "in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum".

<sup>73</sup> See the Explanatory Report (*ibid.*), para. 117. See on Art. 13(3), *infra*, paras 163 *et seq.*

<sup>74</sup> See, *ibid.*, para. 113.

<sup>75</sup> See *supra*, para. 56 and the "Process Maps", *infra*, paras 107 *et seq.*

<sup>76</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. In 2016, the European Commission submitted a Proposal for a recast of the Brussels IIa Regulation (COM(2016) 411). The Regulation and the Proposal are available at < <http://eur-lex.europa.eu> >. All further references in this Guide regarding the Brussels IIa Regulation are subject to change in the process of the ongoing revision process of that instrument and the discussions thereof.

<sup>77</sup> The Inter-American Convention on the International Return of Children is available on the website of the Organization of American States at < [www.oas.org](http://www.oas.org) >, under "Documents" then "Treaties and Agreements". For information, see also the "Latin American Section" at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section".

<sup>78</sup> The Brussels IIa Regulation is directly applicable in all Member States of the European Union with the exception of Denmark, which is not bound by the Regulation, nor subject to its application; see Recital No 31 and Art. 2(3) of the Brussels IIa Regulation.

<sup>79</sup> See Recital No 17 and Art. 60(e) of the Brussels IIa Regulation.

<sup>80</sup> Relevant judgments from the Court of Justice of the European Union are available, *e.g.*, on the website of the Court of Justice of the European Union at < [curia.europa.eu](http://curia.europa.eu) > and in INCADAT (*op. cit.* note 6).



69. The Brussels IIa Regulation reinforces the principle that the court shall order the immediate return of the child and seeks to restrict the application of the exception under Article 13(1)(b) of the 1980 Convention to a strict minimum. Under the Brussels IIa Regulation, the child shall always be returned if he or she can be protected in the State of habitual residence.<sup>81</sup> Accordingly, Article 11(4) of the Brussels IIa Regulation provides that “[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”.<sup>82</sup>

70. It should also be mentioned that, unlike the 1980 Convention, the Brussels IIa Regulation, in its Article 11(2), expressly includes the requirement for courts to ensure that the child is given an opportunity to be heard when applying Articles 12 and 13 of the 1980 Convention (thus including Article 13(1)(b) cases), unless this appears inappropriate having regard to the child’s age or degree of maturity.<sup>83</sup>

71. In the situation where a court has decided not to return a child on the basis of Article 13 of the Convention, Article 11(6) and 11(7) of the Brussels IIa Regulation provide a special procedure, the so-called “overriding mechanism”. The procedure provides the possibility for the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention and having jurisdiction under the Brussels IIa Regulation, to examine the question of custody of the child. According to Article 11(8) of the Brussels IIa Regulation, if this court were to issue a subsequent judgment which requires the return of the child, this judgment would be directly recognised and enforceable in the requested Member State without the need for exequatur.<sup>84</sup>

72. It is important to emphasise that the objectives and underlying principles of the 1980 Convention, including considerations in relation to the scope of Article 13(1)(b) and its role within the normative system of the Convention,<sup>85</sup> remain valid for Contracting States in cases where both the Convention and the Brussels IIa Regulation apply, given the complementary nature of the relevant provisions of the latter Regulation.

## **ii. Article 11(b) of the Inter-American Convention on the International Return of Children**

73. The Inter-American Convention is in force among the Member States of the Organization of American States (OAS) that are Parties to this Convention, and in practice often operates in parallel to the 1980 Convention among relevant States in the Latin American region.<sup>86</sup>

74. Article 11(b) of the Inter-American Convention, the corresponding article to Article 13(1)(b) of the 1980 Convention, provides that “[a] judicial or administrative authority of the requested State is not required to order the child’s return if the party raising objections to the

<sup>81</sup> See the Practice Guide for the Application of the Brussels IIa Regulation, published by the European Commission, available at < <http://ec.europa.eu/justice/civil> >, then “Related Documents”, para. 4.3.3.

<sup>82</sup> This provision has been retained in the Proposal for a recast of the Brussels IIa Regulation (*op. cit.* note 76), with two additions. Art. 25(1) of the Proposal states: “A court cannot refuse to return a child on the basis of [Art. 13(1)(b)] if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. To this end the court shall: (a) co-operate with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of Central Authorities or through the European Judicial Network in civil and commercial matters, and (b) take provisional, including protective, measures in accordance with Art. 12 of this Regulation, where appropriate.”

<sup>83</sup> The Proposal for a recast of the Brussels IIa Regulation (*ibid.*) retains this requirement with modifications, see, *i.a.*, Recital No 23, Arts 20 and 24 of the Proposal.

<sup>84</sup> For more information on Art. 11(6)-(8) of the Brussels IIa Regulation, see the Practice Guide (*op. cit.* note 81), paras 4.1 and 4.4. The “overriding mechanism” has been retained, with modifications, in Art. 26 of the Proposal for a recast of the Brussels IIa Regulation (*ibid.*).

<sup>85</sup> See, *supra*, paras 32 *et seq.* and paras 51 *et seq.*

<sup>86</sup> For example, judgments may make reference to both Conventions, *e.g.*, Supreme Court of Argentina in *F. 441. XLVI. F. R., F. C. c/ L. S., Y. U. s/ reintegro de hijo* [not yet in INCADAT]; Appeal Court of Buenos Aires in *M. c. M., M. A. s/ reintegro de hijo* of 24 October 2013 [not yet in INCADAT]; Appeal Court of Montevideo, Uruguay in *CED-0010-000669/2016* of 6 June 2016 [not yet in INCADAT].

return establishes that: [...] there is a grave risk that the child's return would expose the child to physical or psychological danger".

75. The principal difference in the wording of Article 11(b) of the Inter-American Convention and the wording of Article 13(1)(b) of the 1980 Convention is that Article 11(b) of the Inter-American Convention omits the third category of "placing the child in an intolerable situation".<sup>87</sup>

76. However, case law from States that are Parties to the Inter-American Convention and the 1980 Convention indicates that courts apply the same standards in relation to the application of Article 11(b) of the Inter-American Convention and Article 13(1)(b) of the 1980 Convention.<sup>88</sup>

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<sup>87</sup> See, *supra*, paras 59 *et seq.*

<sup>88</sup> See, *e.g.*, the Argentine Supreme Court in *S.A.G. s/restitucion internacional solicita restitucion de la menor* [INCADAT Reference: HC/E/AR 1332] and in *F. 441. XLVI. F. R., F. C. c/ L. S., Y. U. s/ reintegro de hijo* [not yet in INCADAT]. See also, *e.g.*, E. Tellechea Bergman, *Análisis de la Convención Interamericana sobre Restitución Internacional de Menores de Montevideo de 1989*, Revista Uruguaya de Derecho de Familia No 4, FCU, 1989, pp. 131-142 and *La Convención Interamericana de Montevideo de 1989 sobre Restitución Internacional de Menores. Consideraciones acerca de sus soluciones y de su funcionamiento* in A.L. Calvo Caravaca/E. Castellanos Ruiz, *El Derecho de Familia ante el Siglo XXI: aspectos internacionales*, Madrid, Colex, 2004, pp. 797-804; M.S. Najurieta, *Interpretación Uniforme de las excepciones al reintegro del niño o niña previstas en los convenios de restitución internacional*, Derecho Internacional Privado y Derecho de la Integración, Libro Homenaje a R. Ruiz Díaz Labrano, CEDEP, 2013, pp. 419-441; N. Rubaja, *Derecho Internacional privado de Familia. Perspectiva desde el ordenamiento jurídico argentino*, Abeledo Perrot, 2012, p. 506.

## PART II: Information for competent authorities

### 1. Overview of good practice in the application of Article 13(1)(b)

77. In summary, the proper application of Article 13(1)(b) of the 1980 Convention requires the following:

- the need to balance the objectives of the Convention that, on the one hand, address international child abduction by ensuring the prompt return of the child to the State of habitual residence where any custody / access and related issues may be resolved and, on the other hand, recognise that there may be circumstances where returning a child to his or her State could pose a grave risk to the child;<sup>89</sup>
- the need to confine the scope of the return proceedings to the limited purpose of the Convention, which is *not* to deal with issues of custody and access or to conduct a full “best interests assessment” for a child within return proceedings;<sup>90</sup>
- the need to interpret and apply the Article 13(1)(b) exception in a restrictive manner, as is the case with all of the exceptions under the Convention;<sup>91</sup>
- the need to gather any necessary information and / or to take evidence, and to examine such information and evidence, including dealing with expert opinion or evidence in a manner that is in line with the requirement to act expeditiously in return proceedings;<sup>92</sup>
- when necessary, the need to request, receive and assess information on the availability and adequacy of protective measures in the requesting State to mitigate an asserted or proven grave risk under Article 13(1)(b), in line with the need to ensure the safe return of the child.<sup>93</sup>

78. Various tools and best practices to support the above principles are offered in this Part and Part III of the Guide, with the latter addressed primarily to Central Authorities.

### 2. INCADAT as a general resource for competent authorities

79. The International Child Abduction Database (hereinafter, “INCADAT”) was established in 1999 to facilitate mutual understanding and more consistent interpretation of the 1980 Child Abduction Convention. It is available online at no charge in English, French and Spanish, at: [www.incadat.com](http://www.incadat.com). INCADAT contains summaries and the full texts of leading decisions relevant to international child abduction. It also provides compendia of concise legal analysis on issues which are often the subject of litigation and judicial interpretation in child abduction proceedings, with links to relevant decisions on the database. INCADAT grants judges, Central Authorities, and others easy access to decisions and practices from jurisdictions around the

<sup>89</sup> See *supra*, paras 32 *et seq.* on the objectives and underlying principles of the 1980 Convention.

<sup>90</sup> See *infra*, paras 81 *et seq.* on the limited nature of the proceedings for the return of the child in Article 13(1)(b) cases. It should be noted, however, that parental access and contact *during* the return proceeding are an issue under Article 13(1)(b); see *infra*, Section 11(i).

<sup>91</sup> See *supra*, paras 42 *et seq.* on the restrictive application of Art. 13(1)(b).

<sup>92</sup> See *infra*, paras 163 *et seq.* on information and / or evidence in relation to submissions under Article 13(1)(b).

<sup>93</sup> See *infra*, paras 137 *et seq.* on protective measures in Article 13(1)(b) cases. See also Annex 2.



world. INCADAT currently contains decisions from 47 jurisdictions and seeks to present summaries and the full texts of leading decisions relevant to international child abduction.

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### *Navigating INCADAT*

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INCADAT consists of two sections, found at the top navigation bar of the website. The first is the “Case Law Search” by which decisions can be sought on the basis of various criteria (*e.g.*, the type of order made, the court name and level, the country of decision, the articles and legal basis relied on, etc.). Each decision has its own page containing basic information on the decision, a link to the full text and a summary of the facts, the ruling and the legal basis of the decision, and relevant INCADAT comments. The second section of INCADAT is the “Case Law Analysis” which provides concise overviews of key concepts and issues of the 1980 Child Abduction Convention. The analysis presents trends in judicial interpretation, but does not seek to assess the interpretations or outcomes in individual judgments. The analysis is sorted by legal issue, containing sections on the aims and scope of the Convention, the Article 12 return mechanism, exceptions to return under Articles 12, 13 and 20, implementation and application issues, matters of protection of rights of access and contact, and the inter-relationship of the Convention with other international and regional instruments and national laws.

80. INCADAT is a valuable research and reference tool for competent authorities and system actors tasked with the application of the 1980 Convention and the Article 13(1)(b) exception, as it allows comparison with the decisions of other competent authorities on the basis of particular fact patterns of individual cases. However, it should be remembered that INCADAT does not seek to assess the interpretations or outcomes of individual cases and therefore every case on INCADAT cannot be assumed to represent “best practices” in 1980 Convention cases. In addition, due to limited resources and the voluntary nature of submissions of information to the database, INCADAT cannot be presumed to contain fully updated case law from the jurisdictions presented.

### **3. Overview of procedural requirements for return proceedings and the importance of case management**

81. Return proceedings under the 1980 Convention are conducted by the competent authority in each Contracting State, in accordance with its internal procedures and practices. For example, in some jurisdictions, the return application will be decided on the basis of written submissions filed by the parties without an oral hearing, or with an oral hearing in exceptional cases, whereas in other jurisdictions, oral hearings in return proceedings with the participation of the parties are the norm. Information on the return procedure in Contracting States is available in their Country Profiles.<sup>94</sup>

82. To secure the prompt return of children, many Contracting States have adopted specific procedures, in particular to expedite return proceedings. Information on whether measures have been taken in a Contracting State to ensure that competent authorities act expeditiously in return proceedings is also available in the Country Profiles.<sup>95</sup> In addition to national procedures adopted in various jurisdictions, techniques of scheduled judicial case management have proven invaluable for competent authorities applying the Convention to ensure the expeditious handling of return proceedings (see Section iii, below).

83. The good practices provided in this Part of the Guide should only be considered if appropriate to, and permitted under, internal procedures and practices of the individual

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<sup>94</sup> See the Country Profiles completed by individual Contracting States (*op. cit.* note 21), Section 10.3.

<sup>95</sup> *Ibid.*

Contracting State, and if considered by a competent authority to be appropriate to a specific case, mindful of the need for expedition in proceedings.<sup>96</sup>

### **i. The limited nature of return proceedings under the 1980 Convention**

84. Proceedings to secure the prompt return of children wrongfully removed or retained in any Contracting State (“return proceedings”) take place before the “judicial or administrative authority of the Contracting State where the child is” (Art. 12(1)), *i.e.*, in the “requested State”.<sup>97</sup> In the vast majority of the Contracting States, they are conducted by a competent court and not an administrative authority.<sup>98</sup>

85. The scope of return proceedings should be viewed against the background that “the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child’s habitual residence in cases involving its custody”.<sup>99</sup> The underlying premise of the 1980 Convention is that the authorities that are best placed to resolve the merits of a custody dispute (which would typically include a full “best interests” assessment) are the courts of the child’s State of habitual residence, as, *inter alia*, they will have the best access to information and evidence relevant to the determination of custody, and not the courts of the requested State. The result of this clear jurisdictional rule is greater legal certainty, predictability and continuity for children and their families.<sup>100</sup> (See Part I of this Guide on the “Interpretative Background” of the Convention.)

86. Therefore, return proceedings under the 1980 Convention *should not* include a comprehensive “best interests” assessment typical of custody proceedings, but they rather centre on promptly returning the child to the State of habitual residence in order that the courts in that State may determine substantive matters relevant to parental custody and access, including for example, decisions on international relocation of a parent with custody rights.<sup>101</sup> The 1980 Convention does not determine or vary substantive matters of custody for the child (see, *e.g.*, Arts 16 and 19, discussed below), which is within the purview of the court of the child’s habitual residence and the law applicable in that court.<sup>102</sup>

87. Article 16 prevents a decision on the merits of rights of custody from being taken in the State to which the child has been removed or in which he or she has been retained.<sup>103</sup> It states that the judicial or administrative authorities of that Contracting State may not “decide on the merits of rights of custody until it has been determined that the child is not to be returned or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice” of a wrongful removal or retention of the child in the sense of Article 3.

88. Furthermore, Article 19 stipulates that “[a] decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue”. The objective of this Article is “to prevent a later decision on [custody] rights being influenced by a change of circumstances which has been caused by the unilateral action of one parent”.<sup>104</sup> Both parents

<sup>96</sup> See in this context the introduction, paras 17 *et seq.*

<sup>97</sup> See also the Explanatory Report (*op. cit.* note 8), para. 106.

<sup>98</sup> In very few States, the return application is dealt with by an administrative authority (*e.g.*, in Armenia and The former Yugoslav Republic of Macedonia). See *supra*, note 21.

<sup>99</sup> See the Explanatory Report (*op. cit.* note 8), para. 66. In para. 34 it is stated that Contracting States need to be “convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child’s habitual residence – are in principle best placed to decide upon questions of custody and access”.

<sup>100</sup> This clear jurisdictional rule is further affirmed in Art. 7 of the 1996 Convention.

<sup>101</sup> See, *e.g.*, the Supreme Court of Israel in *T. v. M.* of 15 April 1992 [INCADAT Reference: HC/E/IL 214, transcript, unofficial translation], para. 9: “[T]he court is not considering the question of the permanent custody of the child, nor even that of the welfare of the child in the full sense of the word. The framework of the session is not intended for, and does not enable, such a comprehensive discussion. The role of the court [...] is simply ‘putting out a fire’ or ‘first aid’ in order to restore the former situation – returning the child unlawfully taken from the custody of the other parent or the joint custody determined by a competent authority or in an agreement between the parents [...]. The question of custody, when it is disputed, is ordinarily settled in the competent authority and the welfare of the child is fully and thoroughly examined in that framework.”

<sup>102</sup> Under the 1980 Convention, rights of custody are only considered when determining whether a removal or retention of a child has been wrongful (see Arts 3 and 5).

<sup>103</sup> For further information, see the Explanatory Report (*op. cit.* note 8), para. 121.

<sup>104</sup> See the Explanatory Report (*ibid.*), paras 19 and 124.

should have access to a fair hearing on custody issues in the proper forum under the rules of the Convention, normally the State of habitual residence of the child.

89. Good practices for the court seized with the return proceedings with respect to the scope of these proceedings include the following:

➤ **Return proceedings under the 1980 Convention, which must be conducted expeditiously, are distinct from and *are not* proceedings to decide substantive issues of child custody or other related substantive matters (e.g., relocation, child support): they serve to decide on the issue of the return the child to the State of habitual residence, in which the proper court is located to decide on the merits of any custody or related issue.**

90. It is important that judges dealing with return proceedings are aware of the confined scope of these proceedings under the 1980 Convention.

## **ii. Duty to act expeditiously in proceedings for the return of children**

91. The fundamental principle of the Convention that return to the child's habitual residence will protect the child from the harmful effects of the abduction can only be upheld where the child is returned *quickly*.<sup>105</sup>

92. The Convention was drafted based on the finding that the true victim of the abduction is the child who suffers from a sudden loss of stability, the traumatic loss of contact with the left-behind parent in most circumstances, the uncertainty and frustration which may come with the necessity to adapt to a strange language, unfamiliar cultural conditions and often unknown teachers and relatives.<sup>106</sup> In order to secure stability for the individual child and to avoid that the wrongfully removed or retained child suffers from an uncertain situation in which he or she is living for an uncertain period of time, the Convention aims at securing the child's *prompt* return to the State of habitual residence (see the Preamble and Art. 1(a)).<sup>107</sup>

93. To achieve such prompt return, Article 2 requires Contracting States to use the most expeditious procedures available under their law.<sup>108</sup>

94. Furthermore, Article 11(1) provides that "[t]he judicial and administrative authorities shall act expeditiously in proceedings for the return of children". According to the Explanatory Report, "[t]here is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment".<sup>109</sup> Various Contracting States have embodied these requirements explicitly in their implementing laws, regulations and procedures.<sup>110</sup>

95. It is important to emphasise that expeditious procedures are essential at all stages of Convention proceedings, including any appeals, if allowed.<sup>111</sup> Undue delay should also be

<sup>105</sup> See, *supra*, paras 32 *et seq.* See in this context, R. Schuz (*op. cit.* note 43), p. 448.

<sup>106</sup> See the Explanatory Report (*op. cit.* note 8), para. 24, with reference to the Dyer Report.

<sup>107</sup> In relation to the duty to act expeditiously, see the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), e.g., Chapters 1.5, 5 and 6.

<sup>108</sup> Contracting States are requested, "in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law", Explanatory Report (*op. cit.* note 8), para. 63.

<sup>109</sup> See the Explanatory Report (*ibid.*), para. 104.

<sup>110</sup> See e.g., para. 15(2) of the Australian Family Law (Child Abduction Convention) Regulations 1986 ("A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows."); Section 38(1) of the German International Family Law Procedure Act ("The court shall deal with proceedings for the return of a child with priority at all instances. [...] The court shall apply all measures needed to expedite the proceedings [...]."); s. 107(1) of the Care of Children Act of New Zealand ("A court [...] must, so far as practicable, give priority to the proceedings in order to ensure that they are dealt with speedily."); Resolution 480/2008 of the Supreme Court of Justice of the Dominican Republic; and the Uruguayan Act No. 18.895 Return of persons under sixteen years old illegally removed or retained. Information on whether measures have been taken to ensure that the judicial and administrative authorities in a Contracting State act expeditiously in return proceedings is included in the Country Profiles (*op. cit.* note 21), Section 10.3(d).

<sup>111</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 1.5.

avoided between instances, for example between the first instance court decision and the beginning of any appeal procedure.

96. The Convention sets out in Article 11(2) a timeframe of six weeks after which the applicant or the Central Authority of the requested State (of its own initiative or if asked by the Central Authority of the requesting State) may request from a competent authority a statement of reasons for delay. As mentioned in the Explanatory Report, this provision “draws the attention of the competent authorities to the decisive nature of the time factor in such situations and [...] determines the maximum period of time within which a decision on this matter should be taken”.<sup>112</sup> Some Contracting States<sup>113</sup> have found it useful to set explicitly short timeframes in their laws and procedures to ensure expeditious handling of international child abduction cases,<sup>114</sup> which should be accorded “maximum priority.”<sup>115</sup>

97. In relation to Article 13(1)(b) cases, it can be noted that certain practices in the application of that Article may cause undue delays, including practices applied when courts gather information and / or take evidence, and when they examine such information or evidence.<sup>116</sup> The fact that Article 13(1)(b) is raised in an individual case should not give the court a reason *per se* to unduly delay proceedings or refrain from expediting the procedures. Indeed, courts have developed case management and other techniques in which they can conduct a sufficient examination expeditiously, for example when serious issues are raised under Article 13(1)(b).

98. The necessity of expedition is linked to the limited scope of return proceedings, as these proceedings in the requested State should not be transformed into a substantive examination related to a custody and / or access determination, as the child's State of habitual residence is the correct forum to determine these issues.

99. Good practices to enable courts to act expeditiously in return proceedings include the following:

- **Review internal procedures to assess whether they allow for decisions to be taken within the timeframe of the 1980 Convention, and if not, adjust the relevant procedures accordingly.**
- **Recall the Convention's objective to secure the prompt return of wrongfully removed or retained children (Art. 1(a)) and the duty to act expeditiously in proceedings for their return (Art. 11(1)) at each stage of the return proceedings.**
- **Consider confining the process in a way that it facilitates expeditious resolution of the case, provided that the court has discretion to confine the process, for example, by making use of already available documentary information or evidence, or by allowing witnesses to testify by videoconference instead of requiring them to personally appear in court.**
- **Should the court determine that expert evidence is necessary, ensure to set out the limited scope of the report to be given by the expert, and to set a limited period of time for the expert to provide the report to the courts, as well as a hearing date for the continuation of the proceedings.**

<sup>112</sup> See for more information, the Explanatory Report (*op. cit.* note 8), para. 105.

<sup>113</sup> These Contracting States include those bound by the Brussels IIa Regulation. See, *supra*, para. 68. Art. 11(3) of the Brussels IIa Regulation states: “A court to which an application for return of a child is made [...] shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. [...] [T]he court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.” The Proposal for a recast of the Brussels IIa Regulation (*op. cit.* note 76) clarifies that each instance should give its decision no later than six weeks after the application or appeal is lodged with it, except where exceptional circumstances make this impossible; see Recital 26 and Art. 23(1) of the Proposal.

<sup>114</sup> See, e.g., Law Nr. 18.895 of 20 April 2012 of Uruguay.

<sup>115</sup> Explanatory Report (*op. cit.* note 8), para. 105.

<sup>116</sup> See, *supra*, in the overview, para. 77, and, *infra*, paras 163 *et seq.* on information and evidence. See also the two identified judicial approaches in relation to the analysis of grave risk in Section 4 of this Part, *infra*.

- **When contemplating ordering the return of the child, ensure, to the extent possible, the immediate execution of the return order, for example, by considering that the oral pronouncement of a return order in a hearing should be followed without delay by a written decision.**
- **Systematically apply appropriate judicial case management processes in order to expedite proceedings and to avoid undue delay (see discussion below).**

### iii. Judicial case management

100. To ensure that return applications are dealt with expeditiously at first instance and on appeal, practical or legal measures for strict case management may be necessary.<sup>117</sup> Judicial case management should start as early as possible and can be achieved, for example, by setting and applying standardised procedures, using checklists, and by closely co-operating with all parties involved, including the Central Authorities, if and when necessary.

101. In general, judicial case management allows the court, to the extent possible, to be in charge of timetabling and of what information is filed and obtained, and how it is obtained. Continuity in judicial case management of an Article 13(1)(b) case, from the receipt of the return application until the child has been safely returned to its State of habitual residence, considering all phases of the proceedings, can greatly help to expedite the proceedings in furtherance of the Convention's essential aim.

102. Judicial case management is also important to protect the rights of the child and to ensure the child's safety and well-being (and possibly that of a parent) during return proceedings.<sup>118</sup> Among other things, it facilitates consideration by the court with respect to the possible need to take measures of protection directed to the child and, as appropriate, an accompanying parent (see Section 7, below), and the participation of the child in the return proceedings, as applicable (see Section 9, below).

103. Where possible, it should also be considered whether it may be an option to "concentrate jurisdiction" in your State with respect to 1980 Convention cases, in order to develop specialised expertise and to facilitate greater expedition in international child abduction cases (see Part V, Section 2, below).

#### a) General good practices for case management

104. General good practices for courts in relation to judicial case management, if appropriate and permitted under internal procedures and practices, are as follows:

- **Consider the implementation of appropriate judicial case management processes, including the setting of short and strict timeframes and the concentration of jurisdiction, in particular, to avoid any undue delay caused in the consideration of a case.**
- **Consider throughout the judicial case management process the need to deal with the resolution of the case expeditiously, including with respect to any reports and judicial decision(s) required.<sup>119</sup>**

<sup>117</sup> The Guide to Good Practice on Implementing Measures states (*op. cit.* note 7) in Chapter 6.4: "To ensure that return applications are dealt with expeditiously at first instance and on appeal, some practical or legal measures for strict case management may be necessary. These may include, where constitutionally permitted, requiring or calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications, requiring firm management by judges, both at trial and appellate levels, of the progress of return proceedings and giving Hague return cases preferential listing in court."

<sup>118</sup> See, *infra*, paras 132 *et seq.* on the safety and well-being of the child.

<sup>119</sup> The 1980 Hague Convention on the Civil Aspects of International Child Abduction - National Judicial Institute Electronic Bench Book (updated in 2012), published by the National Judicial Institute, Canada, notes in Chapter VII.A.1: "Throughout the process of managing the case, consider the need to deal with the resolution of the case, including any judicial decision(s) required, expeditiously and in a summary manner. Return applications should be given priority. An order to abridge time or to proceed on an urgent or without notice basis may be required if circumstances warrant." Information about the bench book is provided by The Honourable Justice R.M. Diamond in *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013, pp. 7-9.



- Ensure, to the extent possible, that return proceedings are given priority, for example, when scheduling the hearing in an individual case.
- Ensure that all involved authorities and persons are informed about the set timeframes, including the Central Authority in the requested State<sup>120</sup> and any expert(s) that are, for example, asked to hear the child or to provide expert evidence / opinion.<sup>121</sup>

#### **b) Early identification and management of exception(s) to be raised**

105. Among other things, the application of appropriate judicial case management processes may assist the court to know early in the process what exception or exceptions are being relied upon so that:

- the court can identify the particulars of the exception(s) that will need adjudication;
- the court can request information and / or order evidence to support the asserted facts in relation to the exception(s), and, if necessary and permissible, initiate or facilitate the gathering of information and / or the taking of evidence;<sup>122</sup>
- the court can identify whether expert evidence is necessary and if so, order the provision of such a report while setting out concise instructions to the expert as well as a limited time frame for the provision of the report;
- the left-behind parent is made aware of the assertions raised by the taking parent in relation to the exception and given the opportunity to dispute them and / or to provide information and / or evidence;<sup>123</sup>
- information relevant to the issues raised can be ascertained by direct judicial communication or other means;<sup>124</sup>
- the participation of the child in the proceedings is considered and / or the child's views ascertained;
- mediation can be ordered or offered and facilitated in relation to the asserted issues.<sup>125</sup>

#### **c) Early identification and management of other aspects of a case**

106. Judicial case management will include the setting of and adhering to strict timeframes which are useful to address, depending on internal laws, procedures and practices, in relation to other aspects of the return proceedings, for example:

- the making of preliminary objections;
- the making of orders for interim care and protection of the child, including the possibility of contact with the left-behind parent (whether under supervision or otherwise);
- the disclosure and communication of affidavits, exhibits and written statements;

<sup>120</sup> See, *infra*, paras 213 *et seq.* on the role of Central Authorities.

<sup>121</sup> See, *infra*, paras 163 *et seq.* on information and evidence, including expert opinion / evidence.

<sup>122</sup> Depending on internal laws, procedures and practices, the court may have the ability to gather information in relation to the submission made by the taking parent and can use this opportunity to expedite proceedings.

<sup>123</sup> Depending on internal laws, procedures and practices, the court may order a short adjournment to enable the left-behind parent to provide necessary information and / or evidence.

<sup>124</sup> See, *infra*, paras 123 *et seq.* on direct judicial communications.

<sup>125</sup> See, *infra*, paras 191 *et seq.* on mediation in Article 13(1)(b) cases.

- the preparation and filing in court, for example, of child welfare reports, school reports, medical reports, police reports;
- where relevant, the filing, for example, of orders from the court of the State of habitual residence, such as provisional or other injunctions (e.g., restraining or protection orders) in relation to family violence;
- the time required for hearing witnesses or experts, whether within a non-adversarial or adversarial procedural framework (e.g., length of or other conditions relating to cross-examinations and examinations on discovery in common law systems);
- an early fixing of the date that the application will be set down for hearing;
- an early identification as to whether the 1996 Convention is in force between the requested State and the State to which the child would be returned, in case its provisions may be relied upon for the “safe return” of the child (see Section 7(iv), below);
- planning as to the potential use of mediation, so long as this will not delay proceedings unduly, including through the use of videoconferencing, in order that parents may come to agreement as soon as possible as to conditions or arrangements in the case of the two possible outcomes of the proceedings, return or non-return (see Section 10, below).<sup>126</sup>

#### 4. The process of analysing the grave risk exception: two identified approaches

107. Return proceedings under the 1980 Convention are conducted by the competent authority in each Contracting State in accordance with its internal procedures and practices. Notwithstanding procedural differences in the various Contracting States, the Working Group tasked with the development of this Guide identified at least two basic approaches commonly taken by courts in various jurisdictions when analysing the “grave risk exception” under Article 13(1)(b). However, these approaches should not be deemed universal, and they may not apply to every legal system.

108. While each case will be fact-specific, the two identified approaches are deemed by the competent authorities that apply them to be in accordance with the terms and objectives of the Convention, with the main difference being the order in which the court examines the availability of adequate and effective measures to prevent or mitigate an asserted grave risk to the child (see Section 7, below). The first approach may allow for more expedition in the return proceedings.

109. The two main identified approaches are set out immediately below in facilitative process charts.

110. Despite their differences, either approach will ultimately lead to the same outcome in a particular case; namely, a decision by the competent authority on whether or not to return the child to the State of habitual residence.

111. In both approaches, the competent authority begins the examination with the question of whether the facts asserted by the taking parent or another person or body opposing return are of sufficient detail and substance that, *were they to be proven*, they would constitute a grave risk under Article 13(1)(b) (Step 1).

112. If the competent authority finds that the facts asserted under the exception, even if proven, are *not* of sufficient detail and substance to constitute a grave risk, the competent

<sup>126</sup> E.g., parents may amicably settle and agree to conditions and protective measures to ensure the swift and safe return of a child, or in the case of a contrary outcome, agree in advance to contact or other arrangements in the case of non-return of a child.

authority is in a position to order the *return* of the child (barring, of course, reliance upon other exceptions).

113. On the other hand, if the competent authority finds that the facts asserted are indeed of sufficient detail and substance that, if proven, they would constitute a grave risk, the competent authority continues with the examination. The difference between the two approaches lies in the steps that follow this conclusion.

114. In **Approach 1**, the competent authority *assumes* that the assertions under the exception may be proven and immediately verifies whether adequate and effective protective measures that prevent or mitigate the asserted grave risk are available in the State to which the child will be returned (Step 2). A competent authority may take this approach in the interests of expedition, in order to facilitate the most prompt return of the child to the State of habitual residence.

115. Where the competent authority finds that such protective measures are available and can be put in place in the State to which the child will be returned, the competent authority is in a position to order the return of the child. Where the competent authority finds that adequate and effective measures of protection would not be available, it proceeds with the evaluation of the information or evidence to find out whether grave risk will be established (Step 3).

116. Where the competent authority finds, by evaluating the information or evidence, that a grave risk has *not* been established, it is in a position to order the return of the child. Where the competent authority finds that a grave risk has, indeed, been established, the competent authority "is not bound to order the return of the child" (Art. 13(1)).

117. Approach 1 potentially avoids examining the information or evidence related to the assertions under the grave risk exception, which may be a time-consuming step. Approach 1 may therefore be particularly useful in circumstances where the availability of adequate protective measures is evident.

118. In **Approach 2**, after a finding that the facts asserted are of sufficient detail and substance that, if proven, they would constitute a grave risk, the competent authority evaluates the information or evidence provided to assess whether grave risk has been established (Step 2).

119. Where the competent authority finds, by evaluating the information or evidence, that a grave risk has *not* been established, the competent authority is in a position to order the return of the child. Where the competent authority finds that a grave risk has, indeed, been established, the competent authority "is not bound to order the return of the child" (Art. 13(1)) but, in exercising discretion, may further examine whether there are any relevant considerations that nevertheless call for the return of the child (Step 3).

120. The competent authority then verifies whether adequate and effective protective measures that prevent or mitigate the grave risk are available in the State to which the child would be returned. If such measures are available and can be put in place, the competent authority is in a position to order the return of the child. If no such protective measures are available, the competent authority is not bound to order the return of the child.

121. Approach 2 takes into account that in some jurisdictions, the consideration of protective measures is viewed as part of the competent authority's exercise of discretion under Article 13(1)(b) and Article 18 and is a step that follows after a competent authority has found that the grave risk exception has been established.

