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**[DRAFT] GUIDE TO GOOD PRACTICE**  
**under 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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## GLOSSARY

### **Article 13(1)(b) case:**

The term “Article 13(1)(b) case” is used in this Guide to refer to 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.

### **Case management:**

This describes the process by which the court oversees the conduct of the case notably to ensure that the case is ready to be heard promptly and that there are no undue delays in the proceedings.

### **Child abuse:**

“Child abuse”, depending on the definition used in the relevant jurisdiction, refers to types of physical, emotional or psychological neglect, maltreatment or sexual molestation of a child, typically resulting from actions or a failure to act by a parent or other person.

### **Direct judicial communications:**

Direct judicial communications refer to communications that take place between sitting judges, located in different jurisdictions, concerning a specific case.<sup>1</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, emotional, 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.

### **Family violence:**

See above under “Domestic and family violence”.

### **Grave risk:**

For the purposes of this Guide, “grave risk” to the child refers to the 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.

### **Grave risk exception:**

For the purposes 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 types of grave risk – exposing the child to physical harm, exposing the child to psychological harm, or otherwise placing the child in an intolerable situation.<sup>2</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 (HCCH) to facilitate communication and co-operation between judges at the international level and to assist in the effective operation of the 1980 Convention.

### **Left-behind parent:**

The term “left-behind parent” describes the person, institution or body who claims that a child has been wrongfully removed or retained in another State, in breach of their rights of custody under the 1980 Convention.

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<sup>1</sup> See *Direct Judicial Communications – 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*, The Hague, 2013, p. 12 (hereinafter, the “Emerging Guidance on Judicial Communications”) (also available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction” then “Direct Judicial Communications”).

<sup>2</sup> See Section I.2 of this Guide.

**Listing:**

"Listing" refers to the procedure of placing a case on the docket of a court's hearing schedule.

**Mirror orders:**

Mirror orders are identical or similar orders made by the courts in both the requested and requesting States, that are available only in some legal systems and jurisdictions. Each order is enforceable and effective in the State in which it was issued.<sup>3</sup>

**Practical arrangements:**

Practical arrangements are not intended to mitigate a grave risk and are to be distinguished from protective measures. Practical arrangements may be put in place to facilitate and implement the return of the child.

**Protective measures:**

For the purpose of this Guide, the term is to be understood broadly as measures available to mitigate the asserted grave risk.

**Requested State:**

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>4</sup>

**Requesting State:**

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>5</sup>

**Return proceedings:**

"Return proceedings" refer to proceedings pursuant to the 1980 Convention for the return of a child or children which take place before the judicial or administrative authority of the Contracting Party to which the child has been removed or where the child is being retained ("requested State").<sup>6</sup>

Depending on the jurisdiction, return proceedings may be filed by the left-behind parent, an attorney representing the left-behind parent, the Central Authority in the requested State and / or a public institution like, *e.g.*, a public prosecutor.

**Rights of custody:**

The notion "rights of custody" as used in this Guide is to be understood in the sense of its autonomous definition as provided under Article 5(a) of the 1980 Convention and includes "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

**Separate representative for the child:**

A person or body appointed or approved by the court to represent the child or children in the proceedings and includes, but is not limited to, an Independent Children's Lawyer and a legal representative for the child.

**Taking parent:**

The person who is alleged to have wrongfully removed a child from his / her State of habitual residence to another Contracting Party or to have wrongfully retained a child in another Contracting Party.

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<sup>3</sup> This Guide adopts the definition of "mirror orders" as provided in the *Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part I – Central Authority Practice*, Bristol, Family Law (Jordan Publishing Limited), 2003 (hereinafter, the "Guide to Good practice on Central Authority Practice") (also available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Publications").

<sup>4</sup> See Arts 11(2), 12(3), 13(1), 14, 17, 20 and 24 of the Convention.

<sup>5</sup> See Art. 9 ("requesting Central Authority") and Art. 11(2) of the Convention.

<sup>6</sup> See Art. 12(1) of the Convention.

**Undertaking:**

An undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – 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>7</sup>

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<sup>7</sup> This Guide adopts the definition of “undertakings” as provided in the Guide to Good Practice on Central Authority Practice (*op. cit.* note 3).