122. Good practices for competent authorities in relation to these approaches are:

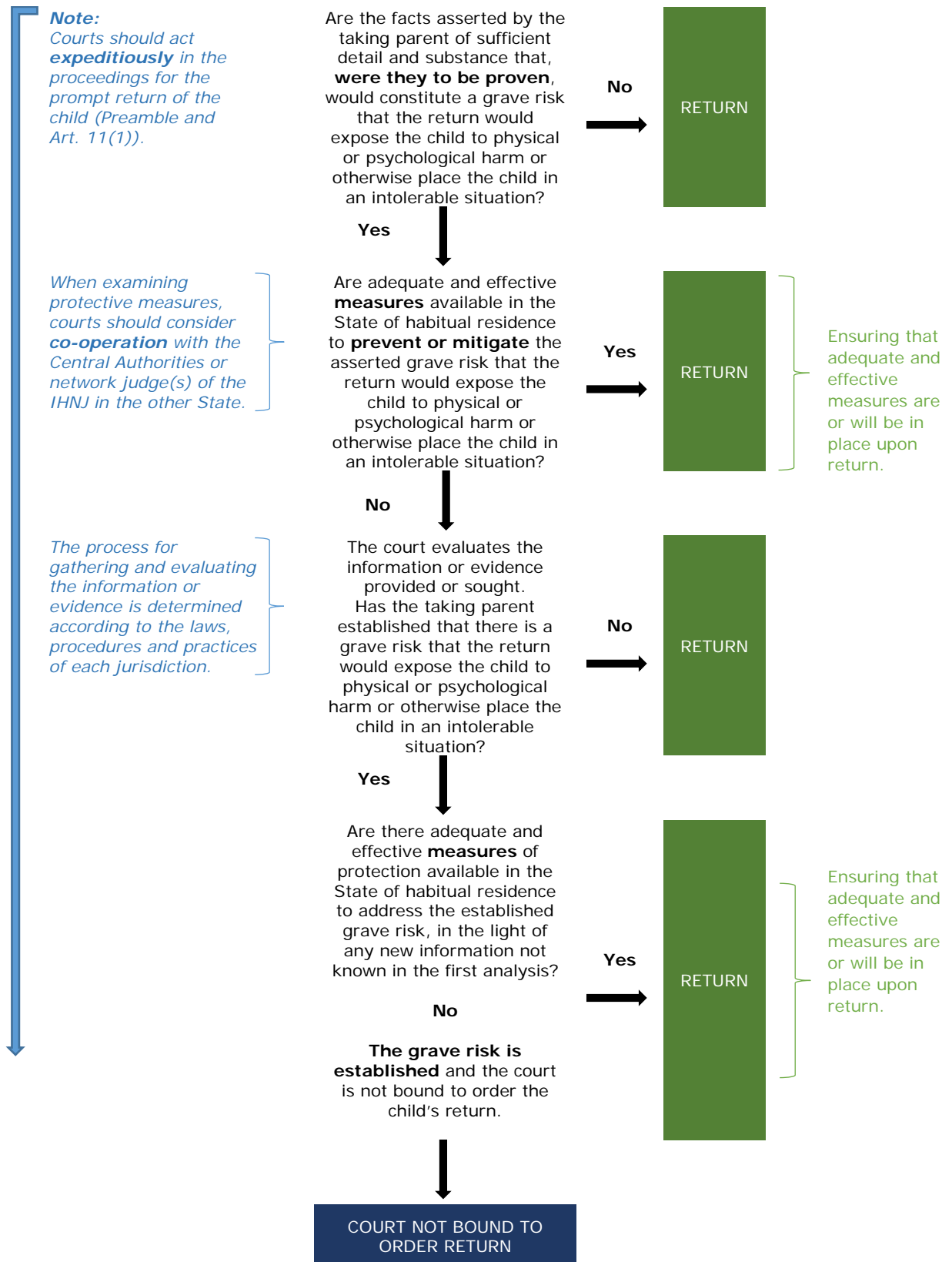
- **Be aware that there are different approaches taken by courts to examine an Article 13(1)(b) case which are in accordance with the Convention.**
- **Select the approach which, depending on the facts of the Article 13(1)(b) case and on national practices or procedures, is most suitable for deciding on the return of the child, considering in particular the duty to act expeditiously in**



return proceedings (Art. 11(1)), and the need to ensure the safe return of the child (and an accompanying parent, when relevant).

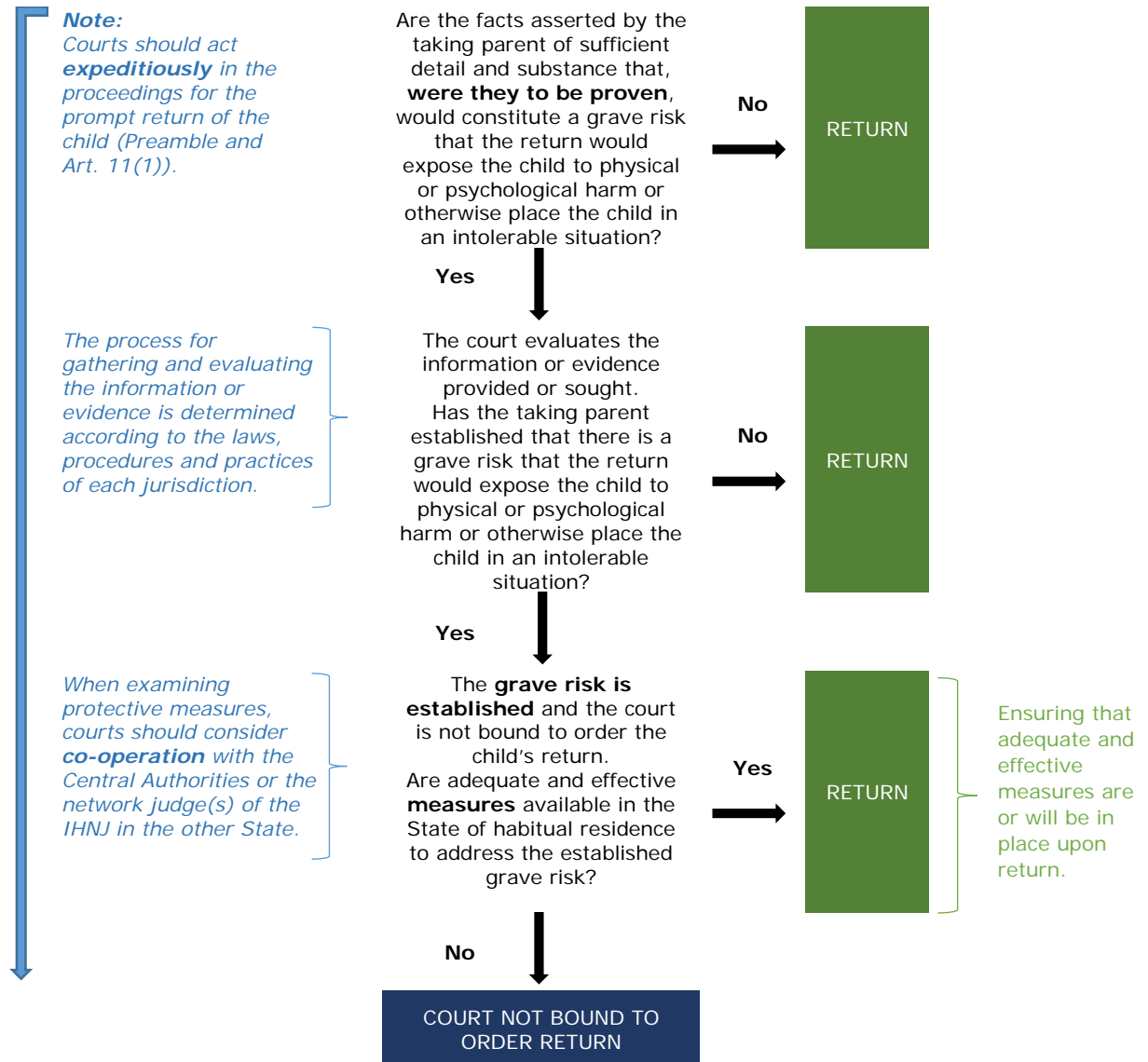
## i. Examination of Article 13(1)(b) – Approach 1

The court considers the following questions for the analysis of the Article 13(1)(b) exception:



## ii. Examination of Article 13(1)(b) - Approach 2

The court considers the following questions for the analysis of the Article 13(1)(b) exception:



## 5. Use of the IHNJ and direct judicial communications with the court in the requested State

123. Direct judicial communications (*i.e.*, communications between judges in different jurisdictions that concern a specific case) may be particularly useful in return proceedings in which the grave risk exception has been raised, for example, in relation to assessing the availability of adequate measures of protection to ensure the child's safe return to the State of habitual residence.<sup>127</sup>

124. It is recommended that where direct judicial communication is contemplated, the court seized with the return proceedings and the other competent authority involved, which is usually a competent court in the requesting State, take due account of the "*Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements*," reproduced in Annex 5.<sup>128</sup> The objective of the Principles is to provide transparency, certainty and predictability to such communications for both judges involved as well as for the parties and their representatives. They are meant to ensure that direct judicial communications are carried out in a way which respects the legal requirements in the respective jurisdictions and the fundamental principle of judicial independence in carrying out network functions.<sup>129</sup>

125. When possible and appropriate, direct communications with courts located in foreign jurisdictions can be established via the relevant members of the International Hague Network of Judges (IHNJ), designated at the national level.<sup>130</sup> Central Authorities or parties to litigation may bring the existence of the IHNJ to the attention of a competent authority hearing a return case, as it could be a source of valuable assistance in the given case.

126. Judges designated by their State<sup>131</sup> as members of the IHNJ serve as a link between their colleagues at the domestic level and other members of the Network at the international level. Network Judges have two main communication functions. The first is of a general nature (*i.e.*, not case-specific) and includes the sharing of information from the IHNJ or the Permanent Bureau of the Hague Conference on relevant Hague Children's Conventions with other judges in their jurisdiction, and assisting with the reverse flow of information.<sup>132</sup> The second communication function concerns direct judicial communications with regard to specific cases, as described above. In this context, members of the IHNJ can seek, from their counterpart in the State of habitual residence, specific information relevant in an individual case.

<sup>127</sup> More information is available at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Judicial Communications". Information on whether there is a legislative basis for direct judicial communications in a given Contracting State or whether, in the absence of such legislation, judges can engage in direct judicial communications is included in the Country Profiles (*op. cit.* note 21), Section 21.

<sup>128</sup> The "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements", are included in the "*Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges*", published by the Permanent Bureau of the Hague Conference, 2013 (hereinafter "Emerging guidance on the IHNJ and general principles for judicial communications"), available at < [www.hcch.net](http://www.hcch.net) > (path indicated *ibid.*). In Costa Rica, these principles have been incorporated in a Protocol, see the *Circular N° 8-2014 - Asunto: "Protocolo de Actuaciones para Comunicaciones Judiciales Directas en Asuntos de Derecho Internacional de Familia"*.

<sup>129</sup> See the Emerging guidance on the IHNJ and general principles for judicial communications (*ibid.*), p. 7.

<sup>130</sup> Information about the IHNJ is available at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "The International Hague Network of Judges". See also the Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128). Within the European Union, the European Judicial Network in civil and commercial matters has been established; more information is available at < <https://e-justice.europa.eu> >.

<sup>131</sup> International Hague Network Judges have been designated primarily by Contracting States to the Convention and also by a number of Non-Contracting States. A list of Network Judges is available at < [www.hcch.net](http://www.hcch.net) > (path indicated *ibid.*). At the Sixth Special Commission, it was recommended that "States that have not yet designated Hague Network judges are strongly encouraged to do so"; see the Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 64.

<sup>132</sup> *E.g.*, see the report of the Dutch Office of the Liaison Judge International Child Protection of 2014 available at < [www.rechtspraak.nl/SiteCollectionDocuments/The-Dutch-Office-of-the-Liaison-Judge-International-Child-Protection-report-2014.pdf](http://www.rechtspraak.nl/SiteCollectionDocuments/The-Dutch-Office-of-the-Liaison-Judge-International-Child-Protection-report-2014.pdf) >.

127. It is important to note that judicial communications, in particular direct judicial communications, have the potential to expedite return proceedings. However, as with other components of a return proceeding, judicial communications should not unduly prolong the proceedings.<sup>133</sup>

### i. Overview of suggested good practices

128. Good practices for courts in relation to direct judicial communications, if appropriate and permitted under internal laws, procedures and practices, and giving due respect to judicial independence,<sup>134</sup> include the following:

- **The competent authority can encourage parties to prepare for outcomes by initiating direct judicial communications with the other relevant State at an early stage. For instance, the judge in the requested State may obtain permission of the parties to ask what court in the requesting State would have jurisdiction for child custody proceedings following the conclusion of return proceedings, and whether the presence of the child in that State is a prerequisite for jurisdiction.**
- **In general, consider direct judicial communications in Article 13(1)(b) cases, when necessary and possible, for example, to:<sup>135</sup>**
  - **facilitate and expedite the gathering of information and / or taking of evidence with relevance to the case;**
  - **verify the adequacy of statements made or information provided by the taking parent to support his / her claim in relation to Article 13(1)(b), such as statements about the situation of the child in the State of habitual residence (including, e.g., findings about domestic or family violence made by the court in the State of habitual residence);**
  - **find out about laws, procedures and / or services available in the State of habitual residence;**
  - **establish whether adequate and effective protective measures are available for the child and, if so, that they can be put in place in the State of habitual residence to protect the child (and the taking parent, if necessary) upon return or how soon the authorities in that State can take these measures;<sup>136</sup>**
  - **seek confirmation that adequate and effective measures to protect the child (and / or the taking parent, when and if necessary) have been taken, and / or any orders in that respect have been made, by the competent authority in the State of habitual residence so that the return of the child can be ordered;**
  - **find out whether measures of protection taken by the court in the requested State to protect the child (and, if necessary, the taking parent) can be**

<sup>133</sup> See on the duty to act expeditiously in return proceedings, *supra*, paras 91 *et seq.*

<sup>134</sup> See Principles 6.1 to 6.3 of the Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 and Annex 5), which state, respectively, that: “[e]very judge engaging in direct judicial communications must respect the law of his or her own jurisdiction”; “[w]hen communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue”; and, “[c]ommunications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.”

<sup>135</sup> For an example of the use of cross-border judicial communications at the national level, see the *Uniform Child Custody Jurisdiction and Enforcement Act* (1997), 9 (1A) U.L.A. 657 (1999) (the “UCCJEA”) in the United States of America. The UCCJEA (Section 204(d)) requires immediate, mandatory judicial communication by the court in relation to the taking of emergency jurisdiction where a parent or child may be at risk.

<sup>136</sup> This information may be relevant, *i.a.*, in relation to a measure of protection taken under Art. 11 of the 1996 Convention. For example, a measure of protection is taken in the requested State under Art. 11, the court in that State may want to find out when this measure will lapse in accordance with Art. 11(2) or (3) of the 1996 Convention. See on Art. 11 of the 1996 Convention *supra*, paras. 147 *et seq.*

recognised, and if necessary enforced,<sup>137</sup> in the requesting State, or a mirror order can be issued;

- if deemed important to the individual case, find out how soon the child custody proceedings can take place in the State of habitual residence after the return of the child;
- find out whether an arrest warrant or criminal proceedings against the taking parent in relation to the wrongful removal or retention of the child are pending in the State of habitual residence and if so, whether these proceedings can be dropped if this would facilitate the return of the taking parent with the child.

- Contact the member(s) of the IHNJ in your jurisdiction<sup>138</sup> to facilitate communications with a court in the requesting or other State.
- When engaging in direct judicial communications, consider the “Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements” (Annex 5) and applicable internal rules or procedures.
- When engaging in direct judicial communications, have regard to speed, efficiency and cost-effectiveness<sup>139</sup> and ensure that the request for information or assistance is, among other things:
  - communicated as early as possible in the proceedings and that it indicates a timeframe within which a response is required, and
  - formulated in a clear and detailed way and in a language which the concerned International Hague Network Judge or other judge understands.
- When engaging in direct judicial communications, consider informing the Central Authority, where appropriate.<sup>140</sup>

## 6. Assistance from Central Authorities and other authorities

129. One of the ways the 1980 Convention seeks to achieve its objectives is by creating a system of close co-operation among the administrative and other authorities of Contracting States.<sup>141</sup> This system is brought into play, in particular, by the Central Authorities that must be designated in each State, and whose role is summarised in Article 7 of the Convention. Part III of this Guide, below, directed primarily at officials within Central Authorities (it also may be of interest to competent authorities), sets out in detail suggestions as to how Central Authorities can assist in 13(1)(b) cases based on their functions outlined in the Convention.

130. Competent authorities are encouraged to familiarise themselves with the role(s) that Central Authorities can play in Article 13(1)(b) cases and to seek assistance from Central Authorities when possible and appropriate in the individual case.

131. Good practices for courts, if appropriate and permitted under internal procedures and practices, include the following:

- **Take due account of the role that Central Authorities play in the operation of the 1980 Convention in general and in Article 13(1)(b) cases in particular (see Part III).**

<sup>137</sup> Information on the recognition and enforcement of foreign civil protection orders is, e.g., available at < [www.hcch.net](http://www.hcch.net) > in the Section “Protection Orders Project”.

<sup>138</sup> A list of members of the IHNJ is available at < [www.hcch.net](http://www.hcch.net) > (path indicated in note 130).

<sup>139</sup> See Annex 5, Principle 7.1. More specific guidance is provided in the Principles that follow Principle 7.1.

<sup>140</sup> *Ibid.*, Principle 9.1.

<sup>141</sup> See the Explanatory Report (*op. cit.* note 8), paras 35, 37, 42 and 43.

- Consider requesting assistance from the Central Authorities and other relevant authorities (e.g., child welfare authorities) at various stages of the proceedings, when necessary and possible, and with due respect to judicial neutrality and independence.
- Consider that assistance from Central Authorities may be useful, depending on facts and circumstances of the individual case, for example, to:
  - ensure the safety and well-being of the child during the return proceedings by facilitating co-operation with relevant authorities, such as child welfare agencies;
  - find out about laws, procedures and / or services available to protect the child (and / or the taking parent, if necessary) in the State of habitual residence upon return of the child to that State;
  - find out whether adequate and effective protective measures are available and, if so, that they can be put in place in the State of habitual residence to protect the child (and the taking parent, if necessary) upon return or how soon the authorities in that State can take these measures;
  - seek confirmation that adequate and effective measures to protect the child (and the taking parent, when relevant) have been taken and / or any orders in that respect have been made by the competent authority in the State of habitual residence so that the return of the child can be ordered;
  - find out whether an arrest warrant or criminal proceedings against the taking parent in relation to the wrongful removal or retention of the child are pending in the State of habitual residence and if so, whether these proceedings can be dropped if this would facilitate the return of the taking parent with the child;
  - consider establishing electronic communication between the child and the left-behind parent at the earliest possible opportunity, including supervised electronic communication if supervision is considered to be necessary for the protection of the child or the left-behind parent, or to safeguard the child's relationship with the left-behind parent;
  - consider the appropriateness of introducing the child to a support service for children who have been subjected to international parental child abduction or a similar dislocation.<sup>142</sup>

## 7. Ensuring the safety and the “safe return” of the child and an accompanying parent, where relevant

132. During return proceedings in the requested State, it is important that the court and other authorities ensure, to the extent possible and as necessary, the safety and well-being of the child. This may be of particular importance in cases in which the exception in Article 13(1)(b) is raised.

133. Likewise, once return has been ordered, the concept of and practical issues surrounding the “safe return” of the child as well as an accompanying parent, where relevant, have featured prominently at past Special Commission Meetings (see Annex 2) and also as the subject of a range of good practices developed by competent authorities, Central Authorities and others dealing with 1980 Convention cases.

<sup>142</sup> E.g., see the child's page on < [www.zank.de](http://www.zank.de) > which has a question line that can be accessed by children, independently of the taking parent.



## i. Measures of protection to ensure the safety and well-being of the child during proceedings in the requested State

134. There may be a need to consider measures to protect the child in the requested State during the return proceedings,<sup>143</sup> for example, where a party asserts that the child suffered from abuse or violence (direct or indirect) in the State of habitual residence before the removal. The safety or well-being of the child may also be at risk due to specific behaviour (e.g., mistreatment, physical or psychological abuse) of the taking parent or the left-behind parent over the course of the proceedings.

135. In cases where it is established that the taking parent, during or after the abduction, is exposing the child to physical or psychological harm, the requested State should take urgent protective measures, such as the removal of the child from the taking parent (and / or, of course, ordering the return forthwith of the child to the State of habitual residence, as appropriate).

### a) Overview of suggested good practices

136. Good practices that help to ensure the safety and well-being of the child during return proceedings include the following:

- **Arrange for measures which ensure, to the extent possible and necessary, the safety and / or well-being of the child during return proceedings and consider that there may be a need to take protective measures for the child as early as possible in the process.**
- **If necessary, communicate with relevant authorities, such as the Central Authorities or child welfare authorities, and / or with the legal representative of the child (if applicable), to find out whether there is a need to take protective measures to ensure the safety and / or well-being of the child during the return proceedings, and if so, to assess what type of protective measures would be adequate and effective in the individual case.**
- **Consider making use of Article 11 of the 1996 Convention (if applicable) when contemplating taking measures of protection for the child.<sup>144</sup>**

## ii. Protective measures in Article 13(1)(b) cases to ensure the “safe return” of a child

137. Competent authorities seized with an application for return have made increasing use of protective measures,<sup>145</sup> including those implemented in the foreign jurisdiction through, for example, mirror orders or safe harbour orders,<sup>146</sup> to secure the prompt and safe return of a child.<sup>147</sup> A protective measure may also consist, for example, in an undertaking offered and complied with voluntarily by the left-behind parent (which should, however, be used with caution unless it can be made enforceable in the requesting State, e.g., by way of a consent order which is then “mirrored” in the other jurisdiction)<sup>148</sup> or one that is imposed by the court as a condition precedent to the return (sometimes called a “condition” or “stipulation”).

<sup>143</sup> In relation to protective measures, see, *infra*, paras 137 *et seq.*

<sup>144</sup> See in relation to Art. 11 of the 1996 Convention, *infra*, paras 147 *et seq.*

<sup>145</sup> For example, courts applying the Brussels IIa Regulation are required to examine the availability of protective measures due to Art. 11(4) of the Regulation, see, *supra*, paras 68 *et seq.*

<sup>146</sup> For an explanation of terminology, see, *infra*, the Glossary in Annex 1.

<sup>147</sup> For more information on protective measures see, e.g., P.R. Beaumont and P.E. McEleavy (*op. cit.* note 56), pp. 156 *et seq.*; R. Schuz, (*op. cit.* note 43), pp. 289 *et seq.* See also the Guide to Good Practice on Enforcement (*op. cit.* note 17), Chapter 1, at paras 17-22, Chapter 5, at paras 92-94; Chapter 8, at paras 116-120. See also the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 6.2.

<sup>148</sup> For example, voluntary undertakings should not be used, *i.a.*, for issues connected to the personal safety and security, or the fundamental well-being of the child or an accompanying parent. Research has indicated that voluntary undertakings are not effective in cases of domestic violence, for example, R. Hoegger, “What if she leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy”,



138. The question whether to establish, and if so, what type of protective measure the court can take in a given case depends on the particular circumstances of that case, and the legal systems and practices of the States where the measure is to be taken and / or implemented. Some types of protective measures are often implemented in or among common law jurisdictions through safe harbour orders and mirror orders, whereas in some jurisdictions (predominantly of a civil law tradition) courts may lack a legal basis for the taking or implementation of such measures.<sup>149</sup> Therefore, in the event it is necessary to obtain in the State of habitual residence, for example, a safe harbour order (or a mirror order in respect of protective measures taken by the court seized with the return proceedings), to ensure that the child returns to a safe environment, the first precondition will be that the legal system of the State of habitual residence can accommodate such an enforceable order.<sup>150</sup>

139. Thus, the principal difficulty of some types of mechanisms to implement protective measures taken to secure the safe return of the child (e.g., undertakings, mirror and safe harbour orders) is that they may prove to be unknown or unenforceable in the State to which the child will be returned and thus will not protect effectively the child upon return to that State. However, the use of Article 11 of the 1996 Convention, when in force between the two States, is one mechanism to overcome this problem (see Section 7(iv), below).<sup>151</sup>

140. Co-operation and co-ordination using the IHNJ and the Central Authority system (see Sections 5 and 6 in this Part, Part III and Annex 5) should prove of invaluable assistance in circumstances where a competent authority is of the view that protective measures should be put in place to ensure the safe return of a child and an accompanying parent, where relevant. Mediation may be another tool used by competent authorities or other system actors to assist in establishing agreement as to the details of safe return (see Section 10, below).

### a) Overview of suggested good practices

141. When contemplating taking a measure of protection, good practices for competent authorities include the following (see also good practices suggested below in the context of the 1996 Convention, where applicable):

➤ **Parties to return proceedings may be encouraged from the earliest point in proceedings to prepare for possible outcomes. Each parent should know from the outset what issues, including any need for and availability of protective measures and / or conditions to return, will require evidence. Preparing for outcomes encourages each party to reflect on their respective positions, the impact on the child of potential outcomes and to focus on what will happen after the forum has adjudicated.**<sup>152</sup>

18 *Berkeley Women's Law Journal* 181; and J. Lewis, "Comment: The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity", Fall 2000, 13 *Transnat'l Law* 391, p. 23.

<sup>149</sup> Courts in civil law jurisdictions often require a legal basis for the taking of protective measures initiated by the foreign competent authority, which may not be provided in their internal procedural law. However, in some cases, a court in a civil law jurisdiction has made a return order dependent on certain conditions; see in this regard R. Schuz (*op. cit.* note 43), p. 291. See Juzgado Segundo de Niñez y Adolescencia de Panamá (Panama Second Court of Childhood and Adolescence) Ruling N°393-05-F, 5 July 2005 [INCADAT Reference: HC/E/PA 872], for the first example of a civil court in Latin America establishing protective measures as a "mirror order". See also *Ley 26.994 promulgada por Decreto 1795/2014* which introduced Article 2642 to the Argentinian Civil Code, allowing judges to order protective measures for the returning child and, if necessary, the accompanying parent at the request of the foreign competent authority.

<sup>150</sup> See the Guide to Good Practice on Enforcement (*op. cit.* note 17), Chapter 8, at para. 117.

<sup>151</sup> Measures of protection under Art. 11 of the 1996 Convention are described in more detail, *infra*, at paras 147 *et seq.* See also, e.g., P. Nygh, "The new Hague Child Protection Convention" in *International Journal of Law, Policy and the Family*, 11, (1997), pp. 344-359 at p. 351. It should be noted that under the 1996 Convention, enforcement of a foreign measure is not automatic, but "[e]ach Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure" (see Art. 26).

<sup>152</sup> This approach may avoid the situation where conditions to return are sought and / or made as an afterthought following the decision about return. Conditions which are not properly considered or which one party resents and feels powerless to oppose, may increase, rather than decrease, parental conflict once the child is returned to the State of habitual residence.

- Consider that protective measures should be confined to achieving the purpose of securing the prompt and safe return of the child and should not go beyond what is necessary in the individual case to achieve the objectives of the Convention. Care should be made not to impinge on the jurisdiction of the courts of the habitual residence, which are the proper courts to determine any protective measures on a long-term basis, in accordance with the best interests of the child.
- Consider that protective measures should be, in general, detailed, adequate and effective, taking into account the circumstances in the individual case, and that, in an Article 13(1) b) case, they should adequately address the concerns as to a grave risk for the child, without being unnecessarily burdensome.
- Ensure, in the event the protective measures are directed towards the left-behind parent, that these measures do not overburden him / her,<sup>153</sup> as it is the taking parent that, by wrongfully removing or retaining the child, created an unlawful factual situation that the 1980 Convention seeks to address by restoring the *status quo ante*.<sup>154</sup>
- In general, ensure that the burden of proving whether adequate and effective measures of protection are available is not placed solely on the left-behind parent.<sup>155</sup>
- In the event the protective measures are to be implemented in the State to which the child will be returned, before ordering them:
  - consider whether the laws, procedures and practices in that State would allow the implementation of these measures, and / or whether there are ways to recognise and, if necessary, to enforce them; be aware that it might not be possible to implement or to recognise and / or enforce a specific protective measure in that State due to internal laws and procedures, with the consequence that the child may not be adequately and effectively protected upon return;
  - consider applying Article 11 of the 1996 Convention that provides a jurisdictional basis, in cases of urgency, for taking, in respect of a child,<sup>156</sup> necessary measures of protection, which are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned, provided that both States concerned are Contracting States to the 1996 Convention.<sup>157</sup>
- Consider using direct judicial communications<sup>158</sup> and / or requesting assistance from Central Authorities designated under the 1980 Convention<sup>159</sup> and / or

<sup>153</sup> See the Guide to Good Practice on Enforcement (*op. cit.* note 17), Chapter 5, at para. 93.

<sup>154</sup> See in this context, *e.g.*, the Explanatory Report (*op. cit.* note 8), paras 11-16. However, in some circumstances, *e.g.*, a violent left-behind parent with substantiated wrongful / unlawful previous behaviour, the court should give due regard to the gravity of this parent's behaviour with respect to the consideration of adequate protective measures that would ensure safe return, if appropriate.

<sup>155</sup> As the burden of establishing that there is a grave risk lies on the person or institution opposing return (see *supra* para. 63). However, in some circumstances, *e.g.*, a violent left-behind parent with wrongful / unlawful previous behaviour (*ibid.*), the court should give due regard to the gravity of this parent's behaviour, although avoiding a comprehensive "best interest assessment" (see para. 86, above). Some experts do suggest that, in certain circumstances, the burden of proving the adequacy and effectiveness of the requesting State's mechanisms for protecting the child should fall to the applicant requesting return, as it is difficult to prove the negative.

<sup>156</sup> Some jurisdictions may also employ this provision of the 1996 Convention to the protection of an accompanying parent, when relevant; see *infra*, note 171.

<sup>157</sup> See Arts 23 *et seq.* of the 1996 Convention. See also, *infra*, paras 147 *et seq.*

<sup>158</sup> See, *supra*, paras 123 on direct judicial communications.

<sup>159</sup> See, *e.g.*, the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Chapters 3.19, 4.15 and 6.3. See also, *infra*, paras 213 *et seq.* on the role of Central Authorities.

Central Authorities designated under the 1996 Convention (if applicable),<sup>160</sup> for example, to find out:

- whether and if so, which specific measures of protection are available in the State to which the child will be returned and by which means they can be implemented (e.g., conditions, mirror and safe harbour orders);
- whether protective measures taken in the State in which the child is present can be accepted or implemented and / or recognised and, if necessary, enforced in the State to which the child will be returned;
- how long it would take the authorities in the State to which the child will be returned to take measures of protection for the child upon the child's return;<sup>161</sup> and,
- whether adequate and effective protective measures are in place in the State to which the child will be returned before return is ordered or before the actual return of the child.

➤ Consider informing the competent authorities in the State to which the child will be returned, including the Central Authority designated under the 1980 Convention and / or designated under the 1996 Convention (if applicable), about the fact that protective measures for the child are contemplated or have been taken, for example, to enable them, to the extent possible, to initiate or take measures required by the situation in their State to ensure the continuous protection of the child upon the child's return.

➤ Ensure that consideration of adequate and effective measures of protection in an Article 13(1)(b) case does not cause undue delay in the consideration of the case in the return proceedings.

142. In many circumstances in which Article 13(1)(b) is raised, competent authorities in the State to which the child will be returned (which is usually the State of habitual residence of the child) will be able to address concerns raised in relation to the grave risk exception and ensure the safety of the child upon return. However, where the court is not satisfied that in the individual case protective measures provide adequate and effective and, as necessary, enforceable protection for the child upon return, the court would need to consider refusing return.

### **iii. Considerations relating to the safety of both the taking parent and the left-behind parent**

143. The safety and the well-being of the child, in certain circumstances, can be closely linked to the safety and fundamental health or well-being of a child's parent. Past Special Commissions have stressed this point in particular with respect to mechanisms for the "safe return" of the child, where an accompanying parent is often involved (see Annex 2).

144. More is now known about the harmful effects that inter-spousal or intimate partner domestic violence may have on children (see Annex 3). The Sixth Special Commission recommended, in line with modern social science evidence and international norms, that: "[i]n considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other".<sup>162</sup>

145. Therefore, the court may need to consider measures that are not only directed at protecting the child but also the taking parent. This might be necessary, for example, in a situation where both the child and the taking parent suffer from the effects of domestic violence, there are threats by the left-behind parent during the return proceedings, and / or a fear of the

<sup>160</sup> For more information on the assistance provided by Central Authorities designated under the 1996 Convention, see, *infra*, para. 159.

<sup>161</sup> See in this regard Art. 11(2) and (3) of the 1996 Convention.

<sup>162</sup> Report of Part I of the Sixth Special Commission, para. 42 (*op. cit.* note 28).

continuance or recurrence of such behaviour in the event of a return to the requesting State.<sup>163</sup> In certain cases a child and a parent's essential safety or well-being may be difficult to separate (in particular if that parent is a primary carer), and the same considerations as to availability, adequacy and enforceability of arrangements or measures of protection as described in Section 7(ii), above, should be employed by competent authorities. In some instances a court will find such protective measures directed toward an accompanying parent to be inadequate or ineffective to prevent a grave risk of harm to a child, and thus will have to consider non-return.<sup>164</sup>

146. The court may also need to have regard for the safety of the left-behind parent who, for example, attends the return proceedings in the requested State and there are assertions of being threatened by the taking parent or the taking parent's family members, or due to other serious circumstances.

#### **iv. Measures of protection under Article 11 of the 1996 Convention**

147. A growing number of countries are Contracting States to the 1996 Convention, which provides additional practical tools for competent authorities hearing return proceedings under the 1980 Convention. The Hague Conference website ([www.hcch.net](http://www.hcch.net)) contains updated information as to whether your State and the other State involved in a 13(1)(b) case are Party to the 1996 Convention (under "Protection of Children," then "Status Table").

148. The 1996 Convention seeks to improve the protection of children in international situations and, to that end, deals with jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.<sup>165</sup> Children who benefit from the implementation and application of the 1996 Convention include those who are the subject of international child abduction: the 1996 Convention supplements and strengthens the 1980 Convention in various respects.<sup>166</sup>

149. Article 7 of the 1996 Convention, in harmony with the 1980 Convention, provides that in cases of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention retain their jurisdiction. This will continue until the child has acquired a habitual residence in another State, and additionally either: (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or, (b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

150. For courts dealing with return proceedings under the 1980 Convention and, thus, located in the Contracting State to which the child has been removed or retained (Art. 12(1)),<sup>167</sup> an important provision is Article 11 of the 1996 Convention which reads as follows:<sup>168</sup>

<sup>163</sup> See, e.g., regarding the psychological impact on the taking parent, the United Kingdom Supreme Court in *Re S (a Child)* [2012] UKSC 10. The Supreme Court focused on the psychological impact on a mother of being returned in the context of domestic and family violence, taking account of the "objective basis" for those fears.

<sup>164</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) in *BT v JRT* [2008] EWHC 1169 (Fam) and in *DT v LBT* [2010] EWHC 3177 (Fam); and the United States District Court, Southern District of New York in *Davies v. Davies*, 2017 WL 361556.

<sup>165</sup> See the Preamble and Art. 1 of the 1996 Convention.

<sup>166</sup> See, e.g., Arts 7 and 50 of the 1996 Convention. For more information on the role of the 1996 Convention in international child abduction cases, see, e.g., the *Practical Handbook on the Operation of the 1996 Child Protection Convention*, published by the Permanent Bureau of the Hague Conference on Private International Law, The Hague, 2014 (hereinafter, "Practical Handbook on the 1996 Convention"), available at < [www.hcch.net](http://www.hcch.net) > under "Publications", Chapter 13, Section A. See also N. Lowe and M. Nicholls, *The 1996 Convention on the Protection of Children*, Jordan Publishing Ltd., 2012, Chapter 7.

<sup>167</sup> See, *supra*, para. 84.

<sup>168</sup> See the Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 41.

“(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question”.<sup>169</sup>

### a) Overview of uses of Article 11 of the 1996 Convention in return proceedings

151. Provided that the 1996 Convention is applicable in the individual case, Article 11 of the 1996 Convention can be used in Article 13(1)(b) cases to:

- **protect the child and ensure the child’s welfare throughout the return proceedings in the requested State<sup>170</sup> (in some jurisdictions Art. 11 of the 1996 Convention has also been used to protect an accompanying parent, where relevant);<sup>171</sup>**
- **address concerns that the child may not be adequately and effectively protected on return to the requesting State; and**
- **ensure the continued protection of the child in the State of habitual residence until the authorities in that State take measures to protect the child.**

### b) The mechanics of Article 11 of the 1996 Convention in the context of return proceedings

152. Article 11 of the 1996 Convention attributes jurisdiction to the authorities of a Contracting State to the 1996 Convention on the territory in which the child or property belonging to the child is present, to take, in all cases of urgency, any necessary measures of protection.<sup>172</sup> Jurisdiction to take urgent measures under this Article can therefore be exercised by the court seized with the return proceedings in the State where the child has been wrongfully removed or retained (provided that this State is a Contracting State to the 1996 Convention).<sup>173</sup>

153. In such a case, the competent authorities in the State where the child has been removed or retained would apply their own law when taking measures of protection under Article 11 of

<sup>169</sup> See also Art. 7(3) of the 1996 Convention stating that so long as the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which the child has been retained can take only such urgent measures under Article 11 of the 1996 Convention as are necessary for the protection of the person or property of the child.

<sup>170</sup> See, *supra*, paras 132 *et seq.* on ensuring the safety and well-being of the child during return proceedings.

<sup>171</sup> See “Explanatory Note on specific matters concerning the 1996 Convention”, as drafted and agreed upon by the participants of the Latin American Meeting on the International Protection of Children and the Recovery of Maintenance Abroad, Santiago, Chile, 4-6 December 2013, co-organized by the Hague Conference on Private International Law (HCCH) and the Heidelberg Center for Latin America (available on the Hague Conference website at < <http://assets.hcch.net/docs/4ada9ef9-9e58-4540-a859-c62ec6e68a60.pdf> >). See, e.g., Tribunal de Apelaciones de Familia de 1 Turno de Uruguay (Uruguayan Family Court of Appeal of First Rotation), *S.G., P.C. v U., M.*, 22 December 2016.

<sup>172</sup> For more information on Art. 11, see P. Lagarde, “Explanatory Report on the 1996 Hague Child Protection Convention”, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998 (hereinafter, “Explanatory Report to the 1996 Convention”), paras 68 *et seq.* See also the Practical Handbook on the 1996 Convention (*op. cit.* note 166), Chapter 6 (case example 6(g) concerns Art. 13(1)(b)) and Chapter 13, Section A, paras 13.1 *et seq.*, in particular, para. 13.7.

<sup>173</sup> For Article 11 of the 1996 Convention to be applied, the child does not need to be habitually resident in a Contracting State to the 1996 Convention. See Art. 11(3) of the 1996 Convention.

the 1996 Convention.<sup>174</sup> They can take such urgent measures of protection under this Article irrespective of whether proceedings in relation to the individual child are pending in the State of habitual residence.<sup>175</sup> Also, the fact that measures of protection have already been taken in the State of habitual residence cannot prevent the authorities of the State in which the child is present to take measures of protection under Article 11, even if the measures would be incompatible with those taken in the State of habitual residence.<sup>176</sup>

154. The 1996 Convention does not provide a definition as to what measures of protection are “necessary” under Article 11 of the 1996 Convention, or what constitute “cases of urgency”. In general, the measures of protection under Article 11 are measures directed to the protection of the person or property of the child which are set out in the non-exhaustive list in Article 3 of the 1996 Convention (and which are not excluded under Article 4 of the 1996 Convention).<sup>177</sup>

155. The Explanatory Report of the 1996 Convention notes that those negotiating the instrument “deliberately abstained from setting out what measures might be taken on the basis of urgency in application of Article 11. This is indeed a functional concept, the urgency dictating in each situation the necessary measures”.<sup>178</sup> It is further suggested that “a situation of urgency [...] is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10 [of the 1996 Convention], might bring about irreparable harm for the child.”<sup>179</sup> The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly”.<sup>180</sup>

156. It follows from this that it is a matter for the court seized with the return proceedings to determine whether, based on the facts of the individual case, the case is one of “urgency” such that Article 11 of the 1996 Convention can be relied upon to take necessary measures of protection for the child. Provided this condition is met in the individual case, Article 11 enables the court to take necessary measures of protection (e.g., interim protective orders) to ensure the protection of the child during the return proceedings and to ensure the safe return of the child.

157. These measures of protection have extra-territorial effect<sup>181</sup> until they are superseded by measures in relation to that child taken by the authorities in the State of habitual residence, provided that both States concerned are Contracting States to the 1996 Convention. Therefore, these measures will also ensure the child’s continued protection in the requesting State, until the authorities in the State of habitual residence make their own arrangements to protect the child.

<sup>174</sup> See Chapter III, Arts 15 *et seq.*, in particular Art. 15(1), of the 1996 Convention.

<sup>175</sup> Art. 13 of the 1996 Convention does not apply to measures of protection taken under Art. 11 of the 1996 Convention.

<sup>176</sup> See N. Lowe and M. Nicholls (*op. cit.* note 166), Chapter 3, paras 3.23 *et seq.*, in particular, para. 3.25.

<sup>177</sup> It follows from this that only measures of protection for the benefit of a child normally fall within the scope of the 1996 Convention; an order made to protect a parent that accompanies the returning child, unless made also for the child’s protection, would not come within the scope of the 1996 Convention; see “Consultations on the desirability and feasibility of a Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - a preliminary report”, Prel. Doc. No 7 of May 2011, available at < www.hcch.net > under “Sixth Special Commission meeting (Part I, June 2011; Part II, January 2012)” (path indicated in note 25), Note by the Permanent Bureau, para. 4.3. As noted above, however, some jurisdictions have found Art. 11 of the 1996 Convention useful to protect an accompanying parent as well as a child in the context of a return order. See, *supra*, para. 151.

<sup>178</sup> See the Explanatory Report to the 1996 Convention (*op. cit.* note 172), para. 70.

<sup>179</sup> It has been noted in leading jurisprudence that the concept of “urgency” under Art. 11 should not be limited only to cases where there is a risk of “irreparable harm” to the child, but encompasses a broader set of circumstances (see for example *In re J (A Child)* [2015] UKSC 70, [2016] AC 1291). Such measures may include protective measures which are not available in the State of habitual residence.

<sup>180</sup> See *ibid.*, para. 68. See also the Practical Handbook on the 1996 Convention (*op. cit.* note 166), Chapter 6, paras 6.2-6.7.

<sup>181</sup> Measures of protection under Art. 11 of the 1996 Convention are entitled to recognition (by operation of law) and enforcement in accordance with the terms of Chapter IV (Arts 23 *et seq.*) of the 1996 Convention. If there is any concern that a certain measure might not be recognised, *i.e.*, to dispel doubts about the existence of a ground for non-recognition, “advance recognition” of a measure of protection may be sought under Art. 24 of the 1996 Convention. However, it should be noted that the 1996 Convention does not require the procedure in Art. 24 to be “simple and rapid” (as it does in Art. 26(2) of the 1996 Convention). See, e.g., the Explanatory Report to the 1996 Convention (*op. cit.* note 172), paras 129-130.



158. It is worth mentioning that, while Article 11 of the 1996 Convention confers concurrent jurisdiction on the authorities in the State where the child is present, the authorities in the State of habitual residence of the child retain general jurisdiction under Article 5 of the 1996 Convention to take measures directed to the protection of the child's person or property. Nothing therefore prevents the authorities in the State of habitual residence from taking measures to ensure the safe return of the child.

### c) Overview of suggested good practices

159. In addition to the good practices in relation to measures of protection mentioned above,<sup>182</sup> good practices for courts, when contemplating taking a measure of protection under Article 11 of the 1996 Convention in an Article 13(1)(b) case, include the following:

- **Consider, when necessary, requesting assistance from Central Authorities designated under the 1996 Convention,<sup>183</sup> in particular in order to:**
  - **receive information as to the laws of, and services available in, the State to which the child will be returned for the protection of the child upon the child's return to that State (see Art. 30(2) of the 1996 Convention);<sup>184</sup>**
  - **receive information relevant to the protection of the child, if the situation of the child so requires (see Art. 34 of the 1996 Convention),<sup>185</sup> unless the communication of such information would be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family (see Art. 37 of the 1996 Convention);<sup>186</sup>**
  - **request, when measures of protection have been taken under the 1996 Convention, that the authorities of the State of habitual residence assist in the implementation of these measures (see Art. 35(1) of the 1996 Convention).<sup>187</sup>**
- **Consider informing the competent authority in the State of habitual residence (and the Central Authority designated under the 1996 Convention) and the parties about the fact that measures directed to the protection of a child are**

<sup>182</sup> See, *supra*, para. 141.

<sup>183</sup> In most Contracting States to the 1996 Convention, the Central Authority designated under this Convention (see Art. 29 of the 1996 Convention) coincides with the Central Authority designated under the 1980 Convention, which is the recommended approach; see the Practical Handbook on the 1996 Convention (*op. cit.* note 166), Chapter 11, para. 11.6.

<sup>184</sup> Art. 30(2) of the 1996 Convention requires Central Authorities, "in connection with the application of the Convention, [to] take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children".

<sup>185</sup> Art. 34(1) of the 1996 Convention states that "[w]here a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information". This paragraph enables the competent authority to request the information from any authority of another Contracting State, however, Art. 34(2) gives Contracting States the possibility to declare that such requests should "be communicated to its authorities only through its Central Authority". Whether a State has made such a declaration is noted in the status table of the 1996 Convention, available at < [www.hcch.net](http://www.hcch.net) > in the "Child Protection" Section. It should be noted that the requested authority is not bound to furnish the information requested (*e.g.*, it is possible that its internal law will not permit the authority to meet the request for information); see the Explanatory Report to the 1996 Convention (*op. cit.* note 172), para. 144.

<sup>186</sup> In relation to requests for information or the transmission of information relating to the child, particularly under Arts 31, 34 and 36 of the 1996 Convention, due regard should be given to Art. 37 of the 1996 Convention according to which "[a]n authority should not request or transmit any information under [Chapter V (Arts 29 to 38) of the 1996 Convention], if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family". See the Explanatory Report to the 1996 Convention, *ibid.*, para. 151.

<sup>187</sup> Art. 35(1) of the 1996 Convention provides for mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection in that it stipulates that "[t]he competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis". The fact that the text mentions particularly assistance in relation to the exercise of access rights and the maintenance of contact, does not exclude mutual assistance for the implementation of other measures of protection.



contemplated or have been taken under Article 11 of the 1996 Convention, for example, to:

- encourage them to initiate or take measures of protection of the child required by the situation in their State to ensure the continuous protection of the child upon the child's return;<sup>188</sup>
  - make them aware that this measure of protection would be recognised by operation of law and enforceable in accordance with Articles 23 *et seq.* of the 1996 Convention (provided that both States concerned are Contracting States to the 1996 Convention).
- Enforcement under Articles 24 and 26 may be facilitated if the instrument containing the protective measure recites matters relevant to refusal under Article 23(2), such as the jurisdictional basis for the measure, how the child's voice was heard, how the other party who has parental responsibility was accorded procedural fairness or, where appropriate, how Article 33 was complied with. Recitals which address the grounds for refusal set out in Article 23(2) may lead to fewer delays or opportunistic challenges to recognition.

160. It can be concluded that the 1996 Convention provides considerable benefits for cases of international child abduction including, in particular, in Article 13(1)(b) cases where the child may be in urgent need of protection.

161. The 1996 Convention adds to the efficacy of any such measures of protection ordered by ensuring that such measures are recognised "by operation of law" in the Contracting State to which the child is to be returned and will be enforceable in that Contracting State,<sup>189</sup> until such time as the authorities in the requesting Contracting State are able to put in place any necessary protective measures.

162. The co-operation provisions of the 1996 Convention also provide ways for the court seized with the return proceedings to request assistance from foreign authorities when gathering information in relation to the availability of adequate and effective measures of protection for the child, complementing those provided under the 1980 Convention. The fact that in many Contracting States, the Central Authority designated under the 1996 Convention coincides with the Central Authority designated under the 1980 Convention will facilitate the provision of such assistance.

## 8. Information and evidence under Article 13(1)(b)

### i. General aspects related to information and evidence

163. Rules and practices concerning the taking and admission of evidence and the gathering of information vary among Contracting States.<sup>190</sup> In return proceedings, these rules and practices should be applied with due regard to the necessity for speed and the importance of

<sup>188</sup> See in this context, Art. 11(2) and (3) of the 1996 Convention. See also the Practical Handbook on the 1996 Convention (*op. cit.* note 166), Chapter 6, para. 6.9.

<sup>189</sup> An urgent measure under Article 11 of the 1996 Convention must be recognised "by operation of law" in all Contracting States under Article 23(1) and may be rendered enforceable under Articles 24 or 26, unless recognition or enforcement is refused on one of the grounds provided in Article 23(2). As recognition and enforcement of measures under Article 23(1) may be subject to challenge and potential refusal under Article 23(2), competent authorities or parties may consider pre-recognition under Article 24. It should also be noted that under the 1996 Convention, enforcement of a foreign measure is not automatic, but "[e]ach Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure" (see Art. 26).

<sup>190</sup> Some information about applicable rules in return procedures is provided by Contracting States in their Country Profiles (*op. cit.* note 21). *E.g.*, in Section 10.3, information is provided, *i.a.*, on whether it is possible for a return application to be decided solely on the basis of documentation (*i.e.*, with no court hearing) and whether oral evidence (*i.e.*, in-person evidence) can be received in return proceedings.

limiting the court's enquiry to the matters in dispute which are directly relevant to the issue of return.<sup>191</sup>

164. In an Article 13(1)(b) case, depending on the facts of the individual case, an attempt to solve factual issues may cause undue delay in the proceedings. As described above (see the two approaches described in Section 4 of this Part), it might not be necessary to solve all factual issues, for example, where the court finds that adequate and effective measures of protection for the child are in place in the State of habitual residence to prevent or mitigate the asserted grave risk, allowing it to order the return of the child without the need to enter into an in-depth evaluation of the information or evidence provided by the individual or body objecting to return.<sup>192</sup>

165. It is important to reiterate that the burden to prove the grave risk lies on the person, institution or other body which opposes the child's return, usually in practice the taking parent.<sup>193</sup> Even if the court gathers information or evidence *ex officio*, or if the left-behind parent or another person or body which has lodged the return application is not actively involved in the proceedings, the court still needs to be satisfied that the burden of proof to establish the exception has been met by the individual or body objecting to return. Furthermore, competent authorities, within the parameters of expedited proceedings, will need to be mindful of ensuring that a left-behind parent has an adequate opportunity to respond to assertions with respect to grave risk and to submit evidence in relation to allegations (see Section 11(iii), below, on the Involvement of the left-behind parent in return proceedings).

166. Contrary to the specification as to which party should bear the burden of proof, the standard of proof is not regulated by the Convention and is rather determined by the *lex fori*, i.e., the law of the State where the court is located.<sup>194</sup>

## ii. Admissibility of and the gathering of evidence / information

167. In relation to the admissibility of documents or other information, courts should consider Article 30, which provides that: "[a]ny application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States".<sup>195</sup>

168. This provision seeks to facilitate admission of information or evidence before the judicial or administrative authorities of Contracting States, and Contracting States are encouraged to ensure, where necessary through implementing legislation, that such documentary evidence can be given due weight under national evidence rules. However, Article 30 may not be understood to contain a rule on the evidential value which is to be placed on these documents, as this matter is left to the procedures and practices of the individual Contracting State.<sup>196</sup>

169. Reference should also be made to Article 13(3) stating that the court "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence".<sup>197</sup>

<sup>191</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 6.5.

<sup>192</sup> See the "Process Maps", Approach 1, *supra*, paras 107 *et seq.*

<sup>193</sup> See, *supra*, para. 63.

<sup>194</sup> The standard of proof applied by Contracting States may differ. *E.g.*, many Contracting States apply a general civil standard of proof "preponderance of evidence" or "balance of probabilities"; a few States require the exception to be proved by a higher standard, *e.g.*, "by clear and convincing evidence".

<sup>195</sup> In addition to Art. 30, the 1980 Convention facilitates the taking of evidence from the State of habitual residence with regard to specific matters, such as obtaining information relating to the social background of the child (Art. 13(3)), or taking notice of the law when determining whether a removal or retention is wrongful (Art. 14). Where there is a need to obtain additional evidence from abroad, authorities should consider using the swiftest methods of taking of evidence abroad available in your State. This may include the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention), although judges should be aware that there may be more expeditions methods available in their State by way of practice, internal law, or bilateral treaties (see Arts 27, 28 and 32 of the Hague Evidence Convention).

<sup>196</sup> See the Explanatory Report (*op. cit.* note 8), para. 140 and the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 6.5.2.

<sup>197</sup> See also, *supra*, note 73.

170. In Article 13(1)(b) cases, the court may consider, for example, child welfare reports, school reports, medical reports, police reports as well as filings in and orders from a court of the State of habitual residence, such as provisional or other injunctions in relation to domestic violence. Furthermore, reports from consulates may provide relevant information, for example, in a situation where a taking parent contacted his or her consulate in the State of habitual residence about issues of domestic violence and the consulate has kept a record of this consultation.

171. Finally, in the process of gathering information and taking evidence in connection with assertions of grave risk, it is important for courts to avoid allowing the taking parent (or another body objecting to return) to expand the scope of the inquiry, which may cause delay and further expense to the left-behind parent who resides in another jurisdiction and may have difficulty in participating effectively in an expanded inquiry. The issue that must be resolved is whether the court has sufficient information and / or evidence to determine whether the exception has been established (or if the grave risk *were to be established* based on allegations; see the two approaches described in Section 4, above), and, if so, whether appropriate protective measures can be put into place that would allow the safe return of the child (and accompanying parent, where relevant).

### iii. Overview of suggested good practices

172. Good practices for courts, if appropriate in the individual case and permitted under internal procedures and practices, include the following:

- **When contemplating the taking of evidence or gathering of information, consider the scope of the return proceedings and the limited scope of Article 13(1)(b), and seek to confine the gathering of information and the taking of evidence accordingly. For example, when considering the need to gather information or take evidence in an Article 13(1)(b) case:**
  - keep in mind that return proceedings under the 1980 Convention are distinct from custody proceedings and they serve to decide *only* on whether to return or not to return the child to the State of habitual residence;<sup>198</sup>
  - consider the forward-looking aspect of the exception and that, consequently, the information or evidence needs to be forward-looking (e.g., as regards a grave risk upon return), as well.<sup>199</sup>
- **Ascertain which facts or assertions are admitted or not contested and which are disputed, as it may be possible to swiftly resolve a case on the basis of undisputed facts or assertions.**
- **Set a specific timeframe for the provision of information or the filing of evidence so as to avoid undue delay in the consideration of the case (e.g., as part of judicial case management).<sup>200</sup>**
- **If there are various ways to gather relevant information or to take evidence, choose the way which expedites the proceedings and / or avoids delays.**
- **Within the limited scope of and giving due regard to expedition necessary for return proceedings, ensure that both parties have an equal opportunity to both raise and substantiate (e.g., a taking parent) and respond to (e.g., a left-behind parent) claims and allegations under the grave risk exception. (See Section 11(iii), below, on the Involvement of the left-behind parent in return proceedings.)**

<sup>198</sup> See, *supra*, para. 89.

<sup>199</sup> See, *supra*, paras 54 *et seq.* However, this does not mean that past behaviours and incidents are not relevant to an assessment as to whether a future risk is present. For example, past domestic or family violence may be highly probative on the issue of whether a risk of harm exists in the future.

<sup>200</sup> See, *supra*, paras. 100 *et seq.* on judicial case management.

- Consider taking into account, if relevant, written information that is already available, including information relating to the social background of the child (Art. 13(3)), such as child welfare reports, school reports, medical reports, police reports, reports from consulates as well as filings in and orders from the court of the State of habitual residence, such as provisional or other injunctions in relation to domestic violence.
- Consider gathering additional information in relation to the grave risk exception *ex officio* in order to expedite the process (with the assistance, as appropriate, of the IHNJ and direct judicial communications and of Central Authorities; see Sections 5 and 6, above).
- Consider the availability of adequate and effective protective measures in the child's State of habitual residence as this may lead to a resolution of the case without the need to enter into an extensive investigation and examination of the asserted facts.<sup>201</sup>
- Consider making orders in advance of the process enabling and /or expediting the collection of evidence (e.g., in some legal systems, pre-trial orders can be made concerning evidence and how evidence will be collected).

#### iv. Expert opinion / evidence in Article 13(1)(b) cases

173. The use of expert opinion / evidence in court proceedings varies among jurisdictions according to their laws, procedures and practices.<sup>202</sup> In Article 13(1)(b) cases, expert opinion / evidence is used to assess whether there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Expert opinion / evidence may prove valuable to a court when, for example, the individual or body objecting to return may not have access to a substantial body of evidence, but is, however, raising serious allegations under the grave risk exception.<sup>203</sup>

174. In general, when contemplating expert opinion / evidence in an Article 13(1)(b) case, it is useful for courts to ask the following key questions early in proceedings, keeping in mind the need for expedition and the limited scope of the return proceeding:

- (1) Does the court need an expert opinion?;
- (2) For what specifically does the court need it?; and,
- (3) Who should the expert be?

##### a) A focus on the limited scope of the exception

175. In relation to expert opinion / evidence in return proceedings, it is important to consider that the court seized only decides on the return of the child and not on the merits of any issues related to custody or contact.<sup>204</sup> Thus, an expert opinion / evidence is often not needed, but if it is deemed necessary, it should focus on the return of the child, but not on any substantive custody or related matters which are a matter for the court in the State of habitual residence. In general, courts must be aware that the expert opinion / evidence provided in return proceedings significantly differs in terms of scope from that usually provided in custody cases.

<sup>201</sup> See the "Process Maps", *supra*, paras 107 *et seq.*

<sup>202</sup> E.g., in some jurisdictions, the court decides on whether to request expert evidence / opinion; in others, the parties can provide expert reports to support their submissions or can request the court to provide such a report. In some jurisdictions, the court has the ability to appoint one independent expert to avoid that several experts, appointed by the parties, are involved in the return proceedings which may cause delays.

<sup>203</sup> E.g., a taking parent is alleging serious abuse relevant to the application of the exception which occurred in the requesting State, but did not, for example, report such abuse to the police or other authorities. Some domestic violence experts suggest as a good practice that victim service centres, domestic violence shelters or other bodies that regularly serve victims of violence may be helpful to screen, in the first instance, individuals raising issues of domestic violence, providing expertise in assessing the veracity and seriousness of any allegations.

<sup>204</sup> See, *i.a.*, *supra*, paras 84 *et seq.* on the scope of return proceedings.

176. When requesting or using expert opinion or evidence in an Article 13(1)(b) case, courts should keep in clear focus the limited scope of this provision.<sup>205</sup> For example, when examining a possible grave risk for the child, the expert opinion / evidence should focus on what the situation of the child would be if returned to the State of habitual residence and, thus, should be forward-looking.<sup>206</sup>

### **b) The need for expedition**

177. Courts must also be aware that if an expert opinion or evidence is requested in return proceedings, its use may prolong the proceedings and, thus, its impact on the duty of the court to act expeditiously in proceedings for the return of children (Art. 11(1)) should be assessed. Therefore, competent authorities should consider carefully whether expert opinion / evidence is necessary in the individual case, and if so, set strict timeframes for its provision. Courts need to consider that the setting of strict deadlines for the submission of expert opinion / evidence might be necessary to meet appropriate timeframes (whether or not these are stipulated by law) for the duration of return proceedings.<sup>207</sup>

### **c) Overview of suggested good practices**

178. Good practices for courts in relation to the use of expert opinion / evidence, if appropriate and permitted under internal procedures and practices, include the following:

#### ***Determination of the need for expert opinion / evidence***

- **Assess the need for expert opinion / evidence at the earliest opportunity and determine whether and how it will address an issue relating to the exception under Article 13(1)(b).**
- **Limit the use of expert opinion / evidence to be consistent with the need to conduct the return proceedings expeditiously.**
- **If expert opinion is needed, identify the specific questions about which expertise is sought in order to be able to select the appropriate expert at the earliest opportunity.**
- **Limit the scope of the expert opinion / evidence and ensure that the expert understands that the role of the court is to decide on the application for return and *not* on the custody of the child and other related substantive issues.**
- **Identify, as soon as possible, the deadline by which the expert must provide the opinion / evidence, orally or in writing (e.g., as part of judicial case management).<sup>208</sup>**

#### ***Selection / appointment of the expert***

- **Consider establishing a list of suitable experts who are knowledgeable about the 1980 Convention, about return proceedings and especially about the specific nature of the grave risk exception, and who would be available on short notice. Depending on the facts of a given case, the expert should also have expertise on matters at issue (e.g., domestic and family violence and the effects on children, child sexual abuse, etc.).**

<sup>205</sup> See, *supra*, paras 51 *et seq.* on the scope of Art. 13(1)(b).

<sup>206</sup> An orientation which does not, however, preclude the consideration of past incidents if predictive of future behaviours or harm. See *supra*, note 199.

<sup>207</sup> E.g., *Ley N° 18.895* of Uruguay (*Restitución de personas menores de dieciséis años trasladadas o retenidas ilícitamente*) provides that the court hearing may be extended up to 72 hours for the purposes of the production of evidence.

<sup>208</sup> See *supra*, paras 100 *et seq.* on judicial case management.

- **Appoint or encourage the use of one suitably qualified expert, as agreed jointly by the parties or appointed by the court, rather than each party bringing an expert.**<sup>209</sup>
- **Only appoint an expert who can produce the expert opinion / evidence within the set timeframe.**

#### ***Procedural matters***

- **Provide specific instructions or directions to the expert about the scope and limits of the examination, for example, by way of a letter of instruction, court order or briefing, and about the need for the expert to confine the inquiry to the limited issue involved and not to approach the issue from a broad perspective on the child's best interests.**
- **Consider asking the expert to report orally in court instead of waiting for a written report if this would prolong the proceedings.**
- **Consider providing relevant information to the expert on the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence (Art. 13(3)), if this is not automatically done.**
- **If necessary, consider the availability of the expert for cross-examination by audio or audio-visual connectivity including evidence being given from an appropriately private place and at a time of day which is reasonable for the expert.**

## **9. Involvement of the child in return proceedings**

179. In return proceedings, there is a general need for the child to be informed of the ongoing process and possible consequences of the proceedings, in a manner appropriate to the child's age and maturity.<sup>210</sup> This general need to keep the child informed also applies to Article 13(1)(b) cases.

180. Internal procedures and practices vary as to the question of whether, and if so, how the child is involved in return proceedings. The trend in recent years has been to give children a "voice" in proceedings which affect their lives, including in 1980 Convention proceedings. At the Sixth Special Commission meeting, experts welcomed the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether the Art. 13(2) exception has been raised.<sup>211</sup>

### **i. International norms**

181. One reason for the above-mentioned trend is that State Parties to the UNCRC have implemented Article 12 of that Convention. Article 12(1) of the UNCRC assures to every child capable of forming his or her own views, "the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Article 12(2) states that "the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".<sup>212</sup> Annex 4 of this Guide sets out relevant excerpts from

<sup>209</sup> In some jurisdictions, there will be no need to appoint an independent expert as there will be officers within the court who have the expertise in this area. This is, *e.g.*, the case in Australia and Japan.

<sup>210</sup> Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 50.

<sup>211</sup> See the Report of Part I of the Sixth Special Commission (*op. cit.* note 28), paras 157-166.

<sup>212</sup> See in this context, the General Comment No 12 (2009) of the Committee on the Rights of the Child, available at < [www.ohchr.org](http://www.ohchr.org) >.



General Comment No. 12 on Article 12 of the UNCRC, “The Right of the Child to be Heard,” from the Committee on the Rights of the Child.<sup>213</sup>

## ii. The child’s voice and exceptions under the 1980 Convention

182. The 1980 Convention provides explicitly for the possibility of taking account of the views of the child in return proceedings under the Article 13(2) exception to return, stating that the court may: “refuse to order the return of the child if it finds that 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”. However, regardless of whether the Article 13(2) exception is invoked (separately or in combination with other exceptions), courts are encouraged to take account of the views of the child in relation to other exceptions, including Article 13(1)(b), and other matters relevant to the case (e.g., determinations of habitual residence).<sup>214</sup> In general, it has been acknowledged that the 1980 Convention supports measures to be taken, where appropriate in a particular case, to provide an opportunity for the child to be heard, unless this is inappropriate having regard to the child’s age or degree of maturity.<sup>215</sup>

183. If the court has obtained the views of the child, it will need to examine these views, including the strength of those views and the appropriateness of taking them into account, given the child’s age and maturity, and what contributions such views will make to a determination of whether to order a return or not. The child’s “views” may include, for example, his or her wishes and feelings on certain matters, and also the child’s account of issues of fact that are relevant to Article 13(1)(b) proceedings.

184. In addition, there is a distinction between hearing the child’s voice on dispositive issues such as habitual residence, objection to return or grave risk of harm, and seeking the child’s views on outcome. In some jurisdictions, both inquiries will produce evidence to be considered by the competent authority. An example of seeking the child’s views as to outcomes is to ask the child whether, if he or she is to be returned, is there anything that would make the return easier for the child. Alternatively, if the outcome is that the child remain in the country to which he or she has been taken or in which he or she has been retained, is there anything that would make that outcome easier for the child. Arguably, these inquiries are a minimum that a State which is a Party to the UNCRC can undertake to observe its obligations under Articles 9, 10, 12 and 13 of that instrument.

## iii. Varied practices across jurisdictions

185. The way in which the child’s views may be obtained and introduced into the return proceedings are not addressed in the 1980 Convention but are regulated by the internal laws and procedures of each Contracting State. In general, it can be noted that in some Contracting States, hearing the child is considered a standard practice in return proceedings, depending on the age and maturity of the child.<sup>216</sup> In other Contracting States, hearing the child is less common and depends on the circumstances of the case and the discretion of the judge. Further, in an effort to contain return proceedings to a short hearing which can be completed promptly, courts may be disinclined to expand the evidence which needs to be considered, such as children’s views. However, against this must be weighed the principles of informing the child of proceedings and hearing the child’s voice.

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<sup>213</sup> *Ibid.*

<sup>214</sup> It should be noted that the Brussels IIa Regulation explicitly states that “[w]hen applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.” See in this context Art. 20 and 24 in the Proposal for a recast of the Brussels IIa Regulation, which is currently under discussion by European Union Member States (*op. cit.* note 76).

<sup>215</sup> See the Conclusions and Recommendations of the Fifth Special Commission (*op. cit.* note 27), Appendix, para. 2. Only a few Contracting States limit hearing the voice of the child to cases where the Art. 13(2) exception is raised; see the Report of Part I of the Sixth Special Commission (*op. cit.* note 28), para. 157.

<sup>216</sup> Some jurisdictions stress that every child should be heard, without a reference to a lower age limit, in, however, an age appropriate way.



186. There are different ways children may be involved in the return proceedings. The child may be heard directly by the judge or by an independent expert, for example a social worker or child psychologist (who sometimes works at the court) who would provide a report to the competent authority. Some States provide for the possibility of the participation of an independent child's lawyer on behalf of a child in their procedures.<sup>217</sup>

187. Irrespective of the different approaches, the decision on how to involve the child (either indirectly or directly, and how to represent the child) must be based on what is most effective in ensuring the rights of the child, the child's best interests and well-being in accordance with the applicable rules and procedures and depending on the facts and circumstances of the individual case. If required, the court should not only ensure that the child is involved (and represented, if applicable), but that the child's views and interests are *de facto* taken seriously in that they are important elements in the effective protection of the child. For example, direct and represented participation of a child can deliver important information on adequate and effective measures of protection directed to the child. A failure to accord a child appropriate respect by, for instance, failing or neglecting to hear the child or obtaining the child's views but advising the child that his or her views will not be taken into consideration on the issue of return, may constitute emotional and psychological harm to the child.

188. It is also important to ensure that the person who interviews the child, be it the judge, an independent expert or any other person, has appropriate training for this task (e.g., adequate competencies in communicating with children, expertise to detect signs of traumatization or possible manipulation, etc.).<sup>218</sup> The person should possess specific knowledge (or be clearly briefed on) the 1980 Convention and return proceedings, in order that he / she understands the scope of and elements important to the Article 13(1)(b) exception.

189. In Article 13(1)(b) cases, special consideration should be given to the safety and well-being of the child, and the child's independent views or concerns about his or her own safety and well-being. These considerations may affect the decision by the court as to whether the child will be involved in the return proceedings and, if this is the case, in what way the views of the child will be obtained (for example, if the child fears retaliation or adverse consequences from family members for expressing a certain view).

#### iv. Overview of suggested good practices

190. Good practices for courts, if appropriate and permitted under internal procedures and practices, include the following:

- **Consider applying judicial case management to meet the child's needs for efficient timing, age appropriate treatment and adequate case information and / or participation, as appropriate, in the proceedings.**<sup>219</sup>
- **Inform or encourage the parties, the legal representative of the child or an appointed expert to inform the child of the ongoing process and possible consequences in a timely and appropriate way considering the child's age and maturity.**
- **Consider giving the child an opportunity to be heard in Article 13(1)(b) cases, depending on the facts of the individual case and considering the age and maturity of the child, as the views of the child can provide important information on the need to protect the child and on ways to effectively and adequately provide that protection (in the State to which the child has been removed or retained, and / or in the State to which he or she will be returned).**
- **Ensure that the child is interviewed by individuals with adequate training and expertise in the hearing of children, be it a judge, independent expert or other person (see Annex 4), if possible, with knowledge and a sound understanding of**

<sup>217</sup> Information on the approach Contracting States have taken in this context is included in the Country Profiles (*op. cit.* note 21), Section 10.4. Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29).

<sup>218</sup> Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 50.

<sup>219</sup> See *supra*, paras 100 *et seq.* on judicial case management.

the 1980 Convention, the scope of return proceedings and of the grave risk exception.

- When obtaining the child's views, consider tools such as family reports (tailored to the limited scope of return proceedings) prepared by appropriately qualified experts to assist in the determination of what weight should be placed on the child's views.
- Ensure that hearing the child does not cause undue delay in the consideration of the case in the return proceedings.
- Ensure that the child is not left feeling responsible for the outcome, thereby compromising his or her relationship with both parents.

## 10. Mediation in Article 13(1)(b) cases

191. The question as to whether, under what conditions, by whom and how mediation is conducted varies among jurisdictions and is dependent upon the internal laws, procedures and practices of each State.

192. In many Contracting States to the 1980 Convention with established mediation facilities, courts promote mediation between the taking parent and the left-behind parent in order to reach an agreed solution on the return or access arrangements with respect to their child.<sup>220</sup> In the context of return proceedings, mediation may be focused on establishing agreement on specific conditions for an expeditious and safe return. However, if appropriate, parties are not precluded from addressing substantive matters, e.g., contact or relocation issues, which may resolve the underlying dispute between the parties. Courts and other national authorities can provide information on mediation and / or refer the parents to a mediator or a mediation association for this purpose.<sup>221</sup>

193. It may be helpful to use mediation to prepare the parties for outcomes from the outset of return proceedings, in order to minimise uncertainty and parental conflict for the child. In some jurisdictions,<sup>222</sup> this has been done by requiring the taking parent to set out in detail what conditions to return he or she will seek if a return is ordered and requiring the left-behind parent to respond. At the same time, the left-behind parent is invited to detail a parenting arrangement which he / she would seek if the child is not returned as well as the parenting arrangement which he / she would seek be implemented if the child is returned. The taking parent is then required to respond to each set of proposals with agreement or proposals of his / her own. Ideally, all these matters are discussed, negotiated and refined in mediation conducted just before the hearing; each parent's position can eventually be reduced to documentary form and admitted into evidence without prejudice to the outcome which he or she primarily seeks in relation to return. The exchange of parenting proposals equips the unsuccessful party to deal with the unfavourable outcome and decreases the uncertainty faced by the children who are the subject of the proceedings. An unsuccessful party may feel devastated by the result of a return application, and the child may similarly be subject to severe anxiety because he / she is uncertain about what will happen next (this may be made worse if the parent in whose care the child is has become distracted by his or her loss and is not emotionally available to the child and / or the capacity to parent is impaired). An exchange of proposed conditions to return also reduces the likelihood of safe harbour orders being left until too late in the proceedings to be formulated and fairly implemented.

194. With respect to assessing the suitability of a particular case for mediation, cases in which the Article 13(1)(b) exception is raised are not *per se* excluded from the use of alternative

<sup>220</sup> On mediation in international child abduction cases, see the Guide to Good Practice on Mediation, The Hague, 2012, available at < [www.hcch.net](http://www.hcch.net) > under "Publications". The role of the courts is described in Section 4.1.2.

<sup>221</sup> E.g., in the Netherlands, mediation between the taking parent and the left-behind parent is embedded in Hague return proceedings, see K.L. Wehrung and R.G. de Lange-Tegelaar in *The Judges' Newsletter on International Child Protection*, Vol. XVI / Spring 2010, pp. 45-48. All volumes of *The Judges' Newsletter on International Child Protection* are available at < [www.hcch.net](http://www.hcch.net) > under "Publications".

<sup>222</sup> E.g., Australia.

dispute resolution mechanisms, but each case should be carefully assessed, as is generally required, on whether mediation is appropriate.<sup>223</sup>

195. For example, there are different views on the suitability of mediation where, in an Article 13(1)(b) case, there are assertions of domestic or family violence (see Annex 3). Views differ as to whether family disputes involving types of violence and / or coercion are *ever* suitable for mediation.<sup>224</sup> Some States do not allow mediation in any cases where domestic violence is alleged (irrespective of whether the allegation is proven to be true or not) or make mediation in these cases subject to certain conditions.<sup>225</sup>

196. It is of the essence that mediation should not put the safety or well-being of any person at risk, including family members or the mediator.<sup>226</sup> It is, therefore, highly advisable that relevant cases are carefully screened to assess whether they are suitable for mediation, and that mediation, when conducted, is conducted by one or more experienced family mediators who have undergone specific training for mediation in international child abduction cases and domestic violence cases (and the grave risk exception in particular), if relevant.<sup>227</sup> Safeguards employed during mediation might include the use of caucuses (private meetings between the mediator and one of the parties); agreement as to the commencement of therapy by one of the parties might be the result of mediation under these circumstances, for example.