## INTRODUCTION

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”),<sup>8</sup> also known as the “**grave risk exception**”.<sup>9</sup>
2. Article 13(1)(b)<sup>10</sup> provides:
 

“[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.”
3. The objective of this Guide is to promote, at the global level, the proper and consistent application of the grave risk exception in accordance with the terms and purpose of the 1980 Convention, taking into account interpretative aids such as the Convention’s Explanatory Report,<sup>11</sup> as well as past Conclusions and Recommendations of the Special Commission, and existing Guides to Good Practice on the 1980 Convention. To achieve this objective, the Guide offers information and guidance on the interpretation and application of the grave risk exception, and shares good practices taken from a variety of jurisdictions.
4. The Guide is divided in five Sections. Section I presents Article 13(1)(b) as part of the framework of the 1980 Convention. Section II elaborates on the application of Article 13(1)(b) in practice. Section III provides operational guidance and good practices intended to assist courts<sup>12</sup> seized of return proceedings, in their function of managing the process in an expeditious and efficient manner and assessing the grave risk exception when it is raised before them. Section IV contains information about the role of Central Authorities designated under the Convention,<sup>13</sup> to assist them in dealing with incoming and outgoing cases where the Article 13(1)(b) exception has been raised and is held to be of relevance by the court, thereby facilitating expeditious proceedings and more efficient international co-operation. Section V presents useful resources. While the Guide is primarily intended for courts and Central Authorities, it may also assist lawyers and other institutions / bodies.
5. Although the Guide focuses on Article 13(1)(b), other provisions of the 1980 Convention and other international instruments are referenced to the extent that they may play a role in the application of this Article. In particular, where it is in force between Contracting Parties, the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement*

<sup>8</sup> This Guide is Part V in a series of *Guides to Good Practice under the 1980 Convention* published by the HCCH, see Section V.4 below. Unless provided otherwise, a reference to the “Guide” in this document is a reference to this particular Guide (Part V of the series).

<sup>9</sup> See *supra* “Grave risk” in Glossary.

<sup>10</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>11</sup> See E. Pérez Vera, “Explanatory Report on the 1980 Hague Child Abduction Convention” (hereinafter, the “Explanatory Report”), in *Actes et documents de la Quatorzième session (1980)*, tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, pp. 426-473 (also available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Publications”). The Explanatory Report which, among other things, provides information on the preparatory work and the circumstances of the conclusion of the Convention, can be used as a supplementary means of interpretation of the Convention. See the *Vienna Convention of 23 May 1969 on the Law of Treaties*, Arts 31-32.

<sup>12</sup> A reference to a “court” in this Guide is a reference to the judicial or administrative competent authority seized with the proceedings for the return of children under the 1980 Convention (Art. 11).

<sup>13</sup> See Art. 6 of the 1980 Convention. See also, “Table of Conclusions and Recommendations of previous Meetings of the Special Commission (SC) on the 1980 Child Abduction Convention and the 1996 Child Protection Convention (1989 (1st SC), 1993 (2nd SC), 1997 (3rd SC), 2001 (4th SC), 2002 (follow-up SC), 2006 (5th SC), 2011-2012 (6th SC))”, Prel. Doc. No 6 of July 2017 for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention (October 2017), Item No 38, “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; (b) [...]”, *conf.* 2011 SC C&R No 13 & 2006 SC C&R No 1.1.3 (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” and “Previous Special Commission meetings”); see also *infra* para. 94 et seq.

and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter, the "1996 Convention"), may benefit children who are subject to international child abduction by supplementing and strengthening the 1980 Convention in various important respects.<sup>14</sup> The website of the HCCH (< [www.hcch.net](http://www.hcch.net) >), contains updated information as to whether a State involved in an Article 13(1)(b) case is also Party to the 1996 Convention (under "Protection of Children," then "Status Table").