197. As with other aspects of 13(1)(b) cases, mediation must not unduly delay the continuation and timely conclusion of the return proceedings.<sup>228</sup>

#### **i. Overview of suggested good practices**

198. Good practices in relation to mediation in Article 13(1)(b) cases, if appropriate and permitted under internal laws, procedures and practices, include the following:

- **Consider whether, based on the asserted facts of the individual case, mediation is suitable and if so, provide or require competent authorities or bodies to provide information on mediation to the parties as early as possible in the proceedings,<sup>229</sup> and if the parents agree to mediate, refer the case, without delay, to experienced mediators or a mediation association.**
- **Where issues of domestic violence and / or other harmful behaviours are raised, consider carefully whether a referral to mediation is appropriate, given that there**

<sup>223</sup> In general, it is important to ensure that engagement in mediation does not result in any disadvantage for either of the parties and each case should be assessed as to whether it is suitable for mediation; see the Guide to Good Practice on Mediation (*op. cit.* note 220), *i.a.*, Sections 1.2 and 2.1.

<sup>224</sup> See the Guide to Good Practice on Mediation (*ibid.*), Chapter 10.

<sup>225</sup> *E.g.*, in Spain, according to the *Ley Orgánica 1/2004*, mediation is not conducted in cases in which the existence of domestic violence is asserted. In the United States of America, each state has different rules governing mediation which may include rules about handling cases involving assertions in relation to domestic violence; some mediation programmes will not conduct mediation in cases which involve serious domestic violence. See the Country Profiles of Spain and the United States of America (*op. cit.* note 21), Section 19.4. See also the Guide to Good Practice on Mediation (*ibid.*), Chapter 10, para. 266.

<sup>226</sup> See the Guide to Good Practice on Mediation (*ibid.*), in particular, Section 10.2.

<sup>227</sup> *I.a.*, the mediator should be able, in an initial screening, to identify cases that carry special risks, where special safeguards might need to be taken or mediation might not be appropriate at all. He / she should also be able to identify patterns of domestic violence, to draw the necessary conclusions of domestic violence, its degree and / or risks of future violence, and be prepared to take the necessary precautions and measures during the mediation. Moreover, the choice between direct and indirect mediation, the mediation venue and the mediation method need to be adapted to the particular circumstances of the case. See the Guide to Good Practice on Mediation (*ibid.*), Sections 3.2 and 4.2, and Chapter 10.

<sup>228</sup> See the Guide to Good Practice on Mediation (*ibid.*), Section 2.1. See also the Conclusions and Recommendations of the Fourth Special Commission (*op. cit.* note 26), Recommendation No 1.11 stating that "[m]easures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings", which was reaffirmed in the Conclusions and Recommendations of the Fifth Special Commission (*op. cit.* note 27), Recommendation No 1.3.1.

<sup>229</sup> See the Guide to Good Practice on Mediation (*op. cit.* note 220), Section 4.1. See also, *e.g.*, Art. 23(2) of the Proposal for a recast of the Brussels IIa Regulation stating: "As early as possible during the proceedings, the court shall examine whether the parties are willing to engage in mediation to find, in the best interests of the child, an agreed solution, provided that this does not unduly delay the proceedings".

may be an imbalance of power between the parents and that the mediation should not put the safety or well-being of any person at risk.

- Where mediation is considered appropriate and the necessary expertise is available to conduct the mediation, set a strict timeframe for the mediation process (as part of judicial case management)<sup>230</sup> and ensure that mediation does not unduly delay the proceedings.
- Where mediation is considered appropriate in a case involving any issues of alleged or proven harmful behaviours, ensure that it is conducted by knowledgeable and experienced mediators that are specially trained to mediate in such circumstances.
- Ensure that what transpires during mediation is confidential and that anything said or done in the mediation cannot be used as evidence that the left-behind parent acquiesced (within the meaning of Art. 13(a)) or otherwise.<sup>231</sup>

## 11. Other issues in return proceedings

### i. Contact between the child and the left-behind parent

199. With respect to the well-being of the child, it is important as soon as possible to enable the child to maintain contact with the left-behind parent during the return proceedings, provided that this is possible and appropriate, and that contact is established with care.<sup>232</sup> This contact can be in person, with the left-behind parent travelling to the Requested State, or communication by electronic means.

200. Failure to restore quickly pre-existing contact arrangements operating between the child and the left-behind parent during the course of the return proceedings may carry the risk of causing further harm to the child and estrangement from that parent. The exercise of contact can have de-escalating effects on the proceedings and can help to promote an amicable settlement between the parents. Therefore, courts should facilitate contact between the child and the left-behind parent to the extent possible (regardless of whether a contact order is already in place) and consider that this contact should be maintained, in all circumstances where the child is not at risk.<sup>233</sup> Some Contracting States have included a specific provision in relation to this duty in their implementing laws and / or procedures.<sup>234</sup>

201. This also applies to Article 13(1)(b) cases. Depending on the individual case, the court might be required, in a case where the grave risk exception is raised, to consider appropriate measures to enable contact between the child and the left-behind parent during the return proceedings, taking into account the submissions in relation to the establishment of a grave risk for the child. For example, if the taking parent asserts the existence of violence against the child (or against the taking parent), it is important that the court pays due regard to the safety and well-being of the child (and of the taking parent, if necessary) when considering whether and if so, how to arrange for contact between the child and the left-behind parent. In this

<sup>230</sup> See, *supra*, paras 100 *et seq.* on judicial case management.

<sup>231</sup> While the allegation that the left-behind parent "subsequently acquiesced" may not be accepted or prove to be dispositive, such an argument is a time-consuming distraction in a return proceeding and should be avoided.

<sup>232</sup> Art. 9(3) of the UNCRC states that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests". Art. 10(2) affirms this right also if the child's parents reside in different States.

<sup>233</sup> See, *e.g.*, the *General Principles and a Guide to Good Practice, Transfrontier Contact Concerning Children*, Hague Conference on Private International Law, Bristol, Family Law (Jordan Publishing Ltd.), 2008 (hereinafter, "Guide to Good Practice on Transfrontier Contact"), Chapters 1, 4.6. and 5.1.2. Information on whether in a Contracting State judicial or administrative authorities take provisional or interim measures to enable the left-behind parent to exercise contact or access in respect of the child while return proceedings are pending is provided in the Country Profiles (*op. cit.* note 21), Section 10.6.

<sup>234</sup> *E.g.*, Section 38(2) of the German International Family Law Procedure Act stipulates that in return proceedings, "[a]t every stage of the proceedings the court shall examine whether the right of personal access to the child can be ensured".

regard, effective co-operation with the relevant authorities (e.g., the Central Authority or child welfare authorities) may be useful or even required.

202. Good practices in relation to the maintenance of contact between the child and the left-behind parent during the return proceedings are as follows:

- **Consider, as early as possible in the process and at every stage of the proceedings, whether it is possible to enable contact between the child and the left-behind parent.**
- **If such contact is possible and adequate, consider taking appropriate measures for the establishment or facilitation of such contact, while paying due regard to the safety and well-being of the child, such as, for example:**
  - **facilitating or organising in-person meetings between the child and the left-behind parent (which could, if necessary, be supervised by a child welfare officer or other person);<sup>235</sup>**
  - **facilitating or organising video conferences to allow contact between the child and the left-behind parent from a distance (in particular when the left-behind parent is not able to attend return proceedings);**
  - **making interim contact orders (for which a jurisdictional basis may be provided by Art. 11 of the 1996 Convention).<sup>236</sup>**
- **Communicate and, if necessary, seek assistance from Central Authorities or other competent authorities (e.g., child welfare authorities) to establish or facilitate contact between the child and the left-behind parent during the return proceedings.**
- **Ensure that measures to facilitate or establish contact between the child and the left-behind parent do not cause undue delay in the consideration of the case.**

## ii. Legal representation of the parties

203. The question as to whether the parties in return proceedings are required to be legally represented, and whether legal aid or *pro bono* representation is available, depend on internal laws, procedures and practices.

204. The Convention states in Article 7(2)(g) that Central Authorities, either directly or through any intermediary, shall take all appropriate measures “where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers”.<sup>237</sup>

205. In Article 13(1)(b) cases, it might be particularly advisable for the parties to be legally represented, for example, to assist the taking parent in providing relevant information and / or evidence to establish the grave risk and to assist the left-behind parent in responding to these submissions, without causing undue delay in the consideration of the case.

<sup>235</sup> Information on supervised access, *i.a.*, conditions under which access is supervised and facilities that provide supervised access in a Contracting State, is provided in the Country Profiles (*op. cit.* note 21), Section 16.3.

<sup>236</sup> Art. 11 of the 1996 Convention (if applicable) provides a jurisdictional basis, in cases of urgency, for making an order for interim contact between the child and the left-behind parent by the court seised with the return proceedings. For Art. 11 to be applied, the child does not need to be habitually resident in a Contracting State of the 1996 Convention. The interim contact order will be recognised by operation of law in the State of habitual residence of the child, provided that both States concerned are Contracting States to the 1996 Convention; see, *supra*, paras 147 *et seq.* See in this context also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 233), Chapter 3.3.

<sup>237</sup> See for more information, e.g., the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Chapter 4.13.



206. On the other hand, courts must ensure that each party is given a fair opportunity to produce and challenge evidence and to have their submissions considered by the court, irrespective of whether the party is legally represented or not.

207. A good practice for courts in relation to the legal representation of the parties during the return proceedings is as follows:

- **Provide information on the availability of legal aid or *pro bono* legal representation, if applicable, in the event that one party is not legally represented and consider the assistance of Central Authorities in this respect.**

### iii. Involvement of the left-behind parent in the return proceedings

208. Internal laws and procedures of Contracting States may encourage or require the court seized with the return proceedings to give the left-behind parent an opportunity to participate personally in proceedings.<sup>238</sup> Additionally, in Article 13(1)(b) cases, where serious assertions may be raised in the objections to return, it may be helpful or preferable to the left-behind parent to be heard in person. Moreover, the left-behind parent's participation in mediation in order to prepare for the possible outcomes of the proceedings or to resolve other issues underlying the dispute may be desirable (see Section 10 of this Part, above). In such cases, the court must consider the duty to act expeditiously in the return proceedings (Art. 11(1)) and avoid that the participation of the left-behind parent in proceedings causes undue delay.

209. Good practices generally for courts in this context, if appropriate and permitted under internal procedures and practices, are as follows:

- **Consider the requirement to give the left-behind parent an opportunity to personally participate in proceedings (and / or associated mediation), if applicable, as early as possible (e.g., as part of judicial case management)<sup>239</sup> in order to be able to set adequate time frames and make appropriate preparations, if necessary.**
- **Facilitate the participation of or carry out a hearing with the left-behind parent, if applicable, in the quickest and most efficient manner available,<sup>240</sup> for example, by mediation with or taking evidence from the left-behind parent via tele-conferencing or video-conferencing so as to avoid requiring him / her to travel to the requested State.<sup>241</sup>**
- **Consider requesting assistance from the Central Authority in the requested and / or requesting State to assist with tele-conferencing or video-conferencing arrangements.**

210. Where internal procedures and practices require the personal appearance of the parties, it is important to consider that the left-behind parent in particular may face a financial burden due to travel and accommodation costs in the requested State, and additional financial burdens if time off work is taken (including possible penalties or loss of employment), and time constraints if travelling long distances at short notice to attend the hearing.<sup>242</sup> It can be argued

<sup>238</sup> Information on whether the left-behind parent is generally required to participate in the return proceedings in a Contracting State is included in the Country Profiles (*op. cit.* note 21), Section 10.3(f). For example, Art. 11(5) of the Brussels IIa Regulation stipulates that "[a] court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard".

<sup>239</sup> See *supra*, paras. 100 *et seq.* on judicial case management.

<sup>240</sup> See, e.g., the Practice Guide for the Application of the Brussels IIa Regulation (*op. cit.* note 81), para. 4.3.4.1.

<sup>241</sup> Information on whether facilities are available in a Contracting State to enable the left-behind parent to participate in return proceedings from outside the requested State is included in the Country Profiles (*op. cit.* note 21), Section 10.3(g).

<sup>242</sup> See, e.g., the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), para. 6.5.3, noting, *i.a.*, that a requirement for the left-behind parent's personal appearance in the return proceedings may, in some cases, have the effect of rendering the Convention remedy unavailable. See also the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), para 4.17.

that there should not be an additional burden on the left-behind parent by requiring him / her to take part in proceedings in a forum that the taking parent has unilaterally chosen.<sup>243</sup>

211. The co-operation mechanisms established by the Convention help, *inter alia*, to avoid the left-behind parent having to travel to the State to which the child has been abducted in order to achieve the return of his / her child, in particular when it is onerous to expect him / her to travel. For this reason, the Central Authority acts as the applicant in the return proceedings or represents the left-behind parent directly in some Contracting States.<sup>244</sup> It may not always be possible to avoid the left-behind parent traveling to the requested State to participate in the return proceedings, but courts should ensure that the left-behind parent is not prejudiced as a result. Competent authorities may also wish to consider in such circumstances that, for example, a left-behind parent may not have been given an opportunity to be heard on the question of conditions to return or has not been sufficiently involved in the proceedings through mediation or direct representation. That parent may thus seek to undermine the safe return / “soft landing” orders and arrangements, to the immediate detriment of the child for whose benefit the arrangements were put in place.

212. Good practices for courts in relation to issues of the personal appearance or participation of the left-behind parent in proceedings, if appropriate and permitted under internal procedures and practices, are as follows:

- **Consider that legal representation of the left-behind parent is a means for that parent to make submissions without appearing in person (see Section ii, above).**
- **Ensure, to the extent possible, that a requirement for the personal appearance of the left-behind parent does not cause delay in the proceedings.**
- **If necessary and adequate, try to minimise requirements for the left-behind parent to attend mediation or court hearings in person,<sup>245</sup> for example, by:**
  - **enabling the left-behind parent to make his / her submissions in writing instead of requiring a statement in an oral hearing, unless this would cause undue delay in the proceedings;**
  - **providing facilities (e.g., tele-conferencing or video-conferencing facilities) to enable the left-behind parent to participate in mediation or return proceedings from outside the requested State, so as to avoid requiring the left-behind parent to attend in person.<sup>246</sup>**
- **Consider requesting assistance from the Central Authority in the requested State to assist with arrangements to facilitate the participation of the left-behind parent in mediation or the proceedings.**

<sup>243</sup> See in this context, e.g., P.R. Beaumont and P.E. McEleavy (*op. cit.* note 56), p. 259. However, some jurisdictions find it very useful that the applicant party (e.g., the left-behind parent), even if represented by a lawyer, attends proceedings in person. The benefits might include a better ascertainment of the facts of the case, contact with the child, and an increased possibility of mediation and voluntary agreement between the parties. If the left-behind parent is willing to travel to the requested State, some courts will look for means to support this party: for example, agreement in the setting of the trial dates, an offer of financial support, or assistance in the case of problems in entering the requested State because of visa or immigration issues.

<sup>244</sup> See the Country Profiles (*op. cit.* note 21) and the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Chapter 4.16.

<sup>245</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Chapter 4.17.

<sup>246</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), para. 6.5.3. See also note 241 in relation to the Country Profiles.



## PART III: Information for Central Authorities

### The role of Central Authorities in Article 13(1)(b) cases

213. Central Authorities play a vital role in the effective functioning of the Convention.<sup>247</sup> In Article 13(1)(b) cases,<sup>248</sup> Central Authorities can assist one another, the court seized with return proceedings and other authorities, as well as parents and the child in various ways. Their action depends, however, on the role they are given within their State and the functions and powers provided by national legislation under which they are established.<sup>249</sup> Central Authorities and the national authorities with which they co-operate, may also be limited by their material and human resources.<sup>250</sup>

214. Given that Central Authorities can provide crucial assistance in Article 13(1)(b) cases, it is important that the relevant Central Authority is systematically informed that the taking parent (or another person or body objecting to return) raises a claim that there is a grave risk before the court. When a Central Authority is not regularly informed in a timely manner, its co-operation is necessarily greatly reduced. However, while a Central Authority may assist in various respects, it is also important to emphasise the burden of proof of the existence of a grave risk and of the existence of protective measures ultimately lies on the parties, and not on the Central Authority.

#### i. Acceptance of return applications (Arts 8 and 27)

215. In exercising their functions with regard to the acceptance of return applications (see Art. 8), Central Authorities should respect that the evaluation of factual and legal issues, including allegations under Article 13(1)(b), is a matter exclusively for the court or other competent authority deciding upon the return application.<sup>251</sup>

216. Article 27 gives Central Authorities very limited discretion to reject an application where the “requirements” of the Convention are not met or “the application is otherwise not well founded.”<sup>252</sup> It should be noted that Article 27 cannot be used by Central Authorities to refuse an application on the basis of a party raising the Article 13(1)(b) grave risk exception or another exception which, again, is a matter for the court or other relevant competent authority to evaluate.

#### ii. Duty to co-operate and to promote co-operation among internal authorities (Art. 7(1))

217. Article 7(1) sets out the general duty of Central Authorities to co-operate with each other and to promote co-operation among the competent authorities in their respective States to secure the prompt return of children and to achieve the other objectives of the Convention.

<sup>247</sup> Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 1, p. 12. See, in particular, Arts 6-8 and Art. 21 of the 1980 Convention.

<sup>248</sup> This section focuses on the role of Central Authorities in Article 13(1)(b) cases. Central Authorities are requested to consult the Guide to Good Practice on Central Authority Practice (*ibid.*) for additional, general information.

<sup>249</sup> Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Introduction, p. 7; section 1.1, pp. 12-13.

<sup>250</sup> In this respect, care should be taken to limit the number and scope of requests made to Central Authorities to those crucial to a given situation, in order to maximize the likelihood that the requests can be fulfilled in an expeditious manner.

<sup>251</sup> Conclusions and Recommendations of the Fifth Special Commission (*op. cit.* note 27), para. 1.1.2.

<sup>252</sup> This article can be invoked, *e.g.*, when the child, at the time of the removal, is more than 16 years of age (see Art. 4 of the Convention). The decision to dismiss an application should, due to its consequences, not be taken lightly. See the Conclusions and Recommendations of the Fifth Special Commission (*ibid.*), para. 1.1.3. See also N. Lowe, M. Everall QC & M. Nicholls, *International Movement of Children*, Jordan Publishing Limited, 2004, p. 234 and the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.9, p. 47.

218. It follows that, in situations where the taking parent claims, before the competent authority, that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, and the court sees adequate potential for grave risk, Central Authorities may be asked and should co-operate with one another and the relevant internal authorities to offer support in such situations; in particular in the light of a Central Authority's responsibility under Article 7(2)(h) with respect to securing the safe return of a child.<sup>253</sup>

219. For this task, it is particularly useful if Central Authorities have strong links to the internal justice and welfare system and have established a network of relevant agencies within their jurisdiction.<sup>254</sup> This will also assist in ensuring prompt and expeditious action<sup>255</sup> and the adherence to a (strict) timeframe set by the court.<sup>256</sup> An increasing number of Central Authorities have recognized this need and facilitate co-operation between child protection agencies in different States where there are concerns for the child's safety upon return.<sup>257</sup>

220. General good practices for Central Authorities (in their function as Central Authority of the requesting or of the requested State) are as follows:

- **Exchange information (e.g., upon request of competent authorities) on measures of protection and other arrangements that are available to secure the safe return of the child in the foreign State without delay. The Central Authority can itself identify the need for information on measures of protection and initiate the request for this information, or it can act upon the request by the court seized with the return proceedings.**
- **Establish close and effective working relationships with internal authorities within one's own jurisdiction whose assistance and co-operation is required to protect the child and ensure the child's safe return.**
- **Provide contact information of relevant authorities to enable efficient communications between various authorities, as necessary.**

### iii. Disclosure of the location of child (Art. 7(2)(a))

221. When the Central Authority in the requested State has located the child (see Art. 7(2)(a)), this does not necessarily mean information on the location will in all cases be passed on to the left-behind parent or to the Central Authority in the requesting State.<sup>258</sup> Generally in the course of Article 13(1)(b) proceedings, careful consideration should be given as to whether there is a need to disclose the location of the child to the left-behind parent and whether such disclosure may put the safety of the child or taking parent at risk.<sup>259</sup>

222. Legal norms and practices concerning the procedure for the disclosure of the location of the child vary among jurisdictions. For example, in some jurisdictions, confidentiality of the child's location is mandatory. However, in other jurisdictions, the Central Authority in the requested State may have greater discretion. In the latter case, it may be required to find a balance between the right of the left-behind parent to know the location and circumstances of

<sup>253</sup> See, *infra*, paras 243 *et seq.* on Art. 7(2)(h).

<sup>254</sup> Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), sections 1.2.1, pp. 13-14, and 2.3.3., p. 26.

<sup>255</sup> See the Guide to Good Practice on Central Authority Practice (*ibid.*), section 1.5, pp. 19-20.

<sup>256</sup> See, *supra*, paras 91 *et seq.* in relation to expeditious proceedings.

<sup>257</sup> See the Report of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 28), para. 53.

<sup>258</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.10, pp. 47-48.

<sup>259</sup> The Central Authority, however, whilst it may in certain cases keep the address of the taking parent and child confidential, would normally be obliged to inform the applicant of the court with jurisdiction in the requested State. That court would contact the Central Authority and receive the confidential address information of the respondent. Some jurisdictions put the confidential address information into a special additional file which the applicant may not receive, even when applying for an inspection of the records.

his / her child and the need to prevent possible harm to the child or taking parent as a consequence of possible disclosure of the location.

223. Where disclosing the child's location may put the child or taking parent's safety at risk, Central Authorities should consider carefully whether passing on this information to the left-behind parent is indeed mandatory in the context of return proceedings. Likewise, in case the information should be protected for legal or safety reasons, they may even be hindered from disclosing the information to the Central Authority in the requesting State generally, or without a guarantee of confidentiality.<sup>260</sup> Continuation of return proceedings must be guaranteed even without such information exchange.

224. Good practices for the Central Authority of the requested State, if appropriate and permitted or required under internal laws and procedures, include the following:

- **Know what information a Central Authority may refuse to give to the applicant or the taking parent under internal laws and procedures, in order to be able to retain information when disclosure may put the safety of the child, a parent or others at risk.**
- **Before informing the left-behind parent or the Central Authority in the requesting State about the location of the child, consider carefully whether the disclosure of this information may put the safety of the child or taking parent at risk in the individual case.<sup>261</sup>**
- **If it may put the child or taking parent's safety at risk, do not disclose the information, or disclose the information to the Central Authority in the requesting State only upon a guarantee of confidentiality.**
- **As deemed necessary or appropriate, consider seeking a court order to prohibit the disclosure of the information on the location of the child if necessary and possible under internal laws and procedures.<sup>262</sup>**

225. Disclosure of the location of the child and taking parent may, however, be necessary for the service of documents for initiation of or in the course of return proceedings. For example, the lawyer representing the left-behind parent or the court may require the address of the taking parent and child for the service of documents.<sup>263</sup>

226. In exceptional circumstances where the child and taking parent is deemed to be put at risk by a disclosure of their location, good practices for the Central Authority of the requested State, if appropriate and permitted under internal laws and procedures, include the following:

- **If necessary, establish a means of initiation of return proceedings without obligatory disclosure of the location of the child and taking parent to the applicant, his or her lawyer, or requesting Central Authority, as appropriate.**
- **If the disclosure of the location of the child is necessary for the service of documents and it is deemed that this may put a child and / or parent at risk, consider requesting that the lawyer who is asking for the information to issue a guarantee of confidentiality, or consider other methods of service (e.g., by using the address of the requested Central Authority or by providing the address to the competent authority in a separate letter and requesting it to use means of service without location disclosure).**

<sup>260</sup> A guarantee that the information is not disclosed to the taking parent. See Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.10, p. 48.

<sup>261</sup> This would not apply, e.g., in States where it is mandatory to keep the location of the child confidential.

<sup>262</sup> E.g., in a State where there is no legal rule with respect to the confidentiality of information about the location of the child, it may be required that a court orders non-disclosure of that information, when appropriate.

<sup>263</sup> In particular, this situation may apply if the taking parent is not (yet) represented by a lawyer.

#### iv. Arranging interim contact between the child and the left-behind parent

227. Once the child has been located, the left-behind parent may seek contact with the child, and Central Authorities (as well as competent authorities) should facilitate this contact.<sup>264</sup> Electronic communication between the left-behind parent and the child, for example, may ease the child's anxiety and better prepare both for the eventual outcome.

228. Contact should, however, only take place where appropriate and in a manner that respects the child's need for physical and psychological safety. Therefore, in certain cases in which the "grave risk exception" has been raised and is, at least *prima facie* considered to be based on credible assertions and / or evidence, Central Authorities may need to exercise particular caution when arranging interim contact or when taking or initiating provisional measures to enable the left-behind parent to exercise contact.<sup>265</sup>

229. Where there are serious concerns for the child's safety or well-being, good practices for the Central Authority of the requested State, if appropriate and permitted under internal laws and procedures, include the following:

- **Consider not disclosing the child's location to the left-behind parent and consider facilitating or arranging for contact in a neutral location, if appropriate.**
- **Consider facilitating remote contact between the left-behind parent and the child by, for example, a telephone or video conference, if appropriate.**
- **Consider facilitating "supervised" contact with a representative from a child welfare authority or other agency present at the meeting of the child and the left-behind parent (face-to-face or remotely), if appropriate.**
- **Consider that it may not be appropriate to arrange for interim contact with the left-behind parent where there have been serious issues raised and where contact may put the child's physical or psychological safety at risk.**

#### v. Duty to prevent further harm to the child (Art. 7(2)(b))

230. Central Authorities (in co-operation with other authorities within their States) have a duty to take all appropriate measures "to prevent further harm to the child or prejudice to interested parties by taking or causes to be taken provisional measures" (Art. 7(2)(b)).<sup>266</sup> This may also be relevant, for example, in a case where the taking parent raises the grave risk exception and also claims that the child is currently (in the requested State) in danger or needs special assistance.<sup>267</sup>

231. There is a range of measures that the competent authorities in the requested State can take to protect the child or to prevent further harm to the child in that State, when deemed necessary in certain cases. These measures include mental health counselling or treatment for the child<sup>268</sup> and arrangements for alternative care.<sup>269</sup> The Central Authority may facilitate such

<sup>264</sup> See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 233), section 4.6. in particular 4.6.2, p. 23. Information on whether judicial or administrative authorities can take provisional or interim measures to enable a left-behind parent to exercise contact in respect of the child while return proceedings are pending is included in the Country Profile in section 10.6 (*op. cit.* note 21). See also Part II, Section 11(i) of this Guide, above.

<sup>265</sup> In this context, Central Authority should be mindful of their duty to prevent further harm to the child.

<sup>266</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.15, p. 52.

<sup>267</sup> This might be the case where the child is, *e.g.*, in a very fragile mental condition.

<sup>268</sup> Mental health counselling or treatment may be necessary, *e.g.*, in a situation where the child is traumatized because of the circumstances of the wrongful removal or has experienced domestic violence.

<sup>269</sup> Alternative care may be necessary, *e.g.*, if the taking parent is unable to care for the child in the requested State.

measures, depending on internal laws and procedures within a given jurisdiction.<sup>270</sup> Administrative or judicial authorities in Contracting States to the 1996 Convention can take such measures of protection under Article 11 of that Convention and, when necessary, request assistance from the Central Authority designated under that Convention.<sup>271</sup>

232. Good practices for the Central Authority of the requested State, if appropriate and permitted under internal laws and procedures, and as deemed necessary, include the following:

- **Consider involving the competent child welfare authority, so that protective measure(s) for the child in the requested State may be evaluated.**
- **Immediately take any steps to institute proceedings to secure orders for the protection of the child in the requested State (where an intervention by the child welfare authorities can only be initiated by an order of a competent authority).**
- **Immediately inform the taking parent, left-behind parent and / or their lawyers about their right to apply to a child welfare authority or to initiate court proceedings to obtain protective measures for the child in the requested State (in particular, where the Central Authority does not have or only has limited authority to initiate these measures).**
- **Monitor the process to ensure that measures are commenced without delay and implemented effectively.**
- **Inform the competent child welfare authority or the competent authority if the measure of protection needs to be modified or abrogated.**
- **Consider creating one or more focal points in the child welfare authorities to facilitate and expedite the taking of protective measures to prevent further harm to the child in the requested State.**

#### **vi. Duty to secure a voluntary return or to bring about an amicable resolution of the issues (Art. 7(2)(c))**

233. The fact that a taking parent raises the grave risk exception should not prevent Central Authorities from taking appropriate measures to seek the voluntary return of the child or bring about an amicable resolution of the case (Art. 7(2)(c)), if appropriate.

234. However, caution should be exercised when the taking parent submits for example, under the Article 13(1)(b) exception, that the left-behind parent was violent to him / her or to the child. When the issue of domestic violence is raised, depending on the jurisdiction, mediation may not be permitted or appropriate, or special safeguards may be needed during the mediation process.<sup>272</sup>

<sup>270</sup> Central Authorities may have the authority to initiate protective measures directly through the competent child welfare authority, or to apply directly to a court for a protection order (as is the case, *e.g.*, in Australia, see the Family Law (Child Abduction Convention) Regulations, section 14(1)(d)). Information on this matter is included in the Country Profiles (*op. cit.* note 21), see section 6(2)(j).

<sup>271</sup> See, in general, Chapter V of the 1996 Convention and, in particular, Arts 32(b) and 36. In the majority of Contracting States to the 1996 Convention, Central Authorities designated under that Convention are those designated under the 1980 Convention. If this is not the case, the designated Central Authorities should co-operate closely and effectively and be able to communicate quickly. See the Practical Handbook on the 1996 Convention (*op. cit.* note 166), Chapter 11, in particular paras 11.2 and 11.6. See also, *supra*, paras 147 *et seq.* on the protective measures under the 1996 Convention.

<sup>272</sup> See for more information on mediation, *supra*, paras 191 *et seq.* and the Guide to Good Practice on Mediation (*op. cit.* note 220).

## **vii. Duty to initiate or facilitate the institution of judicial or administrative proceedings (Art. 7(2)(f))**

235. Concerning their duty to initiate or facilitate the institution of judicial or administrative proceedings to obtain the return of the child (Art. 7(2)(f)),<sup>273</sup> Central Authorities should, to the extent possible and as early as possible, collect information and knowledge to assist in the preparation of the case before the court.<sup>274</sup> This is of particular importance when the Central Authority itself, or through an agency, files the application for return before the competent authority.

236. Such assistance can be particularly useful in a case where the taking parent raises assertions of grave risk under Article 13(1)(b), as these cases may be complex and require a higher degree of careful judicial case management. In some States, Central Authorities quickly gather as much information and evidence as possible – such as measures of protection available in the requesting State and police, medical and social workers' reports – before filing the return application with the court.<sup>275</sup> In this context, Central Authorities should also seek to promote expeditious proceedings.<sup>276</sup> If a Central Authority collects such information when assertions of grave risk under Article 13(1)(b) are raised, the inquiry should be conducted within the shortest possible time frame, and with the clear understanding that the competent authority has exclusive competence to evaluate such assertions.

237. However, it should be kept in mind that there is a variety of ways a Central Authority may fulfil its obligation to initiate or facilitate the institution of judicial or administrative proceedings, depending on the role which Central Authorities are given within their State and their functions and powers under national law. For example, some States authorize that the Central Authority itself initiates the return proceedings by filing the application before the competent authority. In other States, the Central Authority will assist both the applicant and the respondent as a neutral third party and is not authorised to be involved in judicial proceedings.<sup>277</sup>

238. Good practices for the Central Authority of the requested State, if appropriate and permitted under internal laws and procedures, include the following:

- **Consider requesting that the taking parent, as early as possible,<sup>278</sup> collects information or evidence to substantiate allegations under Article 13(1)(b) as swiftly as possible.**
- **Contact the Central Authority in the requesting State or the left-behind parent, as early as possible, for a response from the left-behind parent to the taking parent's submissions in relation to Article 13(1)(b), including any information and / or evidence he or she may have at this stage.**
- **Where needed, request, as early as possible, information or reports with relevance to the taking parent's submission regarding the Article 13(1)(b) exception from the Central Authority in the requesting State.**
- **Emphasise in all communications with the Central Authority in the requesting State, the taking parent, the left-behind parent or other involved persons, the**

<sup>273</sup> Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.16, p. 53.

<sup>274</sup> Central Authorities should, as far as possible, use modern rapid means of communication in order to expedite proceedings; see the Guide to Good Practice on Central Authority Practice (*ibid.*), section 1.3.3, p. 16.

<sup>275</sup> See the Report of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 28), para. 104.

<sup>276</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 1.5, pp. 19-20.

<sup>277</sup> Information on How the Central Authority fulfils its obligation to initiate or facilitate the initiation of proceedings is included in the Country Profiles (*op. cit.* note 21), Section 10.3

<sup>278</sup> This request should be made shortly after the Central Authority has learned from the taking parent that he / she raises the Article 13(1)(b) exception, *e.g.*, in the taking parent's response to the letter from the Central Authority providing information about, *i.a.*, the advantages of a voluntary return (see Arts 7(c) and 10 and the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.12, p. 49 and Appendix 4.2.).



**need to provide the information or evidence without delay in order to expedite proceedings.**

- **Ensure that the Central Authority in the requesting State, the taking parent, the left-behind parent, their lawyers and others involved in the case are aware of specific timeframes set by the court with a view to expedite proceedings.**

239. A Good Practice for the Central Authority in the requesting State, if appropriate and permitted under internal laws and procedures, includes the following:

- **Provide, or facilitate the provision of, relevant information with regard to the Article 13(1)(b) exception, as requested by the Central Authority or competent authority in the requested State as soon as possible to ensure return proceedings can be instituted and continued without delay.**

#### **viii. Exchange of information on the social background of the child (Art. 7(2)(d))**

240. According to Article 7(2)(d), Central Authorities should exchange, where desirable, information relating to the social background of the child. In Article 13(1)(b) cases, information relating to the social background of the child may be important (see Art. 13(3))<sup>279</sup> and may be requested by the court in the return proceedings. Central Authorities should facilitate the provision of such information to the court in an expeditious manner.<sup>280</sup>

241. Good practices for the Central Authority in the requested State, if appropriate and permitted under internal laws and procedures, include the following:

- **Where needed, ask, as early as possible, the Central Authority in the requesting State whether a report on the social background of the child exists, and if so, request a copy of the report.**
- **Immediately contact the Central Authority in the requesting State when the court requests information on the social background of the child and inform the Central Authority about the timeframe set by the court for the provision of this information.**

242. A good practice for the Central Authority in the requesting State, if appropriate and permitted under internal laws and procedures, includes the following:

- **Take all steps to provide the Central Authority in the requested State, upon request and as soon as possible, with a report on the social background of the child, including requiring its preparation by local authorities and, when necessary and possible, its translation into a foreign language.**

#### **ix. Duty to provide administrative arrangements to secure the safe return of the child (Art. 7(2)(h))**

243. A key provision in relation to Article 13(1)(b) cases is Article 7(2)(h), according to which Central Authorities have a duty to take all appropriate measures to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child (see Annex 2 of this Guide, which sets forth important Conclusions and Recommendations of past Special Commissions on this topic).<sup>281</sup>

244. General good practices for Central Authorities in this respect, if appropriate and permitted under internal laws and procedures, include the following:

<sup>279</sup> See, *supra*, paras 163 *et seq.* on information and evidence including on Art. 13(3).

<sup>280</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.14, pp. 51-52.

<sup>281</sup> See on this matter the Guide to Good Practice on Central Authority Practice (*ibid.*), sections 3.18 to 3.21, pp. 39-41, and sections 4.21 to 4.23, pp. 55-57.



- **Assist the court in gathering information about the situation of the child (or the taking parent, where relevant) upon return, if such information is of relevance in the individual case.**
- **Provide information about the legal framework and services that are available for the taking parent in the State of habitual residence, if such information would facilitate his / her return with the child.**
- **Arrange immediately for the translation of the main elements of the requested information into a foreign language, when necessary and possible.**
- **Establish close and effective working relationships with other authorities whose assistance and co-operation is required for the provision of such information, including legal aid.**

### **a) Provision of information**

245. Central Authorities play an important role in providing information on possible concerns regarding the “safe return” or the safety of the child upon return to the State of habitual residence. This information should be available as early as possible in the proceedings so that it can be considered by the court seized with the return proceedings.

246. Based on this information, Central Authorities can then further assist in obtaining any necessary information on the availability of appropriate protective measures and other arrangements in the requested State.<sup>282</sup>

247. The information required depends on the particular circumstances of each case and the types of requests received by the competent court / authority. It may relate to the situation of the child upon return and, thus, include information such as where the child will live and who will take care of the child upon return, or the availability of special medical treatment for the child if there are specific needs. In particular, if the taking parent submits that the child would be subject to violent or inappropriate behaviour by the left-behind parent upon return, Central Authorities can assist the court in obtaining information on, for example, previous incidents of violent or inappropriate behaviour toward the child and the availability of protective measures.

248. Relevant information may also concern arrangements in relation to the taking parent. In particular, the protection of the child may require that steps be taken to protect also a taking parent accompanying the child on return.<sup>283</sup>

249. With respect to the provision of information, in the event that the taking parent asserts that he / she is unable to return with the child due to specific circumstances in the State of habitual residence, the Central Authority in the requesting State should provide, to the extent possible, information relevant to the circumstances. For example:

- **when the taking parent makes assertions of violence or harassment, etc., upon return to the requesting State with the child, the Central Authority can provide information on available protective measures, such as, *inter alia*, adequate and safe housing, the possibility to obtain an effective protection order, etc.;**
- **when the taking parent makes assertions that he / she cannot return with the child for economic or financial reasons, the Central Authority can provide**

<sup>282</sup> See the Report of the Sixth Special Commission (*op. cit.* note 28), para. 57 and the Conclusions and Recommendations of this meeting (*op. cit.* note 29), para. 39.

<sup>283</sup> See Annex 2 of this Guide and in particular the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 4.23, pp. 56-57 and the Conclusions and Recommendations of the Fourth Special Commission (*op. cit.* note 26), para. 1.13. See also in this context section 4.24, p. 57 of the Guide to Good Practice on Central Authority Practice stating that Central Authorities should co-operate to ensure that the taking parent who wishes to return with the child is informed about services or assistance available in the requesting State.

**information about the welfare system and possibilities of financial support in the State of habitual residence (e.g., regarding income assistance, financial support for single parents, housing assistance);**

- **when the taking parent asserts ineffective access to justice or inability to afford participation in legal proceedings in the State of habitual residence, the Central Authority can provide information about the legal system and access to courts (e.g., in order to achieve a decision on custody for the child),<sup>284</sup> and / or the availability of legal aid or pro-bono lawyers.**

## **b) Criminal prosecution of the taking parent**

250. In particular, when a taking parent submits, in relation to the Article 13(1)(b) exception, that he / she is unable to return with the child due to a possible criminal prosecution in the requesting State, Central Authorities can assist in various ways, depending on applicable criminal laws and procedures in the requesting State.<sup>285</sup>

251. Good practices for Central Authorities (in their function as Central Authority of the requesting or of the requested State), if appropriate and permitted under internal laws and procedures, include the following:

- **Inform the prosecution authorities and criminal courts about the 1980 Convention in general and, in particular, of the fact that, if a taking parent faces criminal prosecution in the requesting State, the competent authority may take this into account when deciding upon the return of the child.**
- **Exchange information on the stage of the pending criminal proceedings in the requesting State and about possibilities of waiving or discontinuing these proceedings in the individual case.<sup>286</sup>**
- **Inform the left-behind parent of the possibility and / or consider encouraging him or her to drop charges, or assist the taking parent with the fulfilment of any conditions so that charges may be dropped, if possible, under internal criminal laws and procedures.**
- **In the case where the return of the child is ordered, confirm whether the criminal charges have been dropped or are still in place.**

## **c) Immigration issues**

252. In the event the taking parent submits that he / she is unable to return with the child due to immigration issues, Central Authorities, to the extent possible, should exchange relevant information and assist the taking parent and / or the child in obtaining the necessary travel documents, depending on applicable internal laws and procedures.<sup>287</sup> The aim is not to secure long-term status for the taking parent in the requesting State, as this is beyond the scope of the Convention, but rather to allow the parent to enter the requesting State for the purpose of participating in custody / relocation or related proceedings. The taking parent can then raise any relevant immigration claims, which can be fully examined by the court in the State of habitual residence of the child.

<sup>284</sup> It is important to ensure effective access to justice for both parents and the child in custody proceedings following the return of the child, see Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 34.

<sup>285</sup> Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), section 6.3, p. 74.

<sup>286</sup> Relevant information is included in the Country Profile (*op. cit.* note 21), section 11.3.

<sup>287</sup> Where there is an indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary; see Conclusions and Recommendations of the Sixth Special Commission (*op. cit.* note 29), para. 31. See also the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17).

253. In this context, good practices for Central Authorities (in their function as Central Authority of the requesting or of the requested State), if appropriate and permitted under internal laws and procedures, include the following:

- **As early as possible in order to avoid delay, exchange information on the possibility for the taking parent and / or child to obtain necessary travel documents or residence permits to facilitate the return of the child together with the taking parent to the requesting State.**
- **As early as possible in order to avoid delay, assist the taking parent and / or child to obtain the necessary travel documents by contacting the competent authorities, such as embassies or consulates, when possible.**

#### **d) Compliance with orders and conditions upon return**

254. Central Authorities can also assist, in accordance with their internal law and procedures, when the court requires the compliance by the left-behind parent with undertakings or conditions, or the obtaining of mirror orders or safe harbour orders in a court in the requesting State, in order to ensure the safe return of a child.<sup>288</sup>

255. A good practice for the Central Authority in the requested State, if appropriate and permitted under internal laws and procedures, include the following:

- **Notify, without delay, the Central Authority of the requesting State of any requirement the court sets in relation to undertakings or conditions, mirror orders or safe harbour orders in relation to the safe return of a child.**

256. A good practice for the Central Authority of the requesting State, if appropriate and permitted under internal laws and procedures, include the following:

- **Take any steps possible under the internal laws and procedures to facilitate the compliance with undertakings or conditions and the obtaining of mirror orders or safe harbour orders, if ordered by the court.**<sup>289</sup>
- **In States where mirror orders or safe harbour orders are not possible, take steps to give information rapidly on how one might obtain a similar result in the jurisdiction (e.g., swift recognition and enforcement of protective measures by other means).**

257. When return is ordered, Central Authorities should ensure that appropriate child protection bodies are alerted, if it appears to be necessary, so they may act to protect the welfare of children upon return when their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.<sup>290</sup> They should also verify that the agreed protection arrangements are in place upon the return of the child.<sup>291</sup>

#### **x. Follow-up post return**

258. If, in an Article 13(1)(b) case, the court orders the return of the child subject to conditions or mirror orders, the Central Authority of the requested State may require follow-up information after the return to confirm that the necessary measures had been carried out in the State of habitual residence.

<sup>288</sup> See, *supra*, paras 137 *et seq.* on measures of protection.

<sup>289</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), para 3.21, p. 41. It is, however, recognised that the role of Central Authorities in matters of conditions or undertakings may be extremely limited or non-existent.

<sup>290</sup> Conclusions and Recommendations of the Fourth Special Commission (*op. cit.* note 26), para. 1.13.

<sup>291</sup> See the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), para 3.20, p. 40.

259. On the one hand, the provision of such information can be viewed as beyond the scope of the 1980 Convention.<sup>292</sup> Furthermore, some Central Authorities may be unable to request or provide such information due to the function and authority given to them in the concerned State or due to other constraints such as, for example, privacy issues.

260. On the other hand, receiving confirmation that a child who has returned to the requesting State is receiving adequate protection as determined by the court would contribute to building confidence between courts and authorities in Contracting States.<sup>293</sup>

261. Where in force, the 1996 Convention may also provide some useful resources with respect to inquiries on the situation of the child after return to the requesting State. Article 32 of the 1996 Convention allows a Central Authority or other competent authority in a Contracting State “with which the child has a substantial connection,” to request of the Central Authority of the Contracting State in which the child is habitually resident and present, a report on the situation of the child or that measures for the protection of the person or property of the child be taken.

262. Against this background, a good practice for Central Authorities (in their function as Central Authority of the requesting or of the requested State), if appropriate and permitted under internal laws and procedures, include the following:

- **Exchange information on whether protective measures or requirements such as undertakings or conditions, mirror orders, as mentioned in the return order, have been put in place or are being complied with and whether the child is adequately protected in the requesting State, where necessary.<sup>294</sup>**
- **Where in force, consider the use of the 1996 Convention (in particular Art. 32) with respect to the situation of the child in the requesting State subsequent to return.**

<sup>292</sup> After the child has returned to the State of habitual residence, the case is usually closed by the competent authorities of the requested State. The requesting State has no legal obligation under the 1980 Convention to keep the requested State informed about the situation of the child once the child has returned. See in this context, *e.g.*, the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), sections 3.19 to 3.21, pp. 40-41. For further discussion of whether Central Authorities should play an active role in monitoring and ensuring the welfare of the child following the child’s return until the authorities in the requesting State were effectively seized with any relevant issues, see the Report of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 28), paras. 54-57.

<sup>293</sup> See in this context the Explanatory Report, para. 34 (*op. cit.* note 8) referring to “the spirit of mutual confidence” being the “inspiration” of the Convention.

<sup>294</sup> Where the court order imposes an obligation on the left-behind parent (*e.g.*, provision of housing or short-term financial support for the taking parent and child), the question of compliance with such an obligation would be dealt with between the parties in private litigation and, thus, be considered as being beyond the scope of the Convention (and may also be subject to privacy issues). However, if the return is ordered based on assurances provided by the authorities of the requesting State (*e.g.*, any pending criminal charges are to be cancelled, or the welfare authorities of the requesting State are to provide care or treatment for the children), the Central Authority of the requesting State should have access to such information and should, if necessary, be able to provide the Central Authority of the requested State with information concerning compliance.

## PART IV: Case Scenarios / Fact Patterns

263. A number of case scenarios can be discerned from circumstances and fact patterns commonly raised before competent authorities under the Article 13(1)(b) grave risk exception. This Part of the Guide discusses a number of these case scenarios and provides possible considerations for competent authorities when dealing with them.<sup>295</sup>

264. The below case scenarios do not specify which aspect of the Article 13(1)(b) exception is raised or considered by the competent authority (“grave risk of physical harm”, “grave risk of psychological harm” and / or placement “in an intolerable situation”<sup>296</sup>), and do not indicate whether submissions by the taking parent are well-founded (as this is an evidentiary matter), nor how the court may ultimately decide. The purpose of this Part of the Guide is to provide possible considerations competent authorities may take into account when dealing with an Article 13(1)(b) case falling under one or more of the case patterns, and not to provide a “solution” for the case.<sup>297</sup> Also, of necessity, the information provided below focuses on a range of assertions raised by the person or body objecting to the return of the child under Article 13(1)(b). This should not be interpreted as implying that more weight should be given to assertions by the party objecting to return, to the detriment of the party requesting return, who should always be given an opportunity to respond to allegations (see *e.g.*, Part II, Section 11(iii) on the Involvement of the left-behind parent in proceedings). As in any proceeding, both parties must be accorded a fair trial.

265. It is similarly important to stress that the scenarios shared below are not exhaustive, nor do they describe circumstances in which the grave risk exception is automatically established. The question as to whether the exception—which is to be applied in a restrictive fashion—is established is always decided by the competent authority based on the facts and context (*e.g.*, availability of effective protective measures) of the individual case, within the legal framework of the Convention (see *supra*, Part I). Furthermore, competent authorities and other actors are referred to INCADAT (see Part II.2) and their national case law for the latest updates as to how courts may be handling various issues in relation to Article 13(1)(b).

266. This Part of the Guide is divided into three Sections. **Section 1** addresses assertions under Article 13(1)(b) which concern circumstances that relate to domestic violence and child abuse, which may have direct and indirect effects on a child. **Section 2** addresses other assertions under 13(1)(b) which directly relate to the situation of the child upon return. **Section 3** shares case scenarios that relate to the taking parent’s possibility to return with the child, or to his or her own situation upon return, when it is argued that these circumstances establish a grave risk that the child’s return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

267. For ease of reference, the case scenarios in this Part are presented in a short and simplified format, giving only a minimum of information. In each of the scenarios, it is assumed that the left-behind parent or another person or body has filed a return application and the case is before the court seized with the return proceedings that has already found that the removal or retention was wrongful under the Convention. The focus lies on the examination by the court as to whether the grave risk exception would be established.

268. The court ought always to consider the facts and circumstances of each individual case within the legal framework of the Convention, and may wish to take into account the following

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<sup>295</sup> The common case scenarios and possible considerations included in this Part were identified in case law and by judicial and Working Group experts (see *supra*, para. 23).

<sup>296</sup> See in this context, *supra*, para. 62.

<sup>297</sup> Case law relevant to the case patterns can be found in INCADAT (*op. cit.* note 6). See also the case law analysis section on Art. 13(1)(b) in INCADAT.

general considerations, when and if deemed appropriate by a competent authority, and subject to internal laws and procedures:<sup>298</sup>

***Use of the IHNJ, direct judicial communications and assistance from Central Authorities and / or other authorities (see below, items L – M)***

- There may be a range of ways that Central Authorities and the use of the IHNJ and direct judicial communications may be of assistance for various matters throughout proceedings

***Protection of the child during the return proceedings***

See above Part II, Sections 7(i) and 11(i)

- A. **Adequate safeguards:** If there is a request for contact (or the judge must consider contact *ex officio*) between the child and the left-behind parent during the return proceedings (e.g., by way of a temporary access order), take into account the possible necessity to protect the child and provide for adequate safeguards (e.g., provision of supervised contact or by not granting the request for contact).
- B. **Counselling or treatment:** Consider the need to contact child welfare or other relevant authorities with a view to facilitating or enabling the provision of psycho-social counselling or treatment to the child, if necessary.

***Mediation***

See above Part II, Section 10

- C. **Mediation:** Consider whether mediation between the parents (e.g., to obtain the voluntary return of the child with the taking parent and / or conditions for return) is appropriate, and if so, whether safeguards may be needed during the mediation process.<sup>299</sup>

***Consideration of adequate and effective measures to protect the child (and an accompanying parent, where relevant) upon return (see below, items I – K)***

- Such consideration may take place very early in proceedings (see Part II, Section 4, where two judicial approaches to the examination of protective measures and evidence are presented)

***Evaluation of the information and / or evidence submitted in relation to the asserted grave risk***

See above Part II, Section 8

- The consideration of evidence may be subject to various approaches (see Part II, Section 4, where two judicial approaches to the examination of evidence and protective measures are presented)
- D. **Avoid undue delay:**
  1. **Necessity of additional information and / or evidence:** Consider as early as possible whether additional information and / or evidence is necessary in relation to submissions under Article 13(1)(b), as the gathering of such information may prolong the proceedings.
  2. **Ways to receive information and / or evidence:** If such additional information and / or evidence is deemed necessary, consider ways to

<sup>298</sup> For example, in some jurisdictions it would be deemed impossible or inappropriate for a judge to be involved in the collecting of evidence or certain types of information. In other jurisdictions, this might be the standard practice.

<sup>299</sup> See for more information, paras 191 *et seq.* on mediation in Art. 13(1)(b) cases.



receive this information and / or evidence as expeditiously as possible, for example, by:

- i. giving priority to already existing, written information and / or evidence and / or requesting the same (see Art. 13(3));
  - ii. considering the use of direct judicial communications to facilitate and expedite the gathering of information and / or evidence, to verify statements made or information provided;<sup>300</sup>
  - iii. considering carefully whether expert opinion / evidence is necessary having due regard to how this may delay the proceedings.
3. Strict timeframes: Set strict timeframes for the provision or filing of (additional) information or evidence.

- E. Expedited proceedings: Consider that a court in the State of habitual residence of the child will in general be better equipped to examine the relevant circumstances upon return, so long as the requested court is confident that the child will not be exposed to any grave risk.
- F. Restrictive interpretation of Article 13(1)(b): Consider the need to interpret and apply the Article 13(1)(b) exception in a restrictive manner, as is the case with all of the exceptions under the Convention.<sup>301</sup>
- G. Expert report: Unless directly related to and necessary to evaluate the issue of grave risk to a child upon return, consider with caution the need for an expert report.<sup>302</sup>
- H. Views of the child (see above Part II, Section 9): Consider taking the views of the child into account, and if deemed appropriate, the most suitable and effective way to do so.<sup>303</sup>

### ***Consideration of adequate and effective measures to protect the child (and an accompanying parent, where relevant) upon return***

See above Part II, Section 7(ii)-(iv)

- I. Existence of adequate and effective measures: Consider whether adequate and effective protective measures in the State of habitual residence exist to prevent or mitigate any asserted grave risk for the child.
- J. Measures recognised and enforceable: When contemplating adequate and effective protective measures if necessary to ensure the safe return of the child (and an accompanying parent, where relevant), ensure that they are recognised and, as appropriate, can be enforced in the State of habitual residence before or when the child is returned. Consider the use of direct judicial communications to do so<sup>304</sup> and / or consider requesting assistance

<sup>300</sup> See, *supra*, paras 123 *et seq.* on use of the IHNJ and direct judicial communications. See also "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements" (Annex 5).

<sup>301</sup> See *supra*, paras 42 *et seq.* on the restrictive application of Art. 13(1)(b).

<sup>302</sup> For example, a report on the mental condition of the taking parent and, in particular, his / her parenting capacities since it may prolong the proceedings, as normally parenting capacities, being related to the custody of the child, would be a matter to be examined by the competent authority in the State of habitual residence. See, *supra*, paras 173 *et seq.* on expert opinion / evidence.

<sup>303</sup> See, *supra*, paras 179 *et seq.* on involvement of the child in the return proceedings. See also conditions set out in Art. 12(1) of the UNCRC: the views of the child should be "given due weight in accordance with the age and maturity of the child" (see Annex 4).

<sup>304</sup> See, *supra*, paras 123 *et seq.* on use of the IHNJ and direct judicial communications. See also "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements" (see Annex 5).



from the Central Authorities and other relevant authorities to ensure the continuous protection of the child.<sup>305</sup>

- K. If applicable, use of Article 11 of the 1996 Convention (see above Part II, Section 7(iv)): If both States concerned are Contracting States to the 1996 Convention, consider the use of Article 11 to ensure that measures of protection for the child will be recognised and enforced in the State of habitual residence upon return, until the authorities in that State take measures to protect the child.<sup>306</sup>

### ***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

See above Part II, Section 5

- L. IHNJ and direct judicial communications<sup>307</sup> to facilitate the efficient resolution of the dispute, for example:
1. ensuring that protective measures are available and / or that mirror orders, safe harbour orders, or other orders can be recognised and enforced in the other jurisdiction;
  2. verifying whether orders and / or findings about domestic violence were made by the foreign court; and
  3. ascertaining whether the taking parent would have due access to justice and / or would be subject to civil / criminal sanctions upon return.
- M. Central Authorities and / or other authorities (see above Part II, Section 6 and Part III): Consider requesting assistance from the Central Authorities and other relevant authorities (e.g., child welfare authorities) at every stage of the proceedings, when necessary and possible, and with due respect to judicial neutrality and independence.<sup>308</sup>

## **1. Assertions concerning domestic / family violence or child abuse, and that the child's return would expose him or her to a grave risk**

269. In the following case patterns, the taking parent or another person or body opposing return asserts that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation due to direct violence or inappropriate behaviour towards the child, the child's exposure to domestic violence between the parents, and / or the possibility of the taking parent of being harmed by the left-behind parent upon return. It should be noted generally that an order to return the child does not mean an obligatory return of the child to the left-behind parent specifically, nor a return to the household of the left-behind parent; rather, it is the return of the child to the State of habitual residence, which could, for example, include returning to a different city other than the place of residence of the left-behind parent.

### **i. Violent or inappropriate behaviour towards the child upon return**

270. In light of alleged prior physical, psychological and / or sexual abuse of the child or inappropriate behaviour by the left-behind parent, the taking parent or another person or body

<sup>305</sup> See, *supra*, paras 129 *et seq.* on the assistance from Central Authorities and / or other authorities.

<sup>306</sup> See, *supra*, paras 147 *et seq.* on measures of protection under Article 11 of the 1996 Convention.

<sup>307</sup> See, *supra*, paras 123 *et seq.* on use of the IHNJ and direct judicial communications. See also "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements" (see Annex 5).

<sup>308</sup> See, *supra*, paras 129 *et seq.* on the assistance from Central Authorities and / or other authorities.

opposing return asserts that, if returned, the child would be subject to violent or inappropriate behaviour by the left-behind parent and that there is, therefore, a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Submissions in this context may refer to the risk of sexual abuse of the child, the risk that the child would suffer physical or emotional maltreatment by the left-behind parent, or otherwise be exposed to the harmful behaviour of the left-behind parent upon return.<sup>309</sup>

271. In general, these cases may present the challenge that courts need to assess the information or evidence brought before them without carrying out a full-scale inquiry, taking into account the duty to act expeditiously in return proceedings (Art. 11(1)).<sup>310</sup> They also require the court to consider the availability of adequate and effective protective measures or other arrangements which would ensure the child is not exposed to a grave risk.<sup>311</sup>

272. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

**Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).**

***Protection of the child during the return proceedings***

**Adequate safeguards such as supervised or no contact between the left-behind parent and the child (see *supra*, item A).**

**Counselling or treatment (see *supra*, item B).**

***Mediation***

**Mediation (see *supra*, item C). Consider specifically that mediation may not be permitted or appropriate, or that special safeguards may be needed during the mediation process, if, for example, the issue of domestic violence is raised.<sup>312</sup>**

***Evaluation of the information and / or evidence submitted in relation to the asserted grave risk***

**Avoid undue delay with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).**

**Specific information and / or evidence: Consider specifically giving priority to already existing child welfare reports, school reports, medical reports, police reports as well as filings and orders from the court of the State of habitual residence, such as provisional injunctions or other orders in relation to domestic violence or child abuse (see Art. 13(3)).**

**Expedited proceedings (see *supra*, item E).**

<sup>309</sup> See, e.g., the decision of the Supreme Court of Lithuania, 25 August 2008, Case No. 3K-3-403/2008, which noted that inappropriate behaviour on the part of a parent may include extreme cases of alcohol abuse and the use of drugs or psychotropic substances.

<sup>310</sup> See, *supra*, paras 91 *et seq.* on the duty to act expeditiously in return proceedings.

<sup>311</sup> See, *supra*, paras 137 *et seq.* on protective measures in Art. 13(1)(b) cases. See, e.g., the Canadian Ontario Court of Justice in *Borisovs v. Kubiles* [2013] O.J. No. 863, in which the Court found that the child and the taking parent could not be adequately protected from domestic abuse by the left behind parent in Latvia upon return, because the police did not adequately enforce laws in cases of domestic violence and the justice system of Latvia as a whole could not offer effective protection.

<sup>312</sup> See for more information, paras 191 *et seq.* on mediation in Art. 13(1)(b) cases.

Expert report (see *supra*, item G).

Views of the child (see *supra*, item H). Consider specifically whether the child's views may support the asserted violent or inappropriate behaviour.<sup>313</sup>

*Consideration of adequate and effective measures to protect the child upon return*

Existence of adequate and effective measures (see *supra*, item I). In this case pattern, consider for example no-contact or supervised contact orders for the child and the left-behind parent or safe harbour and other protective orders. Consider the concrete availability of other protective arrangements (e.g., separate and safe housing), as necessary.

Measures recognised and enforceable (see *supra*, item J).

If applicable, use of Article 11 of the 1996 Convention (see *supra*, item K).

*Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities*

IHNJ and direct judicial communications (see *supra*, item L).

Central Authorities and / or other authorities (see *supra*, item M).

## ii. Exposure of the child to domestic violence between the child's parents upon return

273. The assertion of the taking parent or another person or body opposing return is that, if returned, the child would be exposed to domestic violence between the child's parents and that this exposure would affect the child to such an extent that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

274. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

*Specific considerations*

Exposure to domestic violence as harm: Consider that although there is not an automatic presumption, as specific evidence will be produced on a case-by-case basis, the exposure of the child to domestic violence between the child's parents is increasingly recognised as harm to the child, as a body of social science research supports the conclusion that violence against a parent can also have a traumatic effect on children who witness it.<sup>314</sup>

Link between domestic violence and child abuse: Consider that a range of studies have found a correlation between instances of spousal abuse and child abuse.

<sup>313</sup> See, e.g., the Dutch District Court of Haarlem 8 November 2011, ECLI:NL:RBHAA:2011:BU6813, the High Court of England and Wales (Family Division) (UK) in *W v W* [2010] EWHC 332 (Fam), and the Court of Appeal of England and Wales (UK) in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26.

<sup>314</sup> See Annex 3 for more information.

Consider that the grave risk of future harm does not always require evidence of past abuse of the child directly and that the child may be at risk due to co-occurrence of domestic violence and child abuse.<sup>315</sup> The impact of the spousal abuse on the child and any related future risks, however, should be evaluated on a case-by-case basis.

*Protection of the child during the return proceedings*

Adequate safeguards such as supervised or no contact between the left-behind parent and the child (see *supra*, item A).

Counselling or treatment (see *supra*, item B).

*Mediation*

Mediation (see *supra*, item C). Consider specifically that mediation may not be permitted or appropriate, or that special safeguards may be needed during the mediation process as the issue of domestic violence is raised.<sup>316</sup>

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

Avoid undue delay with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

Specific information and / or evidence: Consider specifically information and / or evidence, such as information on pending court proceeding against the left-behind parent, police reports, records from consulates or embassies, reports from domestic violence shelters, and medical certificates regarding domestic violence incidents. Admissions such as emails and other correspondence also might be particularly useful. Consider the use of direct judicial communications to verify, for example, if there are any findings on domestic violence made by the foreign court, to verify whether any protection orders are in place and whether any violations of those orders have resulted in court proceedings.

Expedited proceedings (see *supra*, item E).

Expert report (see *supra*, item G).

Views of the child (see *supra*, item H).

*Consideration of adequate and effective measures to protect the child upon return*

Existence of adequate and effective measures (see *supra*, item I). In this case pattern, consider for example stay-away and no-contact orders, non-molestation orders or other measures to protect the taking parent and / or the child. Consider the concrete availability of other protective arrangements (e.g., separate and safe housing), as necessary.<sup>317</sup>

Measures recognised and enforceable (see *supra*, item J).

<sup>315</sup> *The Hague Convention on the Civil Aspects of International Child Abduction in Cases Involving Allegations of Domestic Abuse: A California Bench Guide* (January 2016), published by the Berkeley Hague Domestic Violence Project and the California Hague Convention and Domestic Abuse Bench Guide Consulting Committee, p. 52. See Annex 3 Section (2)(a) on the definition of and research on particular dynamics of domestic violence for more information.

<sup>316</sup> See for more information, paras 191 *et seq.* on mediation in Art. 13(1)(b) cases.

<sup>317</sup> See, e.g., the United States District Court, District of Maryland in *Sabogal v. Velarde*, 106 F.Supp.3d 689 (2015) in which the court found that although the case involved little or no physical abuse, the magnitude of the psychological abuse was unique and sufficient to present a grave risk of harm. The Court then concluded that adequate and effective protective arrangements and measures could be taken to allow for the safe return of the children.

***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

### **iii. Harm to the taking parent by the left-behind parent upon return**

275. The assertion of the taking parent is that he / she has experienced domestic violence by the left-behind parent to the extent that he / she is unable to return with the child to the State of habitual residence for fear of being harmed again (physically and / or mentally) by the left-behind parent. The taking parent asserts that due to this fear or threat, he / she would not be safe or able to cope physically and / or psychologically if required to return to the State of habitual residence and therefore, his / her capacity to care for the child would be impaired. The taking parent further asserts that upon return with the child, there is a grave risk that the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation since the taking parent is the primary carer of the child.

276. The question in this case scenario is whether the risk of harm to the child resulting from the taking parent's apprehension for his or her safety (*e.g.*, and the effect this would have on that parent's capacity to care for the child) is sufficient to cause a grave risk of psychological harm to the child or otherwise place the child in an intolerable situation upon return.<sup>318</sup> Considering the terms and objectives of the 1980 Convention, in this case scenario, the court would reflect on whether the fear of the taking parent for his / her safety is sufficient to warrant denying the return of the child under the Convention.<sup>319</sup>

277. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

**Consider early in the proceedings** assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

#### ***Specific considerations***

**Link between domestic violence and child abuse:** Consider that a range of studies have found a correlation between instances of serious spousal abuse and child abuse. The impact on the child should be considered, in the context of return proceedings, on a case-by-case basis, and not as an automatic presumption. Consider that the grave risk of future harm does not necessarily require evidence of past abuse of the child directly and that the child may be at risk due to co-occurrence (*e.g.*, statistical correlation) of domestic violence and child abuse.<sup>320</sup>

**Coercive control:** Consider that domestic violence may be more than just occurrences of violence. Rather, domestic violence can include "coercive control" of the victim. Potential intimidation may still be exercised on the taking parent and / or the taking parent may be "dragged back into the orbit" of the left-behind

<sup>318</sup> In this scenario, it is to be assumed that the taking parent does not submit that there is a risk of direct physical or mental abuse to the child. The examination by the court is therefore limited to the question whether the risk of harm to the taking parent would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation upon return.

<sup>319</sup> See, *e.g.*, the United Kingdom Supreme Court in *Re S (a Child)* [2012] UKSC 10 taking into account the taking parent's "acute psychological frailty".

<sup>320</sup> See, *supra*, note 315.

parent upon return.<sup>321</sup> Assuming that the domestic violence will not recommence upon the return of the taking parent because the parents can and / or will live in separate residences, may not in all cases be enough depending on the factual situation and adequacy, effectiveness and enforceability of available protective measures, according to the circumstances of the individual case.<sup>322</sup>

**Post-separation violence:** Consider that abuse does not always end upon the physical separation of the abusive parent and the abused parent. Note that directly after leaving a seriously abusive situation, the risk of serious or lethal injuries to an abused parent by the abusive parent increases; such dynamics, however, are particular to the circumstances of an individual case.<sup>323</sup>

**Psycho-social effects of domestic violence:** Consider that the psycho-social effects of domestic violence, e.g., Post-Traumatic Stress Disorder (PTSD), to understand possible behaviour of affected individuals with regards to the credibility or believability of their testimony and the existence or non-existence of evidence.<sup>324</sup>

*Protection of the child during the return proceedings*

**Adequate safeguards** such as supervised or no contact between the left-behind parent and the child (see *supra*, item A).

**Counselling or treatment** (see *supra*, item B).

*Mediation*

**Mediation** (see *supra*, item C). Consider specifically that mediation may not be permitted or appropriate, or that special safeguards may be needed during the mediation process as the issue of domestic violence is raised.<sup>325</sup>

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

**Avoid undue delay** with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

**Specific information and / or evidence:** Consider specifically information and / or evidence, such as information on pending court proceeding against the left-behind parent, police reports, records from consulates or embassies, reports from domestic violence shelters, and medical certificates regarding domestic violence incidents. Consider the use of direct judicial communications to verify if there are any findings on domestic violence made by the foreign court, to verify whether any protection orders are in place and whether any violations of those orders have resulted in court proceedings.

**Expert report** (see *supra*, item G).

<sup>321</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) in *LS v AS* [2014] EWHC 1626 (Fam).

<sup>322</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) in *DT v LBT* [2010] EWHC 3177 (Fam). See Annex 3 Section (2)(b) on coercive control, post-separation violence and traumatic syndromes of domestic violence.

<sup>323</sup> See Annex 3 Section (2)(b) (*ibid.*) for more information.

<sup>324</sup> *Representing Battered Respondents under the Hague Convention on the Civil Aspects of International Child Abduction: A Practice Guide for Attorneys and Domestic Violence Victim Advocates* (October 2014), published by the Berkeley Hague Domestic Violence Project, Part II Section A1. See Annex 3 Section (2)(b) (*ibid.*) for more information.

<sup>325</sup> See for more information, paras 191 *et seq.* on mediation in Art. 13(1)(b) cases.



***Consideration of adequate and effective measures to protect the taking parent and child upon return***

**Existence of adequate and effective measures** (see *supra*, item I). Consider for example stay-away or no-contact orders, non-molestation orders or other enforceable measures to protect the taking parent and / or the child. Consider the concrete availability of other protective arrangements (e.g., separate and safe housing), as necessary. It is important to consider the left-behind parent's previous record of compliance with court orders, bail conditions, undertakings (if applicable) and the like, to assess the efficacy of such orders or conditions in the context of a return.<sup>326</sup>

**Measures recognised and enforceable** (see *supra*, item J). In this regard specifically take into account whether prior protective measures have been put in place to protect the taking parent and / or the child in the State of habitual residence and consider whether these prior protective measures have been adequate and effective, and have been respected by the left-behind parent, as applicable.<sup>327</sup>

***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

## **2. Assertions that the child's return would give rise to a situation where he / she would be exposed to a grave risk**

278. In the following case patterns, the taking parent or another person or body opposing return asserts that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation due to certain circumstances directly related to the person of the child.

### **i. Separation of the child from the child's sibling(s) upon return**

279. The assertion of the taking parent or another person or body opposing return is that, if returned, the child would be separated from his or her sibling(s) (who would remain in the requested State) and that this separation would affect the child to such an extent that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

280. A court seized with return proceedings may deal with a possible separation of siblings, for example, in the following circumstances:

The court finds that one of the siblings objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views, and the court considers refusing to order the return of that sibling under Article 13(2).

<sup>326</sup> See, e.g., the United States District Court, Southern District of New York in *Davies v. Davies*, 2017 WL 361556. The Court determined that return would lead to a grave risk of harm and examined potential protective measures, but decided against return. The Court found that there were no ameliorative measures that could protect the taking parent or the child, due to the previous breaches of restraining orders by the left-behind parent and the inadequacy of the legal system in St. Martin to protect the taking parent and child from the abuse.

<sup>327</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) in *BT v JRT* [2008] EWHC 1169 (Fam) and in *WF v RJ, BF* [2010] EWHC 2909 (Fam), and the Court of Appeal of England and Wales (UK) in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26.

All siblings object to being returned but the court finds that not all of them have attained an age and degree of maturity at which it is appropriate to take account of their views (Art. 13(2)); the court considers refusing to order the return of some but not all siblings.

The court finds that the exception under Article 13(1)(b) is established in relation to one of the siblings and considers refusing to order the return of that sibling. In relation to the other sibling, the grave risk exception is not raised, or the court finds that the grave risk exception is not independently established in relation to that sibling.

The court finds that the left-behind parent consented to or acquiesced in the removal or retention of one sibling and the court considers refusing to order the return of that sibling under Article 13(1)(a). The court finds that there was no consent or acquiescence in relation to the other sibling.

The court finds that the siblings had different States of habitual residence at the time of the wrongful removal or retention (*e.g.*, one sibling is habitually resident in the requested State, the other in the requesting State) and that the duty to return under the Convention would apply in relation to one sibling only.

The court finds that the left-behind parent has custody rights only in relation to one but not to the other sibling. Consequently, there is a breach of custody rights and the removal or the retention is to be considered wrongful (Art. 3(1)(a)) in relation to one sibling but not in relation to the other.

The court finds that the child is wrongfully removed to or retained in the requested State by the taking parent together with the child's (step)-sibling for whom no Hague return application is filed.

The court finds that the 1980 Convention does not apply to one of the siblings because this child has turned 16 years of age before or during the return proceedings.<sup>328</sup>

281. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

**Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).**

#### ***Specific considerations***

**"Child" not "children": Consider that the Article 13 exceptions apply to a "child" who is the subject of return proceedings, it does not speak of "children". The provisions are to be applied separately and distinctly to each child who is wrongfully removed.<sup>329</sup> Yet, also consider that the exercise of discretion for each of the separate children should not be done in isolation, as the child's place within their family must be taken into account.<sup>330</sup> Moreover, although an objection for return established under Article 13(2) for one of the children may lead, upon the specific evidence produced, to an intolerable situation for the**

<sup>328</sup> According to Art. 4, the 1980 Convention ceases to apply when the child attains the age of 16 years. (The 1996 Convention, however, applies to children until they reach the age of 18 years; see Art. 2 of the 1996 Convention.)