6. The continuing relevance of the 1980 Convention in support of the rights of the child can be seen through developments in the international legal framework subsequent to its adoption.<sup>15</sup> States Parties to the *United Nations Convention on the Rights of the Child of 1989* (hereinafter, the "UNCRC"), for example, have obligations in relation to issues such as the participation of children in return proceedings under the 1980 Convention, including where the Article 13(1)(b) exception is raised.<sup>16</sup> The 1980 Convention supports the right of children to be informed of the process and consequences of return proceedings, and to express views in such return proceedings.

7. 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>17</sup> having due regard to the particular facts of each individual case. It is well known that 1980 Convention cases are highly fact-specific, and courts, Central Authorities and others are urged to keep this in mind when consulting this Guide.

8. Further, it is important to emphasise that nothing in this Guide may be construed to be binding upon Contracting Parties to the 1980 Convention (and any other HCCH Convention) 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 Parties and, of necessity, contains only limited references to national jurisprudence and comparative law.<sup>18</sup> Finally, it should be understood that the cases referenced are meant to provide examples of how some courts have approached assertions of grave risk,<sup>19</sup> and not to provide strict or precise directions to judges or others using this Guide. Reference to case law is made with a view to illustrating specific issues discussed at the relevant part of the Guide, regardless of the decision arrived at in that particular case. All the decisions cited in this Guide are available on INCADAT<sup>20</sup> with a full text of the decision in its original language, as well as a summary of it in either English, French or Spanish, a combination of the two or in all three languages. Short summaries of the relevant issues are offered in this Guide in order to provide a quick indication as to the relevance of the case law.

<sup>14</sup> See, e.g., Arts 7 and 50 of the 1996 Convention. For more information on the possible application 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 HCCH, The Hague, 2014 (hereinafter, "Practical Handbook on the 1996 Convention"), available on the HCCH website 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>15</sup> See *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, Supreme Court of Canada (Canada) [INCADAT Reference: HC/E/CA 1389] where the court held that the 1980 Convention, in line with the *United Nations Convention on the Rights of the Child of 1989*, seeks to protect the best interests of children, to protect the child's identity and family relations, to prevent the illicit transfer and retention of children, and to ensure that a child of sufficient maturity should have a say in where he / she lives.

<sup>16</sup> See, e.g., Art. 12 of the UNCRC.

<sup>17</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", para. 62 and also "Conclusions and Recommendations and 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)", C&R No 13 (these two documents are available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Previous Special Commission meetings").

<sup>18</sup> Such information is given by way of example, and courts and others are referred to their national case law and INCADAT (see Section V of this Guide) for further information and updates as to how courts may be handling various issues in relation to Art. 13(1)(b).

<sup>19</sup> See *supra* "Grave risk" in Glossary.

<sup>20</sup> See Section V of this Guide.

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

10. *The HCCH would like to thank the many experts whose knowledge and experience have contributed to this document, and, in particular, the members of the Working Group on the development of the Guide, chaired by the Honourable Diana Bryant (Australia), and composed of judges, government officials (e.g., Central Authority personnel), academic / cross-disciplinary experts and private practitioners from various jurisdictions.*<sup>21</sup>

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<sup>21</sup> The following experts were, at either all or parts of the stages, involved in the drafting of this Guide: Judges: The Honourable Diana Bryant (Australia), Chair of the Working Group, Judge María Lilián Bendahan Silvera (Uruguay), Judge Oscar Gregorio Cervera Rivero (Mexico), The Honourable Jacques Chamberland (Canada), The Honourable Bebe Pui Ying Chu (China, Hong Kong SAR), Judge Martina Erb-Klünemann (Germany), Judge Yetkin Ergün (Turkey), Judge Francisco Javier Forcada Miranda (Spain), The Honourable Ramona Gonzalez (United States of America), The Right Honourable Lady Hale (United Kingdom), Judge Katsuya Kusano (Japan), Judge Torunn Kvisberg (Norway), Judge Annette Olland (Netherlands), Judge Tomoko Sawamura (Japan), Judge Belinda Van Heerden (retired) (South Africa), Judge Hironori Wanami (Japan); Government officials: Ms Aline Albuquerque (Brazil), Mr Hatice Seval Arslan (Turkey), Ms Frauke Bachler (Germany), Ms Gonca Gülfem Bozdog (Turkey), Ms Natália Camba Martins (Brazil), Ms Marie-Alice Esterhazy (France), Ms Victoria Granillo Ocampo (Argentina), Mr Christian Höhn (Germany), Ms Emmanuelle Jacques (Canada), Ms Leslie Kaufman (Israel), Mr Luiz Otavio de Sampaio (Brazil), 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: Mr Nicholas Bala (Canada), Mr Stephen Cullen (United States of America), Ms Mikiko Otani (Japan), Ms Heidi Simoni (Switzerland), Ms Zenobia Du Toit (South Africa).