<sup>329</sup> See, *e.g.*, the Canadian Court of Appeal of Manitoba in *Chalkley v. Chalkley* (1995) ORFL (4th) 422 [INCADAT Reference: HC/E/CA 14].

<sup>330</sup> See, *e.g.*, the Court of Appeal of England and Wales (UK) in *Zaffino v Zaffino (Abduction: Children's Views)* [2005] EWCA Civ 1012 [INCADAT Reference: HC/E/Uke 813].

other child / children under Article 13(1)(b) due to the separation of siblings, the test for Article 13(1)(b) is distinct and should be applied separately.<sup>331</sup>

**Sibling's relationship:** The separation of siblings does not automatically result in a grave risk to a child (such separation might be neutral, positive or detrimental to a child in a given case). In determining whether the separation would affect the child to such an extent that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, consider the strength of the sibling relationship, by taking into account, for example:

- the quality and value of the relationship for the child;<sup>332</sup>
- the age difference between the siblings;<sup>333</sup>
- the duration, intensity and extent of (previous) contact between the siblings;<sup>334</sup> and
- expert evidence, when appropriate and available.

**Protection of the child during the return proceedings** (see *supra*, item A and B).

**Mediation** (see *supra*, item C).

**Evaluation of the information and / or evidence submitted in relation to the asserted grave risk**

**Avoid undue delay** with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

**Expedited proceedings** (see *supra*, item E). In this case pattern, take into account that the return order does not lead to a permanent separation of the siblings as the State of habitual residence can (re)consider the separation of the siblings in any custody or access proceedings upon return.<sup>335</sup>

**Expert report** (see *supra*, item G).

**Views of the child** (see *supra*, item H).

**Existence of adequate and effective measures** (see *supra*, item I).

**Measures recognised and enforceable** (see *supra*, item J).

**Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities**

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

<sup>331</sup> See, e.g., the New Zealand District Court at Henderson in *Secretary for Justice v. Penney, ex parte Calabro* [1995] NZFLR 827 [INCADAT Reference: HC/E/NZ 67]; the Court of Appeal of England and Wales (UK) in *Re T. (Abduction: Child's Objections to Return)* [2000] 2 F.L.R. 192 [INCADAT Reference: HC/E/UK 270]; and the Scottish Outer House of the Court of Session in *W. v. W.* [2003] SCLR 478 [INCADAT Reference: HC/E/UK 508].

<sup>332</sup> See, e.g., the Court of Appeal of England and Wales (UK) in *Re T. (Abduction: Child's Objections to Return)* [2000] 2 FCR 159 [INCADAT Reference: HC/E/UK 270].

<sup>333</sup> See, e.g., the Canadian Court of Appeal of Manitoba in *Chalkley v. Chalkley* (1995) ORFL (4th) 422 [INCADAT Reference: HC/E/CA 14] and the High Court of England and Wales (Family Division) (UK) in *WF v RJ, BF* [2010] EWHC 2909 (Fam).

<sup>334</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) *F v M, B (by his Litigation Friend)* [2015] EWHC 3300 (Fam) and in *WF v RJ, BF* [2010] EWHC 2909 (Fam) and the Family Court of Australia at Sydney in *the Marriage of S.S. and D.K. Bassi* (1994) FLC 92-4 [INCADAT Reference: HC/E/AU 292].

<sup>335</sup> R. Schuz (*op. cit.* note 43), p. 285. See, e.g., the Israeli Supreme Court in *LV v MM, RFamA 2338/09* [INCADAT Reference: HC/E/IL 1037].

## ii. Economic or educational disadvantages to the child upon return

282. The assertion of the taking parent or another person or body opposing return is that, if returned, the child would face extreme economic hardship (e.g., due to the fact that the taking parent and / or the left-behind parent would not be able to provide sufficient financial support for the child) or extreme educational disadvantages (e.g., the child was not able to attend school in the State of habitual residence) and that this circumstance would affect the child to such a detrimental extent that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

283. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

**Consider early in the proceedings** assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

*Protection of the child during the return proceedings (see supra, item A and B).*

*Mediation (see supra, item C).*

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

**Avoid undue delay** with respect to requiring, gathering and receiving additional information and / or evidence (see supra, item D).

**Expedited proceedings** (see supra, item E).

**Restrictive interpretation of Article 13(1)(b)** (see supra, item F).

- Take into account that, in general, more favourable living conditions in the requested State compared to the State of habitual residence is not a relevant consideration, absent exceptional circumstances, e.g. if the child would be left homeless and / or without recourse to State benefits.<sup>336</sup>
- Consider whether the child has resided and (potentially) attended local schooling in the State of habitual residence prior to the abduction without issue.
- Note that both economic or educational disadvantages to the child are in principal substantive matters to be determined, for example, during custody or child support proceedings, or proceedings with respect to relocation, in the State of habitual residence.

**Expert report** (see supra, item G).

**Views of the child** (see supra, item H).

*Consideration of adequate and effective measures to protect the child upon return:*

**Existence of adequate and effective measures** (see supra, item I). In this case pattern, consider for example undertakings or conditions of financial support by the left-behind parent if the basic needs of the child could not otherwise be met.

**Measures recognised and enforceable** (see supra, item J).

<sup>336</sup> See, e.g., the Court of Appeal of England and Wales (UK) in *Re M. (Abduction: Undertakings)* [1995] 1 FLR 1021 [INCADAT Reference: HC/E/UK 20] and the Lithuanian Court of Appeal, 29 September 2016, Case No. e2-1925-381/2016.

### ***Assistance from Central Authorities and / or other authorities***

**Central Authorities and / or other authorities** (see *supra*, item M): Consider requesting assistance from the Central Authority or other relevant authorities of the State of habitual residence to verify statements made or information provided and whether, for example, the taking parent and / or the child will be entitled to State benefits upon return.

### **iii. Risks associated with the State of habitual residence**

284. The assertion of the taking parent or another person or body opposing return is that, due to the serious security, political or economic situation in the State of habitual residence, there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

285. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

**Consider early in the proceedings** assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

#### ***Specific considerations***

**Restrictive interpretation of Article 13(1)(b)** (see *supra*, item F). In this case pattern, consider that the high threshold of imminent danger prior to the resolution of the custody and / or access dispute must be met, *e.g.* if the child would be returned to an active war zone or famine area.<sup>337</sup> Courts have made it clear that circumstances need to be more than isolated incidents in an unsettled political environment to reach the threshold for grave risk.<sup>338</sup>

**Exacerbating factors:** Take into account factors that may exacerbate the risk of harm to the child, *e.g.* whether the child and his / her family belong to a persecuted minority in the State of habitual residence or whether prior targeted attacks have placed the child in harm's way.<sup>339</sup>

**Prior danger:** Where the circumstances in the State of habitual residence, which the taking parent alleges would constitute a grave risk, had not deterred the parent from remaining in that State with the child previously may be a relevant consideration, but it is not determinative of the issue. The court would need to decide whether the risk is as grave as alleged after determining the facts.<sup>340</sup>

***Protection of the child during the return proceedings*** (see *supra*, item A and B).

***Mediation*** (see *supra*, item C).

<sup>337</sup> See, *e.g.*, the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich*, 78 F.3d 1060 (6<sup>th</sup> Cir. 1996) [INCADAT Reference: HC/E/USf 82].

<sup>338</sup> For example, courts have been divided over whether a return to Israel, based on allegations with respect to the security situation, would expose a child to a grave risk of harm, but a great majority has taken the view that it would not; see the INCADAT "Case law analysis Section", under "Exceptions to Return" then "Grave Risk of Harm", then "Risks associated with the child's State of habitual residence". Case law analysis was prepared by P.E. McEavey, University of Dundee, United Kingdom.

<sup>339</sup> See, *e.g.*, the Court of Appeal of England and Wales (UK) in *In the matter of D (Children)* [2006] EWCA Civ 146.

<sup>340</sup> See, *e.g.*, the French Cour d'appel de Rennes Chambre 6 in CA Rennes, 28 juin 2011, No de RG 11/02685 [INCADAT Reference: HC/E/FR 1129] and the Danish High Court, Western Division in V.L.K., 11. januar 2001, 13. Afdeling, B-2939-01 [INCADAT Reference: HC/E/DK 519].

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

Avoid undue delay with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

Specific information and / or evidence: Consider specifically the use of government reports, official documents from international organisations, and / or travel advice detailing the current security, political or economic situation in the State of habitual residence.<sup>341</sup>

Expedited proceedings (see *supra*, item E).

Expert report (see *supra*, item G).

Views of the child (see *supra*, item H). Consider specifically whether the child's views may support any asserted danger in the State of habitual residence.

*Consideration of adequate and effective measures to protect the child upon return*

Existence of adequate and effective measures (see *supra*, item I). In this case pattern, consider for example whether the left-behind parent can provide for security measures, such as, e.g. gated communities with guards.<sup>342</sup>

Measures recognised and enforceable (see *supra*, item J).

*Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities*

IHNJ and direct judicial communications (see *supra*, item L).

Central Authorities and / or other authorities (see *supra*, item M).

#### iv. Risks associated with the child's health

286. The assertion of the taking parent or another person or body opposing return is that, due to the child's physical or psychological condition and the lack of appropriate treatment and / or services in the State of habitual residence, there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

287. The court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations:

Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

*Protection of the child during the return proceedings* (see *supra*, item A and B).

*Mediation* (see *supra*, item C).

<sup>341</sup> See, e.g., the New Zealand Family Court in *APN v. TMH (Child Abduction: Grave Risk and Human Rights)* [2010] NZFLR 463 [INCADAT Reference: HC/E/NZ 1224].

<sup>342</sup> See, e.g., Court of Appeal The Hague 18 January 2012, ECLI:NL:GHSGR:2012:BV5608.



***Evaluation of the information and / or evidence submitted in relation to the asserted grave risk***

**Avoid undue delay** with regards to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

**Specific information and / or evidence:** Consider specifically information and / or evidence, such as already existing medical reports and / or child welfare reports, and, importantly, an up-to-date medical report on the child, if deemed that there may be grave risks to the child's health. Consider the use of direct judicial communications and / or requesting assistance from the Central Authority and other relevant authorities (e.g., child welfare services<sup>343</sup>) of the State of habitual residence to verify whether the child would be able to receive the necessary medical services upon return.<sup>344</sup>

**Expedited proceedings** (see *supra*, item E).

**Expert report** (see *supra*, item G).

**Views of the child** (see *supra*, item H).

***Consideration of adequate and effective measures to protect the child upon return***

**Existence of adequate and effective measures** (see *supra*, item I). In this case pattern, consider, for example, conditions or undertakings by the left-behind parent (or other persons or bodies) for the provision of financial support, health insurance,<sup>345</sup> and / or for the preparation of medical support for the child upon return.<sup>346</sup>

**Measures recognised and enforceable** (see *supra*, item J).

**If applicable, use of Article 11 of the 1996 Convention** (see *supra*, item K).

***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

### **3. Assertions that the taking parent's inability to return would expose the child to a grave risk**

<sup>343</sup> See, e.g., the Dutch Court of Appeal of The Hague 18 November 2009, ECLI:NL:GHSGR:2009:BH036.

<sup>344</sup> See, *supra*, paras 123 *et seq.* on use of the IHNJ and direct judicial communications. See also "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements" (Annex 5). See, *supra*, paras 129 *et seq.* on the assistance from Central Authorities and / or other authorities.

<sup>345</sup> See, e.g., the Peruvian Superior Court - Specialized Family Division in File N° 14.593-2003 [INCADAT Reference: HC/E/PE 874].

<sup>346</sup> See, e.g., the High Court of the Hong Kong Special Administrative Region in *S. v. S.* [1998] 2 HKC 316 [INCADAT Reference: HC/E/CNh 234] and the Dutch District Court of The Hague 24 March 2014, ECLI:NL:RBDHA:2014:6118. See also, e.g., the decision of the French Supreme Court rejecting an appeal on a decision of the court of appeal ordering the return of a child in an Art. 13 (1)(b) case where the child and her parents were HIV-positive, as the child could benefit from appropriate medical treatment in her State of origin, (Civ. 1ère, 4 May 2017, 17-11031).

288. The taking parent or another person or body opposing return may claim that the taking parent is unable or unwilling to return with the child to the State of habitual residence.<sup>347</sup> It may then be argued that if the child is ordered to return without the taking parent, there is a grave risk that the separation from the taking parent would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation, as the taking parent is the primary care provider for the child.

289. It should be noted that judicial decisions from numerous Contracting States demonstrate that the courts take a very restrictive approach to such cases.<sup>348</sup> Other than in exceptional situations, the Article 13(1)(b) exception has not been upheld where the taking parent has refused to return with the child to the State of habitual residence.

290. Nevertheless, the court ought to consider the facts and circumstances of each individual case, and may take into account the following considerations as well as the specific considerations for each case pattern listed below.

**Primary carer of the child:**

- **Examine the nature of the relationship between the child and the taking parent, and also the child and the left-behind parent.<sup>349</sup> Consider whether the taking parent is the sole care provider for the child and whether the left-behind parent or another person or body is capable of providing care.<sup>350</sup>**
- **The following questions may be asked to determine whether the child faces a grave risk of harm:<sup>351</sup>**
  - **Is the left-behind parent capable of independently supporting and caring for the child upon return, or through social / public assistance or aid?**
  - **Does the age,<sup>352</sup> nature, physical or psychological health, or any other relevant circumstances of the child mean that separation from the taking parent is likely to exacerbate the risk of physical or psychological harm to the child?**
  - **Is any potential risk of harm mitigated by the care that can be provided by the left-behind parent?**

**Reasons for the taking parent not to return:**

- **The following questions may be asked in relation to the issue of the parent not returning to the State of habitual residence:**

<sup>347</sup> Sometimes the court states that it will not accept the threat of non-return, as in the decision of the Israeli Supreme Court in *Civil Appeal 4391/96 Ro v. Ro* [INCADAT Reference: HC/E/IL 832], or may manage to get the taking parent to concede that they will return with the child in any event. See the Court of Appeal of England and Wales (UK) in *Re A (A Minor)(Abduction)* [1988] 1 FLR 365 [INCADAT Reference: HC/E/UK 23].

<sup>348</sup> See *supra*, paras 42 *et seq.*

<sup>349</sup> See for example, the Quebec Court of Appeal in *M.G. v. R.F.*, 2002 R.J.Q. 2132 [INCADAT Reference: HC/E/CA 762] where the court noted that if the child returned without the taking parent (mother) this would not place the child in an intolerable situation. Although the mother was the primary caregiver of the child, it was demonstrated that the child had a very good relationship with both parents and would receive adequate care in the State of habitual residence.

<sup>350</sup> The fact that there may be a mere reduction of the level of care is unlikely to trigger the application of the Article 13(1)(b) exception. Similarly, the fact that the left-behind parent may have had, up until the point of the wrongful removal or retention, a more distant relationship with the child is also generally insufficient. See the Scottish Outer House of the Court of Session in *McCarthy v. McCarthy* [1994] SLT 743 [INCADAT Reference: HC/E/UKs 26]. See also the Quebec Court of Appeal in *M.G. v. R.F.*, 2002 R.J.Q. 2132 [INCADAT Reference: HC/E/CA 762].

<sup>351</sup> It is important to note that the child may face some degree of harm if ordered to return to the State of habitual residence, however, this is generally insufficient to meet the high threshold test of Article 13(1)(b). See, for example, the Scottish Outer House of the Court of Session in *Cameron v. Cameron* (No. 2) 1997 SLT 206 [INCADAT Reference: HC/E/UKs 77] where the court noted that some harm may be inevitable by a return order, just as some harm may be inevitable from wrongful removal or retention. It will be the concern of the State to which the children are returned to minimise or eliminate that harm.

<sup>352</sup> For example, where the child is an infant and wholly dependent on the mother (the taking parent) it has been suggested that a return order should not be made. See for example, the decision of the Polish Supreme Court, 7 October 1998, I KKN 745/98 [INCADAT Reference: HC/E/PL 700].

- Is the taking parent unable to return, or merely unwilling to return?
- If the parent is unable to return, have all potential measures that would permit return been exhausted?
- If the taking parent is unwilling to return, what are the reasons for the fear of return?<sup>353</sup>
- If the return of the child is ordered, what is the likelihood of the taking parent nevertheless returning to the State of habitual residence?

#### **i. Criminal or other prosecution in the State of habitual residence due to wrongful removal or retention**

291. In such cases, the taking parent or another person or body opposing return asserts that the taking parent is unable to return with the child to the State of habitual residence because he or she would face criminal or contempt proceedings upon return on account of the wrongful removal or retention of the child. It is further asserted that, if the child is returned without the taking parent, there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation because the taking parent is the primary care provider for the child.

292. The court ought to consider the facts and circumstances of each individual case, and may take into account the considerations above, as well as the following considerations:

**Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).**

##### ***Specific considerations***

**Consequences of the criminal or contempt proceedings upon return:** The taking parent's apprehension of being held criminally or otherwise liable has generally not been considered an objective obstacle to ordering the return of the child.<sup>354</sup> However, the circumstances upon return may need to be carefully considered in the context of each family (for example, when the child is very young and the taking parent is the primary care-giver).

##### ***Consideration of adequate and effective measures to protect the child upon return***

##### **Existence of adequate and effective measures:**

- Consider whether adequate and effective protective measures in the State of habitual residence exist to prevent or mitigate any asserted grave risk for the child.
- Consider in particular whether undertakings or assurances have been made by either the left-behind parent or the relevant authorities to not pursue criminal or other proceedings.<sup>355</sup>
- As pending criminal or other charges may have a negative impact on the child if returned (e.g., affecting the ability of a parent to care for the child,

<sup>353</sup> The Quebec Court of Appeal in *N.P. v. A.B.P.*, 1999 R.D.F. 38 (Que. C.A.) [INCADAT Reference: HC/E/CA 764] found that the taking parent (mother) refused to return to the State of habitual residence because she had previously been trafficked and forced into prostitution by the left-behind parent (father). The court accepted the taking parent was genuinely fearful of return, and that the child would face a grave risk of harm or be otherwise placed in an intolerable situation given the left-behind parent's criminal enterprise.

<sup>354</sup> See, e.g., the decision of the Polish Supreme Court, 7 October 1998, I CKN 745/98 [INCADAT Reference: HC/E/PL 700].

<sup>355</sup> See, e.g., the Court of Appeal of England and Wales (UK) in *Re C. (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 [INCADAT Reference: HC/E/UK 269]; the United States District Court for the Northern District of Illinois, Eastern Division in *Tabacchi v. Harrison*, 2000 WL 190576 (N.D.Ill.) [INCADAT Reference: HC/E/USf 465]; and the Israeli Supreme Court in *B. v. G.*, 8 April 2008 [INCADAT Reference HC/E/IL 923].

if the taking parent is a primary carer), consider to the possibility of communicating with authorities in the State of return for their dismissal or withdrawal. Where the dismissal or withdrawal of pending charges may be secured with the assistance of judicial authorities, consider in particular the use of direct judicial communications (see below).<sup>356</sup>

*Protection of the child during the return proceedings* (see *supra*, item A and B).

*Mediation* (see *supra*, item C).

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

Avoid undue delay with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

Specific information and / or evidence: Consider specifically giving priority to already existing police reports and documents, as well as filings and orders from the court of the State of habitual residence concerning the wrongful removal or retention.

Expedited proceedings (see *supra*, item E).

Restrictive interpretation of Article 13(1)(b) (see *supra*, item F).

Expert report (see *supra*, item G).

Measures recognised and enforceable (see *supra*, item J).

*Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities*

IHNJ and direct judicial communications (see *supra*, item L). Through the use of direct judicial communications in some instances it may be possible that the criminal authorities, being aware of the return proceedings, agree that the person can re-enter the State of habitual residence, *i.e.*, by agreeing on conditions to stop the criminal proceedings or to not enforce an arrest warrant.

Central Authorities and / or other authorities (see *supra*, item M).

## ii. Inability to enter into or remain in the State of habitual residence due to immigration issues

<sup>356</sup> In *Re M. and J. (Abduction: International Judicial Collaboration)* [2000] 1 FLR 803, the taking parent (mother) contended that she could not return with the children to the State of habitual where she was facing an arrest warrant and thus returning the children was likely to cause harm to them. The judge seized with the return application liaised with the appropriate criminal judge in the State of habitual residence to arrange for a recall of the arrest warrant issued against the taking parent until a decision on the merits of custody had been reached. In a case reported in "Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Preliminary Report," drawn up by P. Lortie, First Secretary, Prel. Doc. No 6 (and Appendices A and B) of August 2002 for the attention of the Special Commission of September / October 2002 (available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" and "Special Commission meetings on the practical operation of the Convention" then "Preliminary Documents"), the taking parent (mother) raised concerns as to what would happen if she were to return to the State of habitual residence with the children. The judge seized with the return application received assurances from the judge in the State of habitual residence that the mother would not be subject to any civil sanction provided that the children were returned subject to a return order. The judge further shared the view that it was unlikely that the taking parent would be prosecuted without the initiation of the left-behind parent (father).

293. In such cases, the taking parent or another person or body opposing return asserts that the taking parent is unable to return with the child to the State of habitual residence because the taking parent cannot enter that State due to the expiration of the relevant visa or because he or she has no right of residence there.<sup>357</sup> It is further asserted that, if the child is returned without the taking parent, there is a grave risk that separation from that parent would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation because the taking parent is the primary care provider for the child.

294. It should be noted that cases from numerous Contracting States demonstrate that the courts take a restrictive approach in such circumstances. However, in some cases, courts have demonstrated a willingness to accept this claim if all efforts to obtain permission to enter the country fail. Such cases are nevertheless rare, as in most instances it is possible to obtain the relevant immigration permissions by co-operation between Central Authorities. Also, in certain circumstances, the child might be able to be returned to the care of the left-behind parent or another individual or body in the State of habitual residence. Therefore, other than in exceptional situations, the Article 13(1)(b) exception has not been upheld where the inability to return due to immigration restrictions has been asserted.

295. Nevertheless, the court ought to consider the facts and circumstances of each individual case, and may take into account the considerations above, as well as the following considerations:

**Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).**

***Specific considerations***

**Central Authorities and / or other authorities** (see *supra*, item M) are often able to resolve immigration concerns through co-operation with relevant national authorities, and thus should be involved as soon as possible.

**Other Measures to secure valid immigration status:** Consider whether the taking parent has pursued and exhausted, without undue delay, all potential means to secure immigration permission to the State of habitual residence.

- If the immigration status of the taking parent is merely uncertain, it may not be sufficient to trigger the Article 13(1)(b) exception.<sup>358</sup>
- If the taking parent legitimately cannot return to the State of habitual residence it may be sufficient to trigger the Article 13(1)(b) exception.<sup>359</sup>

***Protection of the child during the return proceedings (see *supra*, item A and B).***

***Mediation (see *supra*, item C).***

***Evaluation of the information and / or evidence submitted in relation to the asserted grave risk***

**Avoid undue delay with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).**

<sup>357</sup> The grave risk exception may also be raised by the taking parent in relation to immigration issues of the *left-behind parent* (a circumstance which would also be interpreted in a restrictive manner). As a general point, experienced practitioners have noted that, in the context of cases involving domestic violence, immigration status is not infrequently used by abusive partners as a means of control of the abused partner.

<sup>358</sup> See, e.g., the Court of Appeal for Ontario in *Jabbaz v. Mouammar* (2003), 226 D.L.R. (4th) 494 (Ont. C.A.) [INCADAT Reference: HC/E/CA 757].

<sup>359</sup> See, e.g., the Family Court of Australia at Melbourne in *State Central Authority of Victoria v Ardito*, 29 October 1997 [INCADAT Reference: HC/E/AU 283].

**Specific information and / or evidence:** Consider specifically giving priority to already existing immigration status reports and documents.

**Expedited proceedings** (see *supra*, item E).

**Restrictive interpretation of Article 13(1)(b)** (see *supra*, item F). In most instances it is possible to obtain the relevant immigration permissions by co-operation between Central Authorities. Therefore, other than in exceptional situations, the Article 13(1)(b) exception has not been upheld where the non-return due to immigration restrictions assertion has been raised.

**Expert report** (see *supra*, item G).

*Consideration of adequate and effective measures to protect the child upon return*

**Existence of adequate and effective measures** (see *supra*, item I).

**Measures recognised and enforceable** (see *supra*, item J).

*Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities*

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

### iii. Economic circumstances upon return

296. In such cases, the taking parent or another person or body opposing return claims that the taking parent is unable or unwilling to return with the child to the State of habitual residence because he or she would be placed in a difficult or untenable economic situation. For example, it may be asserted that the taking parent is unable to find employment in the State of habitual residence or is otherwise in dire circumstances such that the child may be placed in State care. It is further contended that, if the child is returned or is left without the care of the taking parent, there is a grave risk that separation from the taking parent would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation if the taking parent is the primary care provider for the child.

297. The court ought to consider the facts and circumstances of each individual case, and may take into account the considerations above, as well as the following considerations:

**Consider early in the proceedings** assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

*Specific considerations*

**Financial and employment status for the duration of the proceedings on substantive matters in the State of habitual residence:** Examine the financial and employment status of the taking parent, e.g., their savings or assets, <sup>360</sup>

<sup>360</sup> The Court of Appeal of England and Wales (UK) in *Re M (Abductions: Undertakings)* [1995] 1 FLR 1021 [INCADAT Reference: HC/E/UKe 20] considered the savings of the taking parent sufficient to sustain the family for the relevant period of time the English court was concerned with. Consequently, there was no grave risk that



employment possibilities, and alternative means of support. Consider specifically the financial and employment status of the left-behind parent<sup>361</sup> and the time expected for a maintenance ruling to be acquired in favour of the child / taking parent upon return, if necessary. It is important to note that the mere reduction of living standards or income in the State of habitual residence is not sufficient to trigger Article 13(1)(b).<sup>362</sup> However, the potential for the child to be taken into the care of the State because of the dire financial circumstances of the taking parent could satisfy Article 13(1)(b).

**Destitute or homeless:** If the child would be left destitute or homeless because of the insufficient financial circumstances of the taking parent or otherwise, it may be more likely the Article 13(1)(b) exception will be applied. In such circumstances, consider the use of temporary orders for maintenance, conditions of support by the left-behind parent or other arrangements in connection with the child's return, as appropriate.

**Social security:** Take into account whether the taking parent will be eligible for social security or welfare payments, either from the requested State or the State of habitual residence.<sup>363</sup> If eligible, also consider whether the taking parent's dependence on State social security or welfare payments will be insufficient to trigger the application of Article 13(1)(b).<sup>364</sup>

**Protection of the child during the return proceedings** (see *supra*, item A and B).

**Mediation** (see *supra*, item C).

**Evaluation of the information and / or evidence submitted in relation to the asserted grave risk**

**Avoid undue delay** with regards to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

**Specific information and / or evidence:** Consider specifically giving priority to already existing immigration, financial and employment documents.

**Expedited proceedings** (see *supra*, item E).

**Restrictive interpretation of Article 13(1)(b)** (see *supra*, item F). Consider that, in general, more favourable living conditions in the requested State compared to the State of habitual residence is not a relevant consideration, exceptional circumstances, e.g. if the child would be left homeless and / or without recourse to State benefits, aside.

**Expert report** (see *supra*, item G).

their return would expose them to an intolerable situation within the stringent requirements of Article 13(1)(b) until the time of hearing before the Israeli court, being the court of the State of habitual residence.

<sup>361</sup> The Superior Court of Quebec in *Y.D. v. J.B.*, [1996] R.D.F. 753 (Que.C.A.) [INCADAT Reference: HC/E/CA 369] held that financial weakness was not a valid reason for refusing to return a child, stating that "the signatories to the Convention did not have in mind the protection of children of well-off parents only, leaving exposed and incapable of applying for the return of a wrongfully removed child the parent without wealth whose child was so abducted."

<sup>362</sup> See, e.g., the Full Court of the Family Court of Australia in *Director General of the Department of Family and Community Services v. Davis* (1990) FLC 92-182 [INCADAT Reference: HC/E/AU 293], the fact that the mother could not accompany the child to England for financial reasons was insufficient to trigger the Article 13(1)(b) exception.

<sup>363</sup> The Court of Appeal of New Zealand in *K.M.A. v. Secretary for Justice* [2007] NZFLR 891 [INCADAT Reference: HC/E/NZ 1118] considered it unlikely that the Australian authorities would not provide some form of special financial and legal assistance, if required.

<sup>364</sup> See for example, the Court of Appeal of England and Wales (UK) in *Re A. (Minors) (Abduction: Custody Rights)* [1992] Fam 106 [INCADAT Reference: HC/E/UKe 48] and in *Re M. (Abduction: Undertakings)* [1995] 1 FLR 1021 [INCADAT Reference: HC/E/UKe 20].

***Consideration of adequate and effective measures to protect the child upon return***

**Existence of adequate and effective measures** (see *supra*, item I).

**Measures recognised and enforceable** (see *supra*, item J).

***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

#### **iv. Access to justice in the State of habitual residence**

298. In such cases, the taking parent or another person or body opposing return claims that the taking parent is unable or unwilling to return with the child to the State of habitual residence because he or she would lack effective access to justice in that State.<sup>365</sup> For example, it may be asserted that the taking parent is unable to afford legal representation, or that there are other barriers to access to a court for custody proceedings.<sup>366</sup> It is further contended that, if the child is returned without the taking parent, there is a grave risk that separation from the taking parent would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation because the taking parent is the primary care provider for the child. In this context it should be remembered that the 1980 Convention as an international legal instrument is based on mutual trust among legal systems, and was designed for the purpose of avoiding “forum shopping” among jurisdictions, affirming that the proper jurisdiction for custody proceedings is normally in the State of the child’s habitual residence.

299. The court ought to consider the facts and circumstances of each individual case, and may take into account the considerations above, as well as the following considerations:

**Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return** (see below).

***Specific considerations***

**Barriers to timely access to the legal system of the State of habitual residence:** If there is concern that the taking parent will not have timely access to justice, consider coordinating with the relevant Central Authorities or using direct judicial communications to ascertain whether the taking parent will have prompt access to court proceedings soon after return (see below).

<sup>365</sup> See, e.g., the Superior Court of Quebec in *Y.D. v. J.B.* [1996] R.D.F. 753 (Que.C.A.) [INCADAT Reference HC/E/CA 369].

<sup>366</sup> See, e.g., the High Court of England and Wales (Family Division) (UK) in *F. v. M. (Abduction: Grave Risk of Harm)* [2008] 2 FLR 1263 [INCADAT Reference: HC/E/UK 1116]. In this case, the respondent mother claimed she would not be able to obtain legal representation and that the French courts and social services were biased against her and had not properly considered her allegations. Amongst other reasons, the High Court of England and Wales (Family Division) (UK) held that the high threshold required under the first limb of Article 13(1)(b) had not been met. There were no representational or linguistic difficulties and the welfare report was detailed and even handed as were the judgments of the French courts. The Court emphasised that comity and respect for the policy of the Convention required it to defer to the French courts which were just as capable of determining the parties' competing claims.

**Legal representation:** The fact that the parent may be unable to afford legal representation has been found to be insufficient to trigger Article 13(1)(b).<sup>367</sup> In addition, consider whether legal representation would also not have been generally available in a similar domestic proceeding.

***Protection of the child during the return proceedings*** (see *supra*, item A and B).

***Mediation*** (see *supra*, item C).

***Evaluation of the information and / or evidence submitted in relation to the asserted grave risk***

**Avoid undue delay** with respect to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

**Specific information and / or evidence:** Consider specifically giving priority to already existing reports and documents detailing the circumstances of the legal system in question.

**Expedited proceedings** (see *supra*, item E).

**Restrictive interpretation of Article 13(1)(b)** (see *supra*, item F).

**Expert report** (see *supra*, item G).

***Consideration of adequate and effective measures to protect the child upon return***

**Existence of adequate and effective measures** (see *supra*, item I).

**Measures recognised and enforceable** (see *supra*, item J).

***Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities***

**IHNJ and direct judicial communications** (see *supra*, item L).

**Central Authorities and / or other authorities** (see *supra*, item M).

## **v. Inability to return to the State of habitual residence for medical or family reasons**

300. In such cases, the taking parent or another person or body opposing return claims that the taking parent is unable or unwilling to return with the child to the State of habitual residence for medical or family reasons. For example, the taking parent may assert that a medical condition prevents him or her from returning to the State of habitual residence, or that he or she may only receive sufficient medical care in the requested State. Alternatively, the taking parent may claim that he or she has formed a new family in the requested State and cannot leave. The taking parent may thus contend that, if the child is returned without that parent, there is a grave risk that separation from the taking parent would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation because the taking parent is the primary care provider for the child.

301. The court ought to consider the facts and circumstances of each individual case, and may take into account the considerations above, as well as the following considerations:

<sup>367</sup> See, e.g., the Family Court of Australia at Brisbane in *Emmett and Perry and Director-General Department of Family Services and Aboriginal and Islander Affairs Central Authority and Attorney-General of the Commonwealth of Australia (Intervener)* (1996) 92-645 [INCADAT Reference: HC/E/AU 280].

Consider early in the proceedings assistance of Central Authorities and the IHNJ / direct judicial communications, and, if necessary, the availability of adequate and effective measures to protect the child (and accompanying parent, where relevant) upon return (see below).

### *Specific considerations*

#### Physical health of the taking parent:

- Consider whether a medical condition suffered by the taking parent precludes that parent from returning with the child. Consider specifically giving priority to already existing medical reports and documents to determine the reasonableness of this assertion and the possibility of the taking parent to resume his or her medical treatment in the State of habitual residence.
- If the taking parent is unable to return, consider the nature of the care-giving relationship that the taking parent and the left-behind parent each have with the child to determine whether the child may be at grave risk of harm or otherwise placed in an intolerable situation (see *supra*, introduction to Section 3 of this Part).

#### Psychological health of the taking parent:

- Consider whether the alleged psychological condition does in fact preclude the taking parent from returning with the child to the State of habitual residence, and the possibility of the taking parent to resume his or her psychological treatment at the State of habitual residence.<sup>368</sup>
- Consider whether the psychological health of the taking parent would deteriorate if the child is returned and the effect of such deterioration on the child.<sup>369</sup>
- In certain exceptional cases, extreme deterioration of psychological health may place the child at grave risk of harm or an otherwise intolerable situation. For example, the suicidal inclination of the parent<sup>370</sup> or an induced psychosis<sup>371</sup> may be sufficient to trigger the Article 13(1)(b) exception. It may be necessary to ascertain the type or severity of an asserted depressive illness, for example, with the assistance of an expert opinion or other medical evidence, versus some level of depression of the taking parent (*e.g.*, associated with a return to which he or she would object).<sup>372</sup>

#### Family circumstances:

- If the taking parent is unable or unwilling to return, consider the nature of the care-giving relationship that the taking parent and the left-behind parent each have with the child (see *supra*, introduction to Section 3 of this Part).
- Consider also whether separation from siblings would place the child at grave risk of harm or otherwise in an intolerable situation (see *supra*, Section (2)(i)).

<sup>368</sup> The Full Court of the Family Court of Australia in *The Director-General, Department of Families, Youth and Community Care v. Rhonda May Bennett* [2000] Fam CA 253 [INCADAT Reference: HC/E/AU 275] accepted that the taking parent (mother) was suffering from chronic adjustment disorder and that her chances of recovery would be reduced if she were to leave the requested State and lose the support of her family. However, it rejected the initial finding of the trial judge that the psychological condition prevented the return of the taking parent to the State of habitual residence.

<sup>369</sup> See, *e.g.*, the United Kingdom Supreme Court in *Re S (a Child)* [2012] UKSC 10. In some States the courts have been more prepared to take into account a taking parent's mental health state if the condition, from which it is alleged the taking parent suffers and is precluded from returning to the home State, is a condition which was diagnosed before the child was removed or retained. See, *e.g.*, Warnick J's comments in the Australian case *DOF & P* [2003] Fam CA691, [79] – [81].

<sup>370</sup> See, *e.g.*, the Full Court of the Family Court of Australia in *Director-General, Department of Families v. R.S.P.* [2003] FamCA 623 [INCADAT Reference: HC/E/AU 544].

<sup>371</sup> See, *e.g.*, the High Court of England and Wales (UK) in *Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64 [INCADAT Reference: HC/E/UK 24].

<sup>372</sup> See, *e.g.*, the High Court of England and Wales (UK) in *P v P (Minors)(Child Abduction)* [1992] 1 FLR 155 [INCADAT Reference: HC/E/UK 157]; and the Scottish Outer House of the Court of Session in *D. v. D.* [2001] ScotCS 103 [INCADAT Reference: HC/E/UKs 350].

*Protection of the child during the return proceedings* (see *supra*, item A and B).

*Mediation* (see *supra*, item C).

*Evaluation of the information and / or evidence submitted in relation to the asserted grave risk*

Avoid undue delay with regards to requiring, gathering and receiving additional information and / or evidence (see *supra*, item D).

Expedited proceedings (see *supra*, item E).

Restrictive interpretation of Article 13(1)(b) (see *supra*, item F).

Expert report (see *supra*, item G). Consider that expert evidence might be required to differentiate between treatable depression or a more severe psychological condition.

*Consideration of adequate and effective measures to protect the child upon return*

Existence of adequate and effective measures (see *supra*, item I).

Measures recognised and enforceable (see *supra*, item J).

*Use of the IHNJ and direct judicial communications and assistance from Central Authorities and / or other authorities*

IHNJ and direct judicial communications (see *supra*, item L).

Central Authorities and / or other authorities (see *supra*, item M).

## PART V: Enhancing knowledge and sharing of experience and practices

### 1. Training opportunities

302. A pre-requisite for a correct application of Article 13(1)(b) is sound knowledge and understanding of the Convention, including of the scope of Article 13(1)(b) and the role it plays within the normative system of the Convention.<sup>373</sup> Also, in practice, competent authorities should be familiar with the mechanics of the “safe return” of a child, and an accompanying parent if relevant, including through the use of such tools as the International Hague Network of Judges (IHNJ), direct judicial communications, and the Central Authority co-operation system.

303. With a view to acquiring and enhancing such knowledge and understanding, it is recommended that judges and others involved in return proceedings make use of relevant sources of information and aids to interpretation,<sup>374</sup> and to take part in activities, at the national or international level, aimed at providing training and / or facilitating the exchange of knowledge, experiences and practices.<sup>375</sup>

304. It is useful to include in such training activities other authorities and / or individuals that may become involved in the solution of these cases. The objective is to enhance understanding and co-operation among all involved in Article 13(1)(b) cases, such as the Central Authority, child welfare authorities, psychologists and other similar experts, immigration and border control authorities, law enforcement authorities, private practitioners and mediators.

305. Central Authorities, judicial institutes and government officials responsible for the implementation of the Convention should be informed as to training events, as should the national designated member(s) of the IHNJ, who are meant to serve as a point of contact and information on the 1980 Convention and other Hague Children’s Conventions. The Permanent Bureau of the Hague Conference on Private International Law also, upon request and subject to available resources, can assist with training on the 1980 Convention and other Hague Children’s Conventions.

### 2. The value of “concentration of jurisdiction”

306. One extremely effective good practice to ensure Convention expertise are measures aimed at “accumulating” knowledge and experience on the application of the Convention among selected judges from one jurisdiction, for example through a concentration of return proceedings in a limited number of courts (“concentration of jurisdiction”) and / or specific arrangements within the judiciary assigning international child abduction cases to selected judges at all instances.<sup>376</sup> The assignment of cases under the 1980 Convention to specialised courts / judges contributes to building knowledge and experience and to achieving a better handling of the cases, in particular in terms of speed and consistency.

307. Good practices that help judges acquire and enhance knowledge and understanding on the application of Article 13(1)(b) may include the following:

<sup>373</sup> See, *supra*, Part I, Sections 1 and 2, paras 32 *et seq.*

<sup>374</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 8 mentioning the Explanatory Report, international jurisprudence, reports of Special Commission Meetings and academic writings.

<sup>375</sup> See, *e.g.*, the Guide to Good Practice on Implementing Measures (*ibid.*), Chapters 2.2.6, 5.2 and 10.1. See also the Guide to Good Practice on Enforcement (*op. cit.* note 17), Chapter 9.

<sup>376</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 5. See also, *e.g.*, *The Judges’ Newsletter on International Child Protection* (*op. cit.* note 221), Volume XX / Summer–Autumn 2013, where judges report on their experiences with the concentration of jurisdiction in their State.



- Consult, for an explanation of the terms and objectives of the 1980 Convention, including in relation to Article 13(1)(b), for example, the following sources of information:
  - the *Proceedings of the Fourteenth Session (1980)*,<sup>377</sup> including, in particular, the Explanatory Report;<sup>378</sup>
  - the Guides to Good Practice published by the Hague Conference on Private International Law<sup>379</sup> and other practice guides on or with relevance to the application of the 1980 Convention;<sup>380</sup>
  - *The Judges' Newsletter* on International Child Protection;<sup>381</sup>
  - bench books prepared by national judicial authorities;<sup>382</sup>
  - academic writing.<sup>383</sup>
- Consult relevant jurisprudence on the application of the 1980 Convention (e.g., using INCADAT or other databases),<sup>384</sup> and in particular on the application of Article 13(1)(b), including national jurisprudence as well as relevant jurisprudence and reports from other / foreign jurisdictions, international and regional courts or bodies (e.g., jurisprudence of the European Court of Human Rights in relation to Art. 8 of the ECHR,<sup>385</sup> jurisprudence of the Court of Justice of the European Union,<sup>386</sup> and reports of the Inter-American Commission on Human Rights<sup>387</sup>).
- Encourage the organisation of activities (at national and international levels) aimed to provide training and / or enhance the sharing of knowledge, experiences and practices that include a specific session on the application of Article 13(1)(b).
- Consider co-operating with, or seeking assistance from, the Central Authority when planning activities aimed to provide training and / or enhance the sharing of knowledge, experiences and practices.<sup>388</sup>

<sup>377</sup> See *supra*, note 8.

<sup>378</sup> The *travaux préparatoires* of a treaty are an important aid in the process of interpretation; see the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 8.1, referring to Art. 32 of the *Vienna Convention on the Law of Treaties*.

<sup>379</sup> So far, the following Guides to Good Practice have been published: "Part I: Central Authority Practice", "Part II: Implementing Measures", "Part III: Preventive Measures", "Part IV: Enforcement", "Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice" and "Mediation". All Guides are available at < [www.hcch.net](http://www.hcch.net) > under "Publications".

<sup>380</sup> E.g., the Practice Guide for the Application of the Brussels IIa Regulation (*op. cit.* note 81).

<sup>381</sup> See *supra*, note 221.

<sup>382</sup> See, e.g., the National Judicial Institute of Canada published an electronic bench book; see note 119.

<sup>383</sup> See the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 8.4.

<sup>384</sup> See the Guide to Good Practice on Implementing Measures (*ibid.*), Chapter 8.2.

<sup>385</sup> Jurisprudence of the European Court of Human Rights is available at < <http://hudoc.echr.coe.int> >. Case law with relevance to the 1980 Convention is also included in INCADAT (*op. cit.* note 6).

<sup>386</sup> Jurisprudence of the Court of Justice of the European Union is available at < [curia.europa.eu](http://curia.europa.eu) >. Case law with relevance to the 1980 Convention is also included in INCADAT (*ibid.*).

<sup>387</sup> Reports from the Inter-American Commission on Human Rights are available at < [www.oas.org](http://www.oas.org) >. Reports with relevance to the 1980 Convention are also included in INCADAT (*ibid.*).

<sup>388</sup> On the role of the Central Authority in relation to education and training, see the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17), Chapter 6.2. See also the Guide to Good Practice on Implementing Measures (*op. cit.* note 7), Chapter 10.1, stating that "Central Authorities or other relevant bodies are encouraged to develop educational and training programmes for persons responsible for implementing the Convention (judges, lawyers, locating agencies, social services and others concerned) which might also help to resolve difficulties which have arisen in its practical application".

- Consider, in such activities, the participation of relevant authorities and individuals that may be involved in Article 13(1)(b) cases to facilitate an understanding of the application of the grave risk exception and to enhance co-operation among all involved, such as:
  - courts,
  - the Central Authority,
  - child welfare authorities,
  - psychologists and other experts,
  - immigration and border control authorities,
  - law enforcement authorities,
  - private practitioners and mediators.
- Consider that such activities could be used to raise awareness of issues related to domestic violence dynamics and the effects on children, and to discuss the application of the 1980 Convention when these issues are raised in Article 13(1)(b) cases.<sup>389</sup>

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<sup>389</sup> See the Report of Part I of the Sixth Special Commission (*op. cit.* note 28), para. 108.

## ANNEXES

### Annex 1: Glossary of Terms

#### **Article 13(1)(b) case:**

The term “Article 13(1)(b) case” is used in this Guide to denote an international child abduction case for the return of a child or children brought under the 1980 Convention and in which the exception of Article 13(1)(b) has been raised.

#### **Child abuse:**

“Child abuse”, depending on the definition used in the relevant jurisdiction, refers to types of physical or psychological neglect, maltreatment or sexual molestation of a child, typically resulting from actions or a failure to act by a parent or other caretaker. This broad definition is employed in this Guide, unless otherwise indicated. See also below under “Domestic and family violence”.

#### **Concentration of jurisdiction:**

States that implement “concentration of jurisdiction” grant competence to a limited number of courts or administrative bodies within their State to consider Hague return applications.<sup>1</sup>

#### **Custody / rights of custody:**

Unless stated otherwise, this Guide uses the terms “custody” and “rights of custody” in a *broad* sense having regard to the different meanings they encompass in national law and jurisprudence. The Guide adopts the approach taken in Article 5 of the 1980 Convention that defines “rights of custody” as including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence. Similarly, Article 3(b) of the 1996 Convention refers to “rights of custody” as “including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child’s habitual residence”. However, when reference is made in the Guide to “rights of custody under the 1980 Convention”, the term should be understood in light of the autonomous nature of the 1980 Convention and its terminology.<sup>2</sup>

#### **Direct judicial communications:**

Direct judicial communications refer to communications that take place between sitting judges, located in different jurisdictions, concerning a specific case.<sup>3</sup>

#### **Domestic and family violence:**

The term “domestic violence” or “family violence” may, depending on the definition used in the relevant jurisdiction, encompass a range of abusive behaviours within the family, including, for example, types of physical, psychological and financial abuse. It may be directed towards the child (“child abuse”) and / or towards the partner (sometimes referred to as “spousal abuse” or “intimate partner violence”) and / or other family members. Unless stated otherwise, this Guide uses the term “domestic violence” or “family violence” in this broad sense. A distinction may be made between indirect and direct violence with respect to children. The first is domestic violence towards a parent or other members of the household, which may affect the child, depending on

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<sup>1</sup> See, e.g., the Guide to Good Practice on Implementing Measures (*op. cit.* note 7 of this Guide), Chapter 5.1. See also, *supra*, para. 306 of this Guide.

<sup>2</sup> See in this regard the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 233 of this Guide), Chapter 9.

<sup>3</sup> See the Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), p. 12. See also, *supra*, paras 123 *et seq.* of this Guide.

the circumstances of the case, thus exposing the child to the effects of domestic violence,<sup>4</sup> and the second is violence within the family against the child itself. The latter case would generally be referred to as “child abuse”.<sup>5</sup> The term “family violence” is used interchangeably with “domestic violence”.<sup>6</sup>

**Family violence:**

See above under “Domestic violence”.

**Grave risk exception:**

For the purpose of this Guide, the term “grave risk exception” refers to the exception set out in Article 13(1)(b) of the 1980 Convention, including the three stipulated aspects of grave risk – exposing the child to physical harm, exposing the child to psychological harm, or otherwise placing the child in an intolerable situation – unless stated to the contrary.<sup>7</sup>

**Habitual residence:**

The term “habitual residence” is not defined in the 1980 Convention and is considered to be a question of fact.<sup>8</sup> It is usually considered to be the place where the child primarily resides, notwithstanding short absences, and where the centre of the child’s life and activities is found. Where it is difficult to determine the State of habitual residence of the child (e.g., the child has only resided for a relatively short period of time in one place), courts have developed ways to interpret the concept of habitual residence by taking into account, for example, the intention of the persons concerned and, increasingly, the child’s integration in the social and family environment.<sup>9</sup>

**International Hague Network of Judges:**

The International Hague Network of Judges (IHNJ) is a network of judges specialising in family matters that was established by the Hague Conference on Private International Law to facilitate communication and co-operation between judges at the international level and to assist in the effective operation of the 1980 Convention. Many Contracting States to the 1980 Convention and several non-Contracting States have designated one or more judges to the IHNJ to facilitate judicial liaison functions across international borders, and in particular direct judicial communications.<sup>10</sup>

**Left-behind parent:**

The term “left-behind parent” describes the parent who claims that a child has been removed or retained in another State, in breach of his or her custody rights under the 1980 Convention. According to Article 3 of the 1980 Convention, a “removal or retention of a child is to be considered wrongful” where it is in breach of actually exercised custody rights “attributed to a person, an institution or any other body, either jointly or alone, [...]” under the law of the State in which the child was habitually resident immediately before the removal or retention. In most cases, it is a parent who claims that his / her custody rights have been breached; in some cases, it is a person other than the parent (e.g., a grandparent, a step-parent or any other related or unrelated person) or an institution whose custody rights are breached by a wrongful removal or retention of the child. To avoid lengthy descriptions throughout this Guide, unless stated otherwise, the term “left-behind parent” includes any other person, institution or body

<sup>4</sup> See, e.g., Section 4AB of the Australian Family Law Act 1975 stating that “[f]or the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence”.

<sup>5</sup> This Guide adopts the definition of “domestic violence and child abuse” as used in the Guide to Good Practice on Mediation (*op. cit.* note 220 of this Guide), see Chapter 10, para. 261. This definition is very similar to the definition used in Prel. Doc. No 9 of May 2011 (*op. cit.* note 28 of this Guide), para. 10.

<sup>6</sup> See Prel. Doc. No 9 of May 2011 (*ibid.*), para. 10.

<sup>7</sup> See, *supra*, paras 59 *et seq.* of this Guide.

<sup>8</sup> See the Explanatory Report (*op. cit.* note 8 of this Guide), para. 66.

<sup>9</sup> See, e.g., INCADAT (*op. cit.* note 6 of this Guide), the case law analysis for “habitual residence” prepared by P.E. McEleavy, University of Dundee, United Kingdom. For the recent development on the focus on the integration of the child, see, e.g., the Supreme Court of the United Kingdom in *In the Matter of A (Children)* [2013] UKSC 60. See also the case law of the Court of Justice of the European Union on “habitual residence”: Judgement of Court (Third Chamber) of 2 April 2009, A., C-523/07, EU:C:2009:225; Judgement of the Court (First Chamber) of 22 December 2010, *Barbara Mercredi v. Richard Chaffe*, C-497/10 PPU, EU:C:2010:829; and Judgment of the Court (Third Chamber) of 9 October 2014, C. v. M., C-376/14 PPU, EU:C:2014:2268.

<sup>10</sup> See, *supra*, para. 125 of this Guide on the IHNJ.

whose custody rights were breached by an alleged or established wrongful removal or retention.<sup>11</sup>

**Mirror orders:**

Mirror orders are identical or similar orders made by the courts in both the requested and requesting States. These orders become fully enforceable and effective in both States.<sup>12</sup>

**Protective measures:**

For the purpose of this Guide, the term “protective measures” is to be understood broadly and refers to a range of measures taken by the court seized with the return proceedings (sometimes in co-operation with the court or other authorities in the requesting State) to secure the safe and prompt return of the child (and / or the taking parent). The term, thus, includes undertakings (see below), stipulations, conditions, mirror orders (see above), safe harbour orders (see below), as well as the range of measures of protection which may be made enforceable under Article 11 of the 1996 Convention.

**Requested State:**

The term “requested State” refers to the State to which the child has been removed or where the child is being retained. It is the State in which return proceedings take place.<sup>13</sup>

**Requesting State:**

The term “requesting State” refers to the State whose Central Authority or from which an individual party has filed an application for the return of the child, thus, requesting the child’s return under the 1980 Convention to that State. It is usually the State of habitual residence of the child before the child’s removal or retention.<sup>14</sup>

**Return proceedings:**

The term “return proceedings” refer to proceedings for the return of a child or children which take place before the judicial or administrative authority of the Contracting State to which the child has been removed or where the child is being retained.<sup>15</sup>

**Safe harbour order:**

A safe harbour order is an order made in the requesting State with a view to safeguarding the welfare of the child upon return and on which the child’s return may be made conditional by the authorities of the requested State.<sup>16</sup>

**Taking parent:**

The parent who is alleged to have wrongfully removed a child from his / her place of habitual residence to another State or to have wrongfully retained a child in another State is referred to in this Guide as the “taking parent”. In parallel to the use of the term “left-behind parent”, unless stated otherwise, reference to the term “taking parent” may include any person, institution or other body who is alleged to have wrongfully removed or retained a child.<sup>17</sup>

**Undertakings:**

An undertaking is a voluntary promise, commitment or assurance given by a person to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned.<sup>18</sup> Unless undertakings can be made enforceable in the State to which the child will be returned, they should be used

<sup>11</sup> This Guide adopts the approach taken in the Guide to Good Practice on Mediation (*op. cit.* note 220 of this Guide), p. 11.

<sup>12</sup> This Guide adopts the definition of “mirror orders” as provided in the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17 of this Guide), see the Glossary at p. 9.

<sup>13</sup> See Arts 11(2), 12(3), 13(1), 14, 17, 20 and 24 of the Convention. See, *supra*, para. 84 of this Guide.

<sup>14</sup> See Art. 9 (“requesting Central Authority”) and Art. 11(2) of the Convention.

<sup>15</sup> See Art. 12(1) and, *supra*, para. 84 of this Guide.

<sup>16</sup> See N. Lowe, M. Everall QC and M. Nicholls, (*op. cit.* note 252 of this Guide), p. 347.

<sup>17</sup> See, *supra*, the term “left-behind parent” and note 11 of this Guide.

<sup>18</sup> This Guide adopts the definition of “undertakings” as provided in the Guide to Good Practice on Central Authority Practice (*op. cit.* note 17 of this Guide), see the Glossary at p. 9.

with caution, both generally and in particular in relation to fundamental issues of well-being and safety of a child (and an accompanying parent, when relevant).



## **Annex 2: Special Commission Conclusions and Recommendations on the safe return of the child and accompanying parent, where relevant**

### **1. Conclusions and Recommendations of the Sixth meeting of the Special Commission (2011/12)<sup>1</sup>**

*Facilitating the safe return of the child and the accompanying parent, where relevant (1980 and 1996 Conventions)*

39. The Special Commission recognises the value of the assistance provided by the Central Authorities and other relevant authorities, under Articles 7(2) d), e) and h) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

40. The Special Commission also recognises the value of direct judicial communications, in particular through judicial networks, in ascertaining whether protective measures are available for the child and the accompanying parent in the State to which the child is to be returned.

41. It was noted that the 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.

42. In considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other. [...]

62. The Special Commission noted that the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) b)), including allegations of domestic violence, are an exclusive matter for the authority competent to decide on the return, having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child.

### **2. Conclusions and Recommendations of the Fifth meeting of the Special Commission (2006)<sup>2</sup>**

*Ensuring the safe return of children*

1.1.12 The Special Commission reaffirms the importance of Recommendation 1.13 of the Special Commission meeting of 2001: *"To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked. It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody*

<sup>1</sup> Conclusions and Recommendations of Part I and Part II of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention and a Report of Part II of the Meeting.

<sup>2</sup> Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006).

*proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases. The measures which may be taken in fulfilment of the obligation under Article 7 h) to take or cause to be taken an action to protect the welfare of children may include, for example:*

- a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;*
- b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;*
- c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.*

*It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent."*

The Special Commission affirms the important role that may be played by the requesting Central Authority in providing information to the requested Central Authority about services or facilities available to the returning child and parent in the requesting country. This should not unduly delay the proceedings.

## **PART VIII – SECURING THE SAFE RETURN OF THE CHILD**

### *The use of protective measures*

1.8.1 Courts in many jurisdictions regard the use of orders with varying names, e.g., stipulations, conditions, undertakings, as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.

### *Enforceability of protective measures*

1.8.2 When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including "mirror" orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention.

### *A possible Protocol concerning protective measures*

1.8.3 Positive consideration was given to the possibility of a Protocol to the 1980 Convention which would provide a clear legal framework for the taking of protective measures to secure the safe return of the child (and where necessary the accompanying parent). The potential value of a Protocol was recognised though not as an immediate priority.

## **APPENDIX**

### **Additional considerations relevant to the safe return of the child**

Considering that the interests of children are paramount in matters relating to their custody and that to protect children from the harmful effects of their wrongful removal or retention and to ensure the safe return of the child, it remains important to improve the procedures established for this purpose;

The Special Commission is of the view that the provisions of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* support measures to be taken, where appropriate in a particular case, to –

- 1. attempt by mediation or conciliation to obtain the voluntary return of the child or the amicable resolution of the issues, in a manner that does not delay the return of the child;

2. provide an opportunity for the child to be heard, unless this appears inappropriate having regard to the child's age or degree of maturity;
3. secure the exercise of rights of access and contact, as appropriate, during the proceedings related to the application for return of the child;
4. enable or require the relevant authorities to cooperate in order to ensure access to pertinent information available in the States concerned;
5. provide for the protection of the child upon his / her return and to enquire in particular about the measures which the competent authorities of the State where the child was habitually resident immediately before its removal or retention can take for the protection of the child upon its return;
6. inform the competent authorities of the State where the child was habitually resident immediately before its removal or retention about proceedings on the application for return and any decision taken in this respect in the State where the child is;
7. assist in the implementation of protective measures, approved by the authorities in the requesting State, to provide for the protection of the child and, if necessary, the parent who removed or retained the child upon its return;
8. upon request, inform the Central Authority of the State where the return of the child has been ordered about the decision on the merits of rights of custody, rendered in the wake of such return, in so far as is permitted by the law of the State where the decision has been taken.

### **3. Conclusions and Recommendations of the Fourth Meeting of the Special Commission (2001)<sup>3</sup>**

#### *Exchange of information*

1.8 It is recommended that each Central Authority should publish, on its website if possible and / or by other means, such as a brochure or flyer (the precise format being a matter for the Central Authority), information concerning at least the following matters:

[...]

- information concerning the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return;
- information, if applicable, concerning liaison judges.

[...]

#### *Securing the safe return of the child*

1.13 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.

It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases.

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<sup>3</sup> Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001).

The measures which may be taken in fulfilment of the obligation under Article 7 h) to take or cause to be taken an action to protect the welfare of children may include, for example:

- a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
- b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
- c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.

It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.

*Standard questionnaire for newly-acceding States*

2.3 The approved questionnaire is as follows:

...

*VII Social services and child protection services*

Please describe the services which exist for the assessment, care and protection of children in the context of international child abduction.

Please indicate the services available for the protection (if necessary) of returning children, as well as the services available (including legal advice and representation) to a parent accompanying the child on return.

*Safe return orders*

5.1 Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child.

## Annex 3: Dynamics of Domestic Violence, International Norms Relevant to Domestic Violence and Violence against Children

### 1. Introduction

1. As highlighted in the background on the development of this Guide (see *supra*, paras 11 and 12), subsequent to the adoption of the 1980 Convention, social science research and international norms, as well as national policies and legal regimes, have progressed both in a better understanding of the nature and dynamics of domestic and family violence, and also in mechanisms to combat the same. The Sixth Special Commission noted that: “a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training”.<sup>1</sup>

2. More is now known about the harmful effects of inter-spousal or intimate partner domestic violence on children. The Sixth Special Commission recommended, in line with modern social science evidence and current international norms, that: “[i]n considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other”.<sup>2</sup>

3. It is important to note that it has been observed that parental abduction or kidnapping can follow a range of patterns, and in some circumstances can be a form of domestic violence itself (*e.g.*, when a parent wrongfully removes or retains a child to further a pattern of abuse against the left-behind parent), or a response to domestic violence (*e.g.*, in some cases a parent may “flee” a situation of domestic violence with a child).<sup>3</sup> Each case which comes before a competent authority under the 1980 Convention return proceedings will be unique and fact-specific.

4. This informational Annex has been included in this Guide as domestic violence is not explicitly mentioned in the 1980 Convention text or in its Explanatory Report,<sup>4</sup> yet has been raised as an issue which arises with some regularity in the Convention’s operation, as discussed at the Sixth Special Commission (see Section 4 of the Introduction to this Guide) and treated in various studies.<sup>5</sup>

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<sup>1</sup> Report of Part I of the Sixth Special Commission, para. 35 (*op. cit.* note 28 of this Guide).

<sup>2</sup> *Ibid.*, para. 42.

<sup>3</sup> See, for instance, J. Zorza, “The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes?” 37 *Fordham Urban Law Journal* 909 (2000), p. 909; S. Kreston, “Prosecuting Parental Kidnapping”, *American Prosecutors Research Institute*, Update – Vol. 11, No 4, 1998, p. 1; and G.L. Greif and R.L. Hegar, *When Parents Kidnap: The Families Behind the Headlines*, New York, The Free Press, 1993, at pp. 37-42. Greif and Hegar present two of five common abduction patterns, “Pattern 1: Abduction by a Violent Visitor” (26% of cases in the study’s sample) and “Pattern 4: Abduction by a Violent Shared Custodian” (11% of the study’s sample) where relationships were marked by violence perpetrated by the abductor. J. Chiancone, “Parental Abduction: A Review of the Literature”, US Department of Justice, Office of Justice Programs, at p. 5, notes research where it was found that “[a]bout one-quarter of [abduction] cases involved allegations of domestic violence against the abductor, and another one quarter involved allegations against the left-behind parent”.

<sup>4</sup> See, however, the 1980 Convention *travaux préparatoires* in which the British Delegation clarified that: “it was necessary to add the words ‘or otherwise place the child in an intolerable situation’ since there were many situations not covered by the concept of ‘physical and psychological harm’”. For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation.” Fourteenth Session of the Hague Conference on Private International Law (1980), *Actes et documents de la Quatorzième session*, Tome III, *Child abduction* (*op. cit.* note 8 of this Guide), p. 302.

<sup>5</sup> See, for example, J.L. Edleson *et al.*, *Multiple Perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases* (Final Report National Institute for Justice #2006-WG-BX0006), November 2010, available at < [https://gspp.berkeley.edu/assets/uploads/page/HagueDV\\_final\\_report.pdf](https://gspp.berkeley.edu/assets/uploads/page/HagueDV_final_report.pdf) > (last consulted 7 June 2017) in which in-depth interviews were conducted with “taking mothers”, attorneys and “specialists” and 47 published United States cases involving allegations of domestic violence were analysed.

5. Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on the increase in return proceedings as a litigation or delay tactic on the part of taking parents, due to the limited exceptions available under the Convention. It is for the competent authority hearing the case to assess the substance, veracity and seriousness of any allegations, to the extent required within the limited scope of Article 13(1)(b) proceedings (see below), and giving due regard to the need for expedition in the proceedings.

6. This Annex sets out, by way of background for competent authorities and other system actors, in cases where domestic violence is found to be a factor, general introductory information on the dynamics of domestic violence (Section 2) as well as relevant international and regional legal norms (Section 3 and 4), which also may bear generally on the protection of children from forms of violence within the family. Examples of international norms may be helpful in the context of implementation by jurisdictions of mechanisms to ensure the protection of victims of domestic and family violence, which may be of vital importance to prevent individuals from fleeing a jurisdiction, and also to provide assistance and protection if they are to return to a certain jurisdiction. An example of a danger / risk assessment tool (in relation to risk of serious physical harm or lethality), used in some domestic jurisdictions for some situations of domestic violence, is also included (Section 5). It should be noted that generally this Annex only provides limited overview information from a selection of sources.<sup>6</sup>

7. When assertions of domestic violence are raised in the context of an Article 13(1)(b) case, the appropriate and expeditious examination of such assertions falls to the judicial or other competent authority hearing the return proceeding, including whether any substantiated assertions meet the threshold of posing a grave risk to a child.<sup>7</sup> The international co-operation tools, for example, those relating to the collection of information / evidence and evaluation of the availability of effective protective measures when needed, the use of Central Authority co-operation mechanisms and the International Hague Network of Judges (IHNJ), etc., described in this Guide will assist competent authorities in making a determination based on the facts of a given case, within the interpretative framework of the Convention.

8. The Sixth Special Commission, as has been emphasized in this Guide, underlined that the limited scope of return proceedings and the Article 13(1)(b) exception should be kept in mind by competent authorities, noting that:

“Where Article 13(1) b) of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.”<sup>8</sup>

9. As highlighted by the Sixth Special Commission, Article 13(1)(b) proceedings have a much narrower scope than domestic proceedings, and the focus should be kept on the assessment of the grave risk to the child (see, *inter alia*, Part I, Section 2 of this Guide). The general information included below will usually be most relevant in national custody proceedings or relevant family law or other proceedings, and may not be relevant to all Article 13(1)(b) cases where domestic and family violence has been asserted; competent authorities must assess each individual case.

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<sup>6</sup> It is recommended that competent authorities and other system actors, as necessary, when confronted with issues of domestic violence or other allegations of serious abuse (such as child sexual abuse), as appropriate, refer to specialised national and international resources and information, including specific supports and expertise which may be available generally or in a given case in their jurisdiction.

<sup>7</sup> Report of Part I of the Sixth Special Commission, para. 13 (*op. cit.* note 28 of this Guide): “The Special Commission re-emphasises that – (a) in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application.”

<sup>8</sup> *Ibid.*, para. 36.



## 2. Dynamics of Domestic Violence

### a) Definition of and research on particular dynamics of domestic violence

10. The term “domestic violence” may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical, psychological, sexual and / or financial; it may be directed towards the child (“child abuse”) and / or towards an intimate partner (sometimes referred to as “spousal abuse” or “intimate partner violence”) or other family members.<sup>9</sup> This Guide uses the term “domestic violence,”<sup>10</sup> unless stated otherwise, in the broad sense outlined in this paragraph, and is used interchangeably with the term “family violence”.

11. As noted, academic literature has asserted that parental abduction or kidnapping generally can be both a response to domestic violence (e.g., in some cases a parent may “flee” a situation of domestic violence with a child) and also a form of domestic violence itself (e.g., when a parent takes a child to further a pattern of abuse against the left-behind parent).<sup>11</sup> Each case is specific.

12. Additionally, according to current research, “the level of violence is known to vary greatly across families,” and some scholars have suggested a potential approach, based on social science literature, whereby it could be established if a child’s exposure to family violence would rise to the level of posing a “grave risk” of harm to the child under the 1980 Convention’s 13(1)(b) exception.<sup>12</sup>

13. Chamberland and Bala have suggested the following non-exhaustive list of factors that courts might wish to take into account when “assessing the significance for a *Hague Convention* case of a finding that domestic violence has occurred and that a grave risk of harm to the child exists”:<sup>13</sup>

- “nature of the violence:
  - acts, frequency, injuries;
  - pattern: escalating or isolated? Mutual violence or coercive controlling?
  - likelihood of recurrence;
- effect of violence on the victim (e.g., on the parenting capacity of the primary carer);
- effect of violence on the children:
  - did children observe the violence?
  - were they also victims of abuse?
  - was their physical and psychological state and well-being impacted by what they were exposed to?

<sup>9</sup> For an example of a contemporary iteration of such an expansive definition of domestic violence in national legislation, including physical, sexual, and psychological abuse with respect to all those in a “domestic relationship”, see the New Zealand Domestic Violence Act 1995 No 86 (as at 1 March 2017), Public Act (available at < <http://www.legislation.govt.nz/act/public/1995/0086/latest/DLM371926.html> > (last consulted 21 April 2017)). Art. 3(b) of the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (adopted 7 April 2011) enshrines a similar definition whereby domestic violence means “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shared or has shared the same residence with the victim”.

<sup>10</sup> It should be noted that the term “domestic violence”, in some jurisdictions, has been used to refer predominantly to “spousal abuse” or “intimate partner violence”.

<sup>11</sup> See *supra*, note 3 of this Guide.

<sup>12</sup> See S. Shetty and J.L. Edleson, “Adult Domestic Violence in Cases of International Parental Child Abduction”, *Violence Against Women*, 11 (2005), pp. 115-138, at p. 128.

<sup>13</sup> N. Bala and J. Chamberland, “Family Violence and Proving “Grave Risk” for Cases Under the Hague Convention Article 13(b)”, Draft background paper for the Working Group on a Guide to Good Practice on Article 13(1)(b) of the Hague Convention on Child Abduction, *Queen’s University Legal Research Paper No. 2017-091*, January 2015, available at < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2987207](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2987207) > (last consulted on 20 June 2017), pp. 4-5.

- and more importantly, how does this situation translate – if it does – into a “grave risk of harm” should their return to the State of habitual residence be ordered?

- What resources are available to protect the victim and children in the State of habitual residence (e.g., supervised visitation facilities)?
- How responsive is the perpetrator to any available therapeutic interventions, assuming that he has accepted responsibility and is seeking assistance?
- How compliant is the perpetrator with court orders?
- Are there mental health or substance abuse concerns related to the perpetrator?”

14. Most research indicates that, while anyone may be a victim of domestic or family violence, women are the majority of intimate partner violence victims and suffer from more severe harm as a result of this violence.<sup>14</sup> It has been noted that women, due to socio-economic inequalities or other discriminatory patterns, can find their circumstances of victimisation within the family further compounded and complicated (for instance, when they are socially or economically dependent upon an abusive spouse).<sup>15</sup>

### **b) Coercive control, post-separation violence and traumatic syndromes**

15. Modern definitions of domestic violence<sup>16</sup> suggest that some types of family violence can be conceived of as an “on-going pattern of intimidating behaviour in which the threat of serious physical violence is present and may be carried out with the overall goal of controlling the partner”.<sup>17</sup> Controlling behaviour can also be seriously abusive without containing the threat of serious physical violence. Within this conception, dynamics of domestic violence are more than just occurrences of physical violence, but rather an evaluation must be made of the overall context of relationship patterns where strategies of “coercive control” are present.<sup>18</sup>

16. One judge has noted the challenges such patterns may present for judges dealing with domestic violence issues under 1980 Convention return petitions:

“[a] difficulty resides in the imbalance of forces between the abuser and his victim. The judge must be well aware of this imbalance when the time comes for him / her to ask the victim if she is satisfied with the undertakings proposed by the Petitioner to ensure her safety; the

<sup>14</sup> For a discussion on statistical debates see S. Hamby, “The Gender Debate About Intimate Partner Violence: Solutions and Dead Ends”, *Psychological Trauma: Theory, Research, Practice, and Policy*, 2009, Vol. 1, No 1, 24-34. The Preamble to the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (*supra*, note 9 of this Annex) recognises that “domestic violence affects women disproportionately, and that men may also be the victims of domestic violence”.

<sup>15</sup> The World Health Organization notes that violence against women is “both a consequence and a cause of gender inequality”, and risk factors for domestic violence in a woman’s life can include a woman’s level of education, financial autonomy, level of empowerment and social support, and the general attitudes towards the status of women in her surrounding culture and social environment. *WHO Multi-country Study on Women’s Health and Domestic Violence Against Women: summary report of initial results on prevalence, health outcomes and women’s responses*, Geneva, World Health Organization (WHO), 2005, at p. viii and p. 8.

<sup>16</sup> Please note that this sub-section uses a definition of domestic violence which pertains primarily to “intimate partner violence” or “spousal abuse”.

<sup>17</sup> See M.A. Dutton and L.A. Goodman, “Coercion in intimate partner violence: Toward a new conceptualization”, *Sex Roles*, 52 (2005), pp. 743-756; and E. Stark, *Coercive control: The entrapment of women in personal life*, New York: Oxford University Press, 2007.