## I. Article 13(1)(b) as part of the framework of the 1980 Convention

### 1. The principle: return of the child

#### a. Purpose and underlying assumptions of the Convention

11. According to its Preamble, the Convention was concluded “to protect children internationally from the harmful effects of their wrongful removal or retention 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.” These purposes are also reflected in Article 1.<sup>22</sup>

12. The Convention is based on three related notions and assumptions.

#### i. Removal or retention is wrongful when in breach of rights of custody

13. The first notion is that the removal or retention of a child is wrongful when in breach of established rights of custody.<sup>23</sup> A parent who shares rights of custody should therefore seek and obtain consent from any other person – usually the other parent –, institution or body having rights of custody<sup>24</sup> or, if this is not possible, permission from the court, before removing the child to, or retaining him or her in, another State. Doing so would provide a defence under Article 13(1)(b) of the Convention as the removal or retention of the child would not be considered wrongful in these circumstances.

#### ii. Wrongful removal or retention is harmful to the child

14. The second underlying assumption is that the wrongful removal or retention of a child is prejudicial to the child’s welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.<sup>25</sup>

#### iii. Authorities of the State of habitual residence are best placed to decide custody and access

15. The third underlying assumption is that, as a rule, the courts of the child’s State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive “best interests” assessment) as, *inter alia*, they generally will have fuller and easier access to the information and evidence relevant to the making of such determinations. Therefore, the return of the wrongfully removed or retained child to his or her State of habitual residence not only restores the *status quo ante*, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State, by the court that is best placed to effectively assess the child’s best interests.<sup>26</sup> This third underlying assumption is founded on international comity, which requires that the Contracting Parties

<sup>22</sup> Art. 1 reads as follows:

The objects of the present Convention are –

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

<sup>23</sup> Art. 3 provides that the removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. In some jurisdictions, establishing rights of custody may include considering a parent’s power to veto the removal of the child from that jurisdiction (“*ne exeat* rights”). See the decision in *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), 17 May 2010, Supreme Court (the US), [INCADAT Reference: HC/E/USf 1029], where the court held that *ne exeat* rights are custody rights within the meaning of the 1980 Convention.

<sup>24</sup> See *supra* “Rights of Custody” in Glossary.

<sup>25</sup> See the Preamble of the 1980 Convention.

<sup>26</sup> Art. 16 reinforces the application of this principle by specifically preventing 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. Art. 19 further stipulates that “[a] decision concerning the return of the child shall not be

"[...] 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>27</sup>

**b. A decision on the return: Not a custody determination**

16. The above-mentioned purpose of the Convention and underlying assumptions define the narrow scope of the Convention, which deals exclusively with the prompt return of wrongfully removed or retained children to their State of habitual residence,<sup>28</sup> subject only to the limited exceptions provided for by the Convention.<sup>29</sup> In doing so, rights of custody established in the State of habitual residence are respected in the other Contracting Parties. In dealing with the prompt return of children, *the Convention does not deal with the merits of custody and access*, which are reserved for the authorities of the State of habitual residence (see section immediately above).

**c. Summary return proceedings**

17. To implement its purpose, the Convention provides for a summary process allowing for the presentation of an application for return usually by or on behalf of a left-behind parent ("return proceedings"). This application takes place before the court of the "Contracting State where the child is" (Art. 12(1)), *i.e.*, in the "requested State", in accordance with its internal procedures and practices. For this purpose, the court shall use the most expeditious procedures available (Arts 2 and 11).<sup>30</sup>

**d. Co-operation between Contracting Parties**

18. To implement its purpose and to support its proper operation, the Convention also creates a system of close co-operation among the judicial and administrative authorities of the Contracting Parties.<sup>31</sup> This is done through Central Authorities designated in each of the Contracting Parties whose duties are outlined mainly in Article 7.<sup>32</sup> Information about the duties of the Central Authorities in cases where the grave risk exception is raised and related good practices are presented in Section IV of the Guide. Judicial co-operation may be facilitated through the International Hague Network of Judges (hereinafter, "IHNJ").<sup>33</sup>

**e. Duty to order the return of the child forthwith**

19. Where a child has been wrongfully removed or where a child is being wrongfully retained in a Contracting State other than the Contracting State of his or her habitual residence pursuant to Article 3, the court hearing the return application has a duty to order the return of the child forthwith (Art. 12(1)).<sup>34</sup>

20. The Convention does not specify to *whom* the child should be returned. In particular, it does not require the return of the child to the care of a *left-behind parent*. Nor does the Convention specify to what location in the State of habitual residence the child should be returned. This flexibility is deliberate and reinforces the underlying assumption that the issue

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taken to be a determination on the merits of any custody issue". See Council of the European Union, "Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) – General approach", Interinstitutional File: 2016/0190(CNS), dated 12 December 2018.

<sup>27</sup> See the Explanatory Report (*op. cit.* note 11), paras 34 and 41.

<sup>28</sup> Art. 21 which deals with rights of access is not the subject of this particular Guide.

<sup>29</sup> See the Explanatory Report (*op. cit.* note 11), para. 35.

<sup>30</sup> See Art. 2. 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 11), para. 63.

<sup>31</sup> *Ibid.*, para. 35.

<sup>32</sup> The list of designated Central Authorities and their co-ordinates are available on the HCCH website at < www.hcch.net > under "Child Abduction" then "Authorities".

<sup>33</sup> The list of designated members of the IHNJ is available on the HCCH website at < www.hcch.net > under "Child Abduction" then "International Hague Network of Judges".

<sup>34</sup> See also Art. 1(a). In addition, Art. 18 reinforces the duty to secure the prompt return, stating that the provisions of Chapter III of the Convention ("Return of children") do not limit the power of the court 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, for example, by recognising and enforcing a custody order issued in the requesting State, notably under the 1996 Convention, see *infra* para. 48.

of who will care for the child upon the child's return should be determined by the court 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.

21. The duty to return the child *forthwith* is reinforced by Article 11 which requires that courts 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, there is a right to request a statement of the reasons for the delay.<sup>35</sup> There is a "double aspect" to this duty: "firstly, the use of the most speedy procedures known to their legal system;<sup>36</sup> secondly, that applications are, so far as possible, to be granted priority treatment".<sup>37</sup> Some States have embodied these requirements explicitly in their implementing laws and procedures.<sup>38</sup>

22. The duty to act expeditiously does not mean that the court should neglect the proper evaluation of the issues, including where the grave risk exception is asserted. It does require, however, that the court only gather information and / or take evidence that is sufficiently relevant to the issues, and examine such information and evidence, including sometimes dealing with expert opinion or evidence, in a highly focused and expeditious manner.

**f. Limited exceptions to the duty to order return forthwith**

23. The Convention provides for limited exceptions to the principle of the return of the child. If and when these exceptions are raised and established successfully to the appropriate standard of proof, the court of the requested State "is not bound to order the return of the child" to the State of habitual residence, in other words, the court retains discretion. These exceptions appear in Articles 12(2),<sup>39</sup> 13(1)(a),<sup>40</sup> 13(1)(b), 13(2)<sup>41</sup> and 20.<sup>42</sup>

24. Through the enumerated exceptions, the Convention recognises that the non-return of a wrongfully removed or retained child can sometimes be justified. The general assumption that a prompt return is in the best interests of the child can therefore be rebutted in the individual case where an exception is established.

**g. Restrictive interpretation of the exceptions**

25. These enumerated exceptions, however, must be applied restrictively. 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>43</sup> It notes 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>44</sup>

26. In particular, while the exceptions derive from a consideration of the interests of the child,<sup>45</sup> they do not turn the return proceedings into custody proceedings. Exceptions are focussed on the possible (non-)return of the child. They should neither deal with issues of custody and access nor mandate a full "best interests assessment" for a child within return

<sup>35</sup> In relation to the duty to act expeditiously, see *Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part II – Implementing Measures*, Bristol, Family Law (Jordan Publishing Limited), 2003 (hereinafter, the "Guide to Good Practice on Implementing Measures") (also available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Publications"), e.g., Point 1.5 of Chapter 1, and Chapters 5 and 6.

<sup>36</sup> On the obligation to "use the most expeditious procedures available", see Art. 2.

<sup>37</sup> See the Explanatory Report (*op. cit.* note 11), para. 104.

<sup>38</sup> Information on whether measures have been taken to ensure that the judicial and administrative authorities in a Contracting Party act expeditiously in return proceedings is included in the Country Profiles (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Country Profiles"), Section 10.3(d).

<sup>39</sup> Where proceedings before the judicial or administrative authority competent to decide about the return have been commenced more than one year since the wrongful removal or retention and it is demonstrated that the child is settled in his or her new environment.

<sup>40</sup> If it is established that the person, institution or other body having the care of the person of the child was not actually exercising his or her custody rights at the time of the removal or retention, or if it is established that the person, institution or other body having the care of the person of the child consented to or subsequently acquiesced in the removal or retention.

<sup>41</sup> If the court 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.

<sup>42</sup> If ordering the return would breach the fundamental principles of the requested State related to the protection of human rights and fundamental freedoms.

<sup>43</sup> See the Explanatory Report (*op. cit.* note 11), para. 34.

<sup>44</sup> See, *ibid.*

<sup>45</sup> See, *ibid.*, para. 29.

proceedings. The court seized of return proceedings must apply the provisions of the Convention and avoid intervening on questions that are for the State of habitual residence to decide.<sup>46</sup>

27. This said, the exceptions serve a legitimate purpose, as the Convention does not contemplate an automatic return mechanism. Allegations which may give rise to a grave risk, for example, should be promptly examined to the extent required by the exception, within the limited scope of return proceedings.

28. This means that there is a need to balance the purposes of the Convention that, on the one hand, addresses the harmful effects of international child abduction by ensuring the prompt return of the child to the State of habitual residence where any custody / access and related issues should be resolved and, on the other hand, recognises that there may be exceptional circumstances allowing for the non-return of the child.

## **2. Article 13(1)(b) – understanding the grave risk exception**

29. The grave risk exception is based on “the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation”.<sup>47</sup>

### **a. Three types of “grave risk”**

30. Article 13(1)(b) contains the following three different types 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.

31. Each type 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 particular case, the three types have been raised in proceedings, each in its own right. However, although separate, these three types of risk are often employed together, and courts have not always clearly distinguished among them in their decisions.

### **b. A grave risk to the child**

32. The wording of Article 13(1)(b) makes clear that the issue is whether the return would subject the child to a grave risk.

33. But harm to a parent, whether physical or psychological, could, in some circumstances, create a grave risk to the child. The Article 13(1)(b) exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that the child would be exposed to a grave risk because of risk of harm directed to a taking parent due to return.

### **c. Level of “grave risk”**

34. The grave risk refers to the grave risk of physical or psychological harm that a child’s return would expose him or her to, or an intolerable situation that a child’s return would place him or her in.<sup>48</sup> The term “grave” qualifies the risk and not the harm to the child. It indicates that the risk must be real and reach such a level of seriousness to be characterised as “grave”.<sup>49</sup>

<sup>46</sup> See Art. 16 of the 1980 Convention.

<sup>47</sup> See the Explanatory Report (*op. cit.* note 11), para. 29.

<sup>48</sup> See, *K.M.A. v. Secretary for Justice* [2007] NZFLR 891, 5 June 2007, Court of Appeal of New Zealand (New Zealand) [INCADAT Reference: HC/E/NZ 1118], at para. 53. See *supra* “grave risk” in Glossary.

<sup>49</sup> *Re E. (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 A.C. 144, 10 June 2011, Supreme Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 1068], at para. 33. See also the Explanatory Report (*op. cit.* note 11), para. 29. The term “grave risk” reflects the intention of the drafters that this exception should be applied, in line with the general approach to the exceptions under the Convention, restrictively. During the drafting process, a narrower wording of Art. 13(1)(b) was agreed than what was initially suggested. The initial term used in the exception was “substantial risk” which was replaced with “grave risk”, as the word “grave” was considered a more intensive qualifier. See also *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, p. 362.

As for the level of harm, it must amount to an “intolerable situation”,<sup>50</sup> that is a situation that an individual child should not be expected to tolerate. The relative level of risk necessary to constitute a grave risk may vary, however, depending on the nature and seriousness of the potential harm to the child.<sup>51</sup>

**d. A “forward-looking” grave risk**

35. The wording of Article 13(1)(b) also indicates 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.

36. Therefore, whilst the examination of the grave risk exception will require an examination of the information / evidence relied upon by the person, institution or other body which opposes the child’s return (in most cases, the taking parent), it should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead 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 should then also include, when considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.<sup>52</sup>

37. However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not always determinative of the fact that effective protective measures cannot be put into place to mitigate the grave risk.<sup>53</sup>

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<sup>50</sup> See, for example: *Thomson v. Thomson*, [1994] 3 SCR 551, 20 October 1994, Supreme Court of Canada (Canada) [INCADAT Reference: HC/E/CA 11] at page 596; *Re E. (Children) (Abduction: Custody Appeal)* (*op. cit.* note 49), at para. 34; *Gsponer v. Johnson*, 23 December 1988, Full Court of the Family Court of Australia at Melbourne (Australia) [INCADAT Reference: HC/E/AU 255], at page 12. In *S. v. S.* [1998] 2 HKC 316, 4 March 1998, High Court of the Hong Kong Special Administrative Region (China) [INCADAT Reference: HC/E/CNh 234], the Court underlined that the risk of physical harm must be weighty and of substantial or severe, and not trivial, harm; see also *EW v. LP*, HCMP1605/2011, 31 January 2013, High Court of the Hong Kong Special Administrative Region (China) [INCADAT Reference: HC/E/CNh 1408], in which the court held at paragraph 111 that “‘intolerable’ is a strong word but when applied to a child means a situation which this particular child in these particular circumstances should not be expected to tolerate.”

<sup>51</sup> *Re E. (Children) (Abduction: Custody Appeal)* (*op. cit.* note 49), at para. 33, where the court noted that: “Although “grave” characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.”

<sup>52</sup> See, *infra*, paras 41 *et seq.* on protective measures in Art. 13(1)(b) cases.

<sup>53</sup> See, for example: 12 UF 532/16, 6 July 2016, München Senat für Familiensachen (Germany) [INCADAT Reference: HC/E/DE 1405] where the Court stressed that a risk upon return could not be inferred from an alleged past violent behaviour and noted that there was a binding restraining order in place so that the mother could seek adequate protection from any such alleged behaviour of the father; *H.Z. v. State Central Authority*, 6 July 2006, Full Court of the Family Court of Australia at Melbourne (Australia) [INCADAT Reference: HC/E/AU 876] where the judge found that the past violent and inappropriate behaviour could be indicative, though not determinative, of future behaviour, but that the availability of lawful protection against such behaviour prevented a finding of a grave risk; *Re M. (Abduction: Acquiescence)* [1996] 1 FLR 315, 23 November 1994, High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 21] where the Court found no grave risk to a child who had been subject to physical abuse four years prior, where subsequent measures (such as the child living apart from the father and ensuring that contact was supervised) had been undertaken to protect the child.



## II. Article 13(1)(b) in practice

### 1. Considering the grave risk exception

#### a. Step-by-step analysis

38. Assertions of grave risk are made in a range of situations, including where such risk would result from:

- physical, sexual or other forms of abuse of the child, or the child's exposure to domestic violence by the left-behind parent towards the taking parent;
- the child's separation from the taking parent, for example where the taking parent claims to be unable to return to the State of habitual residence due to security, health or economic