<sup>18</sup> *Ibid.* See also the WHO Study, *supra*, note 15 of this Annex, at p. 9, for a description of types of “controlling behaviour” which can form a part of the matrix of intimate partner abuse. In some jurisdictions coercive or controlling behaviour has been criminalised, see, for example, Section 76 of the United Kingdom Serious Crime Act 2015.

judge must be aware of the potential intimidation exercised on these victims, particularly on those not represented by counsel".<sup>19</sup>

17. Other academics have suggested that domestic violence is a "differentiated phenomenon," and may include, as well as "coercive controlling violence", what may be termed "situational couple violence or common couple violence" and "separation-engendered violence," with the latter two types of violence less likely to escalate or reoccur.<sup>20</sup> However, while some experts find the use of categorisation into typologies to be helpful, others suggest that rigid compartmentalizing of types of violence is not reliable and can be dangerous, if it is assumed that certain types give rise to grave risk and others do not. It is important to look carefully in every case at the assertions made and the extent to which they have credibility, and the protective measures available in the state of habitual residence, having regard to the risk of harm asserted.

18. Patterns have also been noted where abusive spouses or partners may use legal proceedings as another way to seek control of and undermine an intimate partner, initiating and continuing, for example, drawn-out custody, access or other legal proceedings.<sup>21</sup> This dynamic of what might be called "intimidatory litigation" may be particularly damaging to one spouse or partner (and also indirectly or directly to a child) if there is a significant gap in legal and financial resources between the two parents in question, or if the respondent parent lacks family and social support.<sup>22</sup>

19. Also noted in social science literature are potential continued retaliation patterns of an abusive spouse or partner which may occur when the abused person takes a step to leave an abusive relationship. Research has noted that it may be directly after leaving an abusive situation (by seeking divorce or leaving the family residence, for instance) that the abused person is most at risk of being seriously injured or even killed by a violent partner.<sup>23</sup> Similar dynamics may in some cases be at play upon the departure or return of a parent after the parent has fled cross-border for safety.<sup>24</sup>

20. Finally, the psycho-social effects of, for example, Post-Traumatic Stress Disorder (PTSD) experienced by an abused parent (and / or child) may compromise perceptions of credibility or the believability of an abused person's testimony as a respondent or witness in court, as well as the existence or non-existence of an evidentiary basis on which to assess an individual's allegations of domestic violence (for instance, delays in or non-reporting of domestic violence incidents to the police could be caused by lack of receptivity of relevant police officials, intimidation, lack of autonomy, "learned helplessness" due to abuse, or cultures of secrecy around domestic violence).<sup>25</sup>

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<sup>19</sup> Justice J. Chamberland, "Domestic Violence and International Child Abduction: Some Avenues of Reflection", *The Judges' Newsletter on International Child Protection*, Vol. X, Autumn 2005, p. 72, available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > under "Publications" and "Judges' Newsletter". See also S.L. Miller and N.L. Smolter, "'Paper Abuse': When All Else Fails, Batterers Use Procedural Stalking", *Violence Against Women*, 17 (2011), pp. 637-650; and M. Przekop, "One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts", *Seattle Journal for Social Justice*, 9 (2011), pp. 1053-1106.

<sup>20</sup> See N. Bala and J. Chamberland (*op. cit.* note 13 of this Annex), pp. 2-3.

<sup>21</sup> See J. Zorza (*op. cit.* note 3 of this Annex), p. 920; and C. Bruch, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases", *Family Law Quarterly*, 38 (2004), p. 541.

<sup>22</sup> *Ibid.*, and also see M. Freeman, *International Child Abduction: The Effects*, 2006, The Reunite Research Unit, Leicester, at p. 39.

<sup>23</sup> See multiple research sources cited in Bruch (*op. cit.* note 21 of this Annex), pp. 541 and 542. See for more information on post-separation violence, also D.A. Brownridge, "Violence against women post-separation", *Aggression and Violent Behavior*, 11 (2006), pp. 514-530; C. Humphreys and R.K. Thiara, "Neither justice nor protection: women's experiences of post-separation violence", *Journal of Social Welfare and Family Law*, 25 (2003), pp. 195-214.

<sup>24</sup> *Ibid.* and see J.L. Edleson *et al.* (*op. cit.* note 5 of this Annex), at p. ix, for a summary of key findings indicating that behaviour of partners or spouses reported by Hague return proceeding respondents involved in the study was consistent with social science literature concerning post-separation violence.

<sup>25</sup> See J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association, American Prosecutors Research Institute, August 2007; M.L. Schuster, *Victim Advocacy in the courtroom: persuasive practices in domestic violence and child protection cases*, Boston, Northeastern University Press, 2011; and K.L. Scheppelle, "Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth", *New York Law School Law Review*, 37 (1992), pp. 123-172. See

### 3. Effects of domestic violence on children

#### a) Convention on the Rights of the Child (UNCRC)

21. The United Nations *Convention on the Rights of the Child*, New York, 20 November 1989 (the “UNCRC”)<sup>26</sup> contains clear provisions which obligate States to combat “the illicit transfer and non-return of children abroad” (Art. 11(1)), to prevent the abduction of children “in any form” (Art. 35), and which affirm the right of a child, “save in exceptional circumstances,” to maintain “personal relations and direct contacts with both parents” when those parents reside in different States (Art. 10(2)).

22. Article 19(1) of the UNCRC also provides that States Parties “shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse [...]”. The Committee on the Rights of the Child General Comment No 13 clarifies that “mental violence” includes “exposure to domestic violence”.<sup>27</sup>

#### b) Links between domestic violence and child abuse

23. There are a number of statistical correlations cited in research that link abuse and harm patterns towards one parent to abuse and harm patterns also towards children who are exposed to adult domestic violence.

24. A range of studies have found a correlation of between 30 to 60% between instances of spousal abuse and abuse of children.<sup>28</sup> This means that children who are part of a family where adult domestic violence is found are at greater risk of being exposed to physical harm themselves. It has been noted in literature that there are linkages between spousal homicide and child homicide such that “in about a quarter of cases where male batterers kill their intimate female partners, they also kill their children”.<sup>29</sup>

#### c) Harm to children who are exposed to domestic violence

25. A 2005 World Health Organization study on domestic violence in 10 countries<sup>30</sup> notes that: “[v]iolence against women has a far deeper impact than the immediate harm caused[...] [i]t has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children”.<sup>31</sup>

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also J.L. Edleson *et al.*, *ibid.*, which describes challenges reported by respondents in Hague return applications in seeking help and / or building an evidentiary base in the requesting country. A recent speech by the United Kingdom (England and Wales) Director of Public Prosecutions notes statistics that indicate “[w]omen experience an average of 35 incidents of domestic violence before reporting an incident to the police” (K. Starmer QC, “Domestic Violence: the facts, the issues, the future”, available at < [http://www.cps.gov.uk/news/articles/domestic\\_violence\\_-\\_the\\_facts\\_the\\_issues\\_the\\_future/](http://www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/) > (last consulted 21 April 2017)).

<sup>26</sup> The UNCRC has 196 States Parties (last consulted 21 April 2017 at < [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) >).

<sup>27</sup> Committee on the Rights of the Child, General Comment No 13 (2011), *Article 19: The right of the child to freedom from all forms of violence*, at p. 9.

<sup>28</sup> See, for example, M. Hester and L. Radford, *Domestic Violence and Child Contact in England and Denmark*, Polity Press, 1996; A.E. Appel and G.W. Holden, “The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal”, *Journal of Family Psychology*, 12 (1998), pp. 578-599; J.L. Edleson, “The Overlap Between Child Maltreatment and Woman Battering”, *Violence Against Women*, 5 (1999), pp. 134-154.

<sup>29</sup> See J. Zorza (*op. cit.* note 3 of this Annex), p. 930, citing N. Websdale, *Understanding Domestic Homicide*, Northeastern University Press, 1999, pp. 179-180. Zorza notes that Websdale found that “in 52.6% of domestic child homicides where two parents were involved in caring for the children, the woman was known to have been beaten before the child was killed... [and that] overall children make up 26% of all domestic homicides”.

<sup>30</sup> *Supra*, note 15 of this Annex. The countries included in the study are Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand and the United Republic of Tanzania.

<sup>31</sup> *Ibid.*, at page vii.

26. A body of social science research supports such observations, and it is reported in this literature that there are correlations between a child's exposure to domestic violence, whether direct or indirect, and contemporaneous childhood and later problems in adult life.<sup>32</sup> Such problems may include higher rates of "aggressive and antisocial" and "fearful and inhibited" behaviours among children, "lower social competence," and higher than average rates of "anxiety, depression, trauma symptoms and temperament problems".<sup>33</sup> The degree of harm to the child in particular situations of family violence has also been found to vary depending on the presence or absence of a variety of other influential factors, including substance abuse of one of the parents, the presence of a protective care-giver or the presence of other protective factors.<sup>34</sup>

27. Modern national legislation includes provisions that directly recognise the harm caused to children by exposure to family violence. For instance, English law recognises that a child witnessing or hearing domestic violence is a child protection issue, and the meaning of harm to a child has been amended by the Adoption and Children Act 2002 to include "impairment suffered through seeing or hearing the ill treatment of another".<sup>35</sup> The *New Zealand Domestic Violence Act 1995* includes within its definition of psychological abuse of a child the act of causing or allowing a child to witness domestic abuse, or of putting the child "at real risk of seeing or hearing the abuse".<sup>36</sup>

#### 4. Domestic and family violence: national and international law context

28. There has been much recent national activity in the development of legislation and case law which seeks to address issues of domestic violence more effectively and appropriately.<sup>37</sup> A number of national jurisdictions have recognised, under their asylum or refugee law, a potential ground for asylum related to gender-based persecution, which may include domestic or family violence.<sup>38</sup> A 2010 report of the Secretary General of the United Nations also details a range of

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<sup>32</sup> See T. Lindhorst and J.L. Edleson, *Battered Women, Their Children, and International Law*, Boston, Northeastern University Press, 2012; G.L. Carpenter and A.M. Stacks, "Developmental effects of exposure to Intimate Partner Violence in early childhood: A review of the literature", *Children and Youth Services Review*, 31 (2009), pp. 831-839; S.E. Evans, C. Davies and D. DiLillo, "Exposure to domestic violence: A meta-analysis of child and adolescent outcomes", *Aggression and Violent Behavior*, 13 (2008), pp. 131-140; D.A. Wolfe *et al.*, "The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique", *Clinical Child and Family Psychology Review*, 6 (2003), pp. 171-187; J.L. Edleson, "Children's Witnessing of Adult Domestic Violence", *Journal of Interpersonal Violence*, 14 (1999), pp. 839-870; J.W. Fantuzo and W.K. Mohr, "Prevalence and Effects of Child Exposure to Domestic Violence", *The Future of Children*, 9 (1999), pp. 21-32; G. Margolin, "Effects of Witnessing Violence on Children", in P.K. Trickett and C.J. Schellenbach (Eds.), *Violence Against Children in the Family and the Community*, American Psychological Association, Washington, DC, 1998, pp. 57-101; and S. Shetty and J.L. Edleson (*op. cit.* note 12 of this Annex), p. 126 (citing, among others, S. Sutton, "Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children", *Journal of Consulting and Clinical Psychology*, 59 (1991), pp. 258-265; H.M. Hughes, "Psychological and Behavioral Correlates of Family Violence in Child Witness and Victims", *American Journal of Orthopsychiatry*, 58 (1988), pp. 77-90).

<sup>33</sup> S. Shetty and J.L. Edleson, *ibid.*

<sup>34</sup> *Ibid.*, p. 128.

<sup>35</sup> *Children Act 1989*, ss 31(9). See also Sir Nicholas Wall, President Family Division, *Keynote address by the President for the National Resolution Domestic Abuse Conference: "Seeking safety – the whole picture"*, 15 October, 2010, at para. 3.

<sup>36</sup> *Supra*, note 9 of this Annex. Part 1, Section 3(3)(a) and 3(3)(b) of the Act provide that psychological abuse of a child occurs when a person: "a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring".

<sup>37</sup> For instance, a Lord Justice of the United Kingdom (England and Wales) (President of the Family Division) has remarked that it was not until a 2000 Court of Appeal Case that "the judiciary really took domestic abuse on board for the evil that it is". Wall (*op. cit.* note 35 of this Annex), para. 2, referencing *In re L (A Child) (Contact: Domestic Violence)*; *In re V, M and H* [2001] Fam 2006. Spain has created a system of specialised jurisdiction to hear cases on a variety of matters (including child custody), where issues of domestic violence are involved. *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género*. The law, however, does not provide for specialised jurisdiction courts to deal with 1980 Convention cases.

<sup>38</sup> These jurisdictions include, among others, Canada, Australia, the United Kingdom and the United States of America. See L. Mendel-Hirs, "Recent Landmark Victories in an On-Going Struggle for U.S. Immigration Law to Recognize and Fully Protect Women's Human Rights", November 19, 2010 (Empire Justice Center). See also Council of Europe work in this area, including its new Convention, Chapter VII (*supra*, note 9 of this Annex).

national developments around the world, as part of the Secretary General's special campaign to end violence against women.<sup>39</sup>

29. While it is beyond the scope of this Annex to explore the range of these national developments (despite the fact that these developments may influence national judicial treatment of issues under the Convention), it is perhaps important to highlight some key international obligations of States, through treaty law or otherwise, with respect to issues of family and domestic violence. Notable obligations contained within the UNCRC are set out above (see Section 3(a)) and a number of others are mentioned below.<sup>40</sup>

### **a) UN Convention on the Elimination of All Forms of Discrimination against Women**

30. The United Nations *Convention on the Elimination of All Forms of Discrimination against Women* of 18 December 1979 (hereinafter, "CEDAW") has, at present, 189 States Parties.<sup>41</sup> The Committee on the Elimination of Discrimination against Women, in its General Recommendation No. 12, Eighth Session, 1989,<sup>42</sup> has stated that Articles 2, 5, 11, 12 and 16 of the Convention "require the States Parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life".

31. The Committee, in subsequent General Recommendation No. 19,<sup>43</sup> clarifies that "discrimination under the Convention is not restricted to action by or on behalf of Governments," but rather States Parties must also "take all appropriate measures to eliminate discrimination against women by any person, organisation, or enterprise".<sup>44</sup> The Committee further notes that States "may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".<sup>45</sup> General Recommendation No. 19 makes a specific affirmation with respect to family violence stating that it is "one of the most insidious forms of violence against women [...] prevalent in all societies" and that "[l]ack of economic independence forces many women to stay in violent relationships".<sup>46</sup>

32. Specific recommendations in General Recommendation No. 19 to States Parties to CEDAW include taking such measures as: gender-sensitive training of judicial and law enforcement officers and other public officials; establishment of support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling; appropriate criminal penalties and civil remedies in cases of domestic violence; services to ensure the safety and security of victims of family violence; rehabilitation programmes for perpetrators; and preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.

<sup>39</sup> See *Intensification of efforts to eliminate all forms of violence against women*, Report of the Secretary-General (A/65/208, of 2 August 2010). Paras 9-10 and 12-14 present particular detail within national jurisdictions.

<sup>40</sup> *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, Art. 31(3)(c). Treaties should be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties". The frameworks and obligations set out in such regional and international instruments might also be helpful for legislators in the context of international child abduction seeking to employ preventive measures, to support and protect parents dealing with domestic violence issues in the requested or requesting State under Convention applications, and in relation to "safe return" issues. See e.g., *My child ... our child! Prevention Guide International Abduction*, Child Focus, Belgium, June 2010, p. 42, which notes that "long-term violence in a relationship can lead to an international child abduction". Available at < [http://www.childhealthresearch.eu/research/add-knowledge/prevention-of-international-child-abduction/at\\_download/file](http://www.childhealthresearch.eu/research/add-knowledge/prevention-of-international-child-abduction/at_download/file) > (last consulted 21 April 2017).

<sup>41</sup> At < [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) > (last consulted 21 April 2017).

<sup>42</sup> Available at < <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> > (last consulted 21 April 2017).

<sup>43</sup> Eleventh session, 1992; available at *ibid.*

<sup>44</sup> *Ibid.*, General Recommendation No 19, para. 9.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, para. 23.



## **b) Recent resolutions of the General Assembly of the United Nations and other United Nations activity in the field of elimination of violence against women**

33. There have been a significant number of Declarations<sup>47</sup> of the United Nations General Assembly (including a Declaration exclusively addressing domestic violence<sup>48</sup>), and other United Nations' endeavours on the global elimination of violence against women, including a 2008-2015 campaign of the Secretary General, "UNiTE to End Violence,"<sup>49</sup> a number of reports by the Secretary General to the General Assembly on this issue,<sup>50</sup> and a Global Database on Violence against Women "on the extent, nature and consequences of all forms of violence against women, and on the impact and effectiveness of policies and programmes for, including best practices in, combating such violence".<sup>51</sup>

## **c) Regional Norms: Latin American Convention and the Council of Europe**

34. The 1994 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (the "Convention of Belem do Para"), developed under the auspices of the Organization of American States, specifically addresses violence against women, and has 32 ratifications.<sup>52</sup> The scope of the Convention covers the private sphere (Art. 1), and the violence included comprises "physical, sexual and psychological violence" (Art. 2) including in the "family or domestic unit or within any other interpersonal relationship" (Art. 2(a)). The Convention asserts that women have the right to "simple and prompt recourse to a competent court for protection against acts that violate her rights" (Art. 4(g)).

35. The *Council of Europe Convention on preventing and combating violence against women and domestic violence* opened for signature on 11 May 2011. The Convention's purposes include to "protect women from all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence" (Art. 1(a)) and "to promote international co-operation with a view to eliminating violence against women and domestic violence" (Art. 1(d)). The instrument addresses, among other things, State obligations to exercise due diligence "to prevent, investigate, punish and provide reparation for acts of violence [...] that are perpetrated by non-state actors" (Art. 5(2)), measures to be taken by Parties on "Integrated policies and data collection" (Chapter II), "Prevention" (Chapter III), "Protection and support" (Chapter IV), provisions on substantive law covering a range of matters (Chapter V), "Investigation, prosecution, procedural law and protective measures" (Chapter VI), "Migration and asylum" (Chapter VII), "International co-operation" (Chapter VIII), and monitoring mechanisms in order to ensure the Convention's effective implementation (Chapter IX).

## **5. Availability of Risk / Harm Assessment Tools**

36. The below example of a domestic violence risk assessment tool is used, for example, in some national jurisdictions in the context of certain domestic proceedings, to assist in assessing the risk of serious injury or lethality where domestic violence has been found to be a factor. The below example is shared in this Guide for competent authorities and other system actors

<sup>47</sup> See, for instance, *Intensification of efforts to eliminate all forms of violence against women* (A/RES/63/155, of 18 December 2008).

<sup>48</sup> *Elimination of domestic violence against women* (A/RES/58/147, of 22 December 2003).

<sup>49</sup> See < <http://www.un.org/en/women/endviolence/> > (last consulted 21 April 2011).

<sup>50</sup> For instance, see *General Assembly. In-Depth Study on All Forms of Violence against Women: Report of the Secretary General*, 2006. A/61/122/Add.1. 6 July 2006. Also, for a more recent Secretary General's report, see *supra*, note 39 of this Annex.

<sup>51</sup> See < <http://evaw-global-database.unwomen.org/en> > (last consulted 21 April 2017), for a link to the Global Database on Violence against Women.

<sup>52</sup> At < <http://www.oas.org/juridico/english/sigs/a-61.html> > (last consulted 21 April 2017).



**for information purposes only.** Such a tool is not intended to be directly applied in the context of Article 13(1)(b) return proceedings, which have a much narrower scope than domestic proceedings (see, *inter alia*, Part I, Section 2 of this Guide), and, under the terms of the Convention, are focussed on the more general grave risk to the child, which can arise from a range of factors. The grave risk to the child under Article 13(1)(b), may arise from various types of “physical or psychological harm” or an otherwise “intolerable situation”; *i.e.*, not only in cases where there may be a risk of serious injury or lethality in the context of domestic violence.

37. Consultation of such tools should not replace tailored consultation with experts, as appropriate, and the use of specialised resources in a relevant jurisdiction, and are not intended to replace an expert opinion, when deemed necessary in an individual case. However, awareness of such tools, and the research upon which they are based, may assist competent authorities and other actors in some certain cases where domestic violence has been found to be present.<sup>53</sup> It should also be noted, however, as stated in the below risk assessment example, the absence of the specified factors is not evidence of the absence of risk of lethality or serious harm. Experienced competent authorities note that the level of risk can, in certain situations, change from low to high quickly, and it may be difficult to ascertain or predict the volatility of an intimate relationship.<sup>54</sup>

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<sup>53</sup> See, *e.g.*, the return case which led to the tragic death of a primary caregiver, Cassandra Hasanovich. The Family Court of Australia in *Department of Community Services v. Hadzic* [2007] FamCA 1703, ordered the return of the two children to England setting aside the grave risk exception raised with regards to the violence of the father towards the mother. The mother had fled with her two young children to Australia following years of domestic abuse, a non-molestation order, breaches thereof, and a sexual assault by the father upon ending the marriage. Relying on the Article 13(1)(b) exception, the mother recounted multiple past physical assaults to both her and the children as well as various death threats made by the father. The court recognized the violence of the father, but noted that the mother could take a number of protective actions upon return and could rely on the courts and authorities in the United Kingdom to assist in her protection and the protection of the children. The court also imposed undertakings and conditions, including that the father could not approach or contact the mother. Following the return of the children and the mother, the father repeatedly breached these undertakings and the prior non-molestation order which led to police involvement and the installation of a panic alarm in the mother's house. In July 2008 the father was convicted of the sexual assault and faced deportation. On the 29<sup>th</sup> of July 2008, the mother requested a police escort to travel to a women's refuge, this was refused and on her way to the refuge the father attacked the mother in her car and stabbed her to death in front of their two children.

<sup>54</sup> See, for example, the judgments of the Canadian Superior Court of Quebec in *P.P. v. V.V.* (16 April 2010) QCCS 1573, *Vera Vucerakovich v. Pedrag Perisic* (8 July 2010), and *Vera Vucerakovich v. Pedrag Perisic* (26 October 2010). In the return proceedings, the court noted that the relationship to be troubled, with arguments and fighting, but found that both parties initiated the confrontations. The court ordered the return of the two children to the father with undertakings, adding that the records show that the father was a good parent and that there was no evidence of violence or abuse towards the children. However, upon the return of the children to the United States the father did not comply with the undertakings and following the institution of divorce proceedings and the granting of interim custody to the mother, the situation escalated. Instead of returning the children, the father disappeared with them and when law enforcement officers attempted to retrieve the children, the father shot and killed his 10-year-old son and seriously injured his 12-year-old daughter.

38. The following particular example is excerpted from a judicial bench guide and enumerates a number of factors may be used to determine a risk of serious injury or lethality.<sup>55</sup>

**Domestic Violence Risk Assessment Bench Guide**

***A research-based bench guide for use by Minnesota judges at all stages of family, Order for Protection, civil or criminal involving domestic violence***

Note: The presence of these factors can indicate elevated risk of serious injury or lethality. The absence of these factors is not, however, evidence of the absence of risk of lethality.

1. Does alleged perpetrator have access to a firearm, or is there a firearm in the home?
2. Has the alleged perpetrator ever used or threatened to use a weapon against the victim?
3. Has alleged perpetrator ever attempted to strangle or choke the victim?
4. Has alleged perpetrator ever threatened to or tried to kill the victim?
5. Has the physical violence increased in frequency or severity over the past year?
6. Has alleged perpetrator forced the victim to have sex?
7. Does alleged perpetrator try to control most or all of victim's daily activities?
8. Is alleged perpetrator constantly or violently jealous?
9. Has alleged perpetrator ever threatened or tried to commit suicide?
10. Does the victim believe that the alleged perpetrator will re-assault or attempt to kill the victim? *A "no" answer does not indicate a low level of risk, but a "yes" answer is very significant*
11. Are there any pending or prior Orders for Protection, criminal or civil cases involving this alleged perpetrator?

39. There are several other types of risk assessment tools available for consultation and use by a range of parties, including judges, prosecutors, domestic violence support organisations, hospital staff, police and first-responders.<sup>56</sup>

<sup>55</sup> These risk assessment factors are validated by a number of studies. See J. Campbell *et al.*, "Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study Practitioner Summary and Recommendations: Validation of Tools for Assessing Risk from Violent Intimate Partners", National Institute of Justice (December, 2005); Heckert and Gondolf, "Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault", *Journal of Interpersonal Violence* Vol 19, No 7 (July 2004). The above risk assessment Bench Guide is excerpted from: *Domestic Violence Benchbooks: A Guide to Court Intervention*, Centre for Court Innovation, New York, Elizabeth Ling and Katie Crank, 2015.

<sup>56</sup> See for example the "Danger Assessment" which is research-backed, validated tool designed to assess the likelihood of lethality or near lethality. It was developed in 1985 and has been the focus of longitudinal studies for two decades. It contains 20 questions, including: "has the physical violence increased in severity or frequency over the past year?", "does he own a gun", "is he unemployed", "has he ever used a weapon against you or threatened you with a lethal weapon?", "does he threaten to kill you?", "does he ever try to choke you?", "does he use illegal drugs?", "does he control most or all of your daily activities? (for instance, does he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car?" Is he violently and constantly jealous of you?", "has he ever threatened or tried to commit suicide?", "does he threaten to harm your children?", "do you believe he is capable of killing you?" and "does he follow or spy on you, leave threatening notes or messages on answering machine, destroy your property, or call you when you don't want him to?". See most recently, J. Campbell *et al.*, "The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide", *Journal of Interpersonal Violence* Vol 24, No 4 (2009) and J. Campbell *et al.*, "The Lethality Screen: The Predictive Value of an Intimate Partner Violence Risk Assessment for Use by First Responders", *Journal of Interpersonal Violence* Vol 32, No 2 (2017). See also the "Method of Assessment of Domestic Violence Situations or Domestic Violence Method (DV-MOSAIC)", an online, computer assisted method which calculates lethality risk available at <<https://www.mosaicmethod.com/>>.

## Annex 4: United Nations Convention on the Rights of the Child (UNCRC), General Comment No. 12 (2009) “The Right of the Child to be Heard”

*Relevant excerpts from General Comment No. 12.*

### **I. Introduction**

3. [...] A widespread practice has emerged in recent years, which has been broadly conceptualized as “participation”, although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.

[...]

### **III. The right to be heard: A right of the individual child and a right of groups of children**

[...]

11. States parties should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard. [...]
  16. The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests. [...]
  21. [...] States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.
  22. The child has the right “to express those views freely”. “Freely” means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard. “Freely” also means that the child must not be manipulated or subjected to undue influence or pressure. “Freely” is further intrinsically related to the child’s “own” perspective: the child has the right to express her or his own views and not the views of others.
  23. States parties must ensure conditions for expressing views that account for the child’s individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.
  24. The Committee emphasizes that a child should not be interviewed more often than necessary, in particular when harmful events are explored. The “hearing” of a child is a difficult process that can have a traumatic impact on the child.
  25. The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child’s clarified decisions.
- [...]
28. The views of the child must be “given due weight in accordance with the age and maturity of the child”.

29. By requiring that due weight be given in accordance with age and maturity [...] makes it clear that age alone cannot determine the significance of a child's views. Children's levels of understanding are not uniformly linked to their biological age [...] For this reason, the views of the child have to be assessed on a case-by-case examination.

[...]

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

[...]

36. The representative can be [...] a lawyer, or another person (inter alia, a social worker). ... there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). [...] it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative [...] Representatives [and judges hearing children directly] must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.

[...]

41. Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome.

[...]

43. Experience indicates that the situation should have the format of a talk rather than a one-sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.

[...]

45. Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered.

[...]

134. All processes in which a child or children are heard and participate, must be:

- (a) Transparent and informative
- (b) Voluntary
- (c) Respectful
- (d) Relevant
- (e) Child-friendly
- (f) Inclusive
- (g) Supported by training
- (h) Safe and sensitive to risk
- (i) Accountable

## **Annex 5: Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements**

The “Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and other requirements” are included in the publication “Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges” (available at < [www.hcch.net](http://www.hcch.net) > under “Publications”). The below is an excerpt from this publication.<sup>1</sup>

[...]

### ***Principles for General Judicial Communications***

The responsibilities of the Hague Network Judge include the collecting of information and news relevant to the implementation of the Hague Conventions and other international child protection matters, both nationally and internationally. He or she will then ensure that this information is disseminated both internally to other judges within his or her State, and internationally amongst members of the Network.

### **3. Internally – within the domestic court system**

- 3.1 The Hague Network Judge should make his or her colleagues in the jurisdiction aware of legislation and Conventions on child protection in general and inform them as to their application in practice. Initiation of and participation in internal training seminars for judges and legal professionals as well as writing articles for publication is also part of this role.
- 3.2 The Hague Network Judge makes certain that other judges within his or her jurisdiction who hear international child protection cases receive their issue of The Judges’ Newsletter on International Child Protection, published by the Permanent Bureau of the Hague Conference, and are aware of any other information, such as on the International Child Abduction Database (INCADAT) of the Hague Conference,<sup>2</sup> that might contribute to the development of the expertise of the individual judge.

### **4. Internally – relationship with Central Authorities**

Another function of a Network Judge is to promote effective working relationships between all those involved in international child protection matters so as to ensure the most effective application of the relevant rules and procedures.

- 4.1 It is recognised that the relationship between judges and Central Authorities can take different forms.<sup>3</sup>
- 4.2 Central Authorities may play an important role in giving support to judicial networks and in facilitating direct judicial communications.<sup>4</sup>

<sup>1</sup> See the Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), pp. 12-16.

<sup>2</sup> Accessible at < [www.incadat.com](http://www.incadat.com) >.

<sup>3</sup> Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*op. cit.* note 27 of this Guide), Conclusion and Recommendation No 1.6.4; Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), paras 27-29 and para. 73 under 2 b).

<sup>4</sup> See the Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference are available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Judicial Communications”, Conclusion and Recommendation No 12.

- 4.3 Successful working relationships depend on the development of mutual trust and confidence between judges and Central Authorities.
- 4.4 Meetings involving judges and Central Authorities at a national, bilateral, regional or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.<sup>5</sup>
- 4.5 The Hague Network Judge will promote within his / her jurisdiction international child protection collaboration generally.

## **5. Internationally – with foreign judges and the Permanent Bureau**

- 5.1 The Hague Network Judge will encourage members of the judiciary in his / her jurisdiction to engage, where appropriate, in direct judicial communications.
- 5.2 The Hague Network Judge may provide, or facilitate the provision of, responses to focussed enquiries from foreign judges concerning legislation and Conventions on international child protection and their operation in his / her jurisdiction.<sup>6</sup>
- 5.3 The Hague Network Judge is responsible for ensuring that important judgments dealing with direct judicial communications, among other matters, are sent to the editors of the International Child Abduction Database (INCADAT).
- 5.4 The Hague Network Judge may be invited to contribute to the Permanent Bureau's *Judges' Newsletter*.
- 5.5 The Hague Network Judge is encouraged to participate in international judicial seminars on child protection in so far as it is relevant and possible.

### ***Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards***

Direct judicial communications refer to communications that take place between sitting judges concerning a specific case. Current practice shows that these communications mostly take place in child abduction cases under the 1980 Hague Child Abduction Convention. These cases show that these communications can be very useful for resolving some of the practical issues, for example, surrounding return and they may result in immediate decisions or settlements between the parents before the court in the requested State.

The role of the Hague Network Judge is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network Judge may be the judge involved in the communication itself, or he or she may facilitate the communication between the judges seized with the specific case. Such communications are different from Letters of Request. The taking of evidence should follow the channels prescribed by law. When a judge is not in a position to provide assistance he or she may invite the other judge to contact the relevant authority.

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<sup>5</sup> Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), para. 73 under 2 g).

<sup>6</sup> It is important to note that Central Authorities under Art. 7 e) of the 1980 Hague Child Abduction Convention shall, in particular, either directly or through any intermediary, take all appropriate measures "to provide information of a general character as to the law of their State in connection with the application of the Convention".



Matters that may be the subject of direct judicial communications include, for example:

- a) scheduling the case in the foreign jurisdiction:
  - i) to make interim orders, *e.g.*, support, measure of protection;
  - ii) to ensure the availability of expedited hearings;
- b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
- c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- d) ascertaining whether the foreign court can issue a mirror order (*i.e.*, same order in both jurisdictions);
- e) confirming whether orders were made by the foreign court;
- f) verifying whether findings about domestic violence were made by the foreign court;
- g) verifying whether a transfer of jurisdiction is appropriate.

## 6. Communication safeguards

### Overarching principles

- 6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.<sup>7</sup>
- 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

### Commonly accepted procedural safeguards

- 6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:<sup>8</sup>
  - except in special circumstances, parties are to be notified of the nature of the proposed communication;

<sup>7</sup> Emerging guidance on the IHJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), para. 73 under 5 *m*). For example, the taking of evidence should follow the channels prescribed by law.

<sup>8</sup> The text of Principle 6.4 follows from the views of experts consulted that consideration should be given to amend Recommendation No 5.6 of the Fourth Meeting of the Special Commission, which originally stated:

“In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

- communications to be limited to logistical issues and the exchange of information;
- parties to be notified in advance of the nature of proposed communication;
- record to be kept of communications;
- confirmation of any agreement reached in writing;
- parties or their representatives to be present in certain cases, for example via conference call facilities.”

- a record is to be kept of communications and it is to be made available to the parties;<sup>9</sup>
- any conclusions reached should be in writing;
- parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

## **7. Initiating the communication**

### Necessity

7.1 In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.

### Timing – before or after the decision is taken

7.2 Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.

7.3 The timing of the communication is a matter for the judge initiating the communication.<sup>10</sup>

### Making contact with a judge in the other jurisdiction

7.4 The initial communication should ordinarily take place between two Hague Network Judges in order to ascertain the identity of the judge seized in the other jurisdiction.<sup>11</sup>

7.5 When making contact with a judge in another jurisdiction, the initial communication should normally be in writing (see Principle No 8 below) and should in particular identify:

- a) the name and contact details of the initiating judge;
- b) the nature of the case (with due regard to confidentiality concerns);
- c) the issue on which communication is sought;
- d) whether the parties before the judge initiating the communication have consented to this communication taking place;
- e) when the communication may occur (with due regard to time differences);
- f) any specific questions which the judge initiating the communication would like answered;
- g) any other pertinent matters.

7.6 The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel unless otherwise ordered by either of the courts.<sup>12</sup>

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<sup>9</sup> It is to be noted that records can be kept in different forms such as, for example, a transcription, an exchange of correspondence, a note to file.

<sup>10</sup> Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), para. 73 under 5 *n*).

<sup>11</sup> *Ibid.*, under 5 *o*).

<sup>12</sup> See American Law Institute, "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases", appearing as Annex K in the Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), Guideline 7 *d*).

## **8. The form of communications and language difficulties**

- 8.1 Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.<sup>13</sup>
- 8.2 The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.
- 8.3 Where two judges do not understand a common language, and translation or interpretation services are required, such services could be provided either by the court or the Central Authority in the country from which the communication is initiated.
- 8.4 Hague Network Judges are encouraged to improve their foreign language skills.

### Written communications

- 8.5 Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers.
- 8.6 Where the written communication is provided through translation, it is good practice also to provide the message in its original language.
- 8.7 Communications should always include the name, title and contact details of the sender.
- 8.8 Communications should be written in simple terms, taking into account the language skills of the recipient.
- 8.9 As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.
- 8.10 Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.
- 8.11 Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.
- 8.12 All communications should be typewritten.
- 8.13 Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language.

### Oral communications

- 8.14 Oral communications are encouraged where judges involved come from jurisdictions which share the same language.

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<sup>13</sup> 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, Art. 8, *OJ L 174*, 27/06/2001, pp. 25-31.

- 8.15 Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.
- 8.16 Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.
- 8.17 Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication.

## **9. Keeping the Central Authority informed of judicial communications**

- 9.1 Where appropriate, the judge engaged in direct judicial communications may consider informing his or her Central Authority that a judicial communication will take place.

Additional information and examples of direct judicial communication can be found in the "Report on Judicial Communications in Relation to International Child Protection".<sup>14</sup>

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<sup>14</sup> Emerging guidance on the IHNJ and general principles for judicial communications (*op. cit.* note 128 of this Guide), paras 35-42 and Annexes, pp. 23-26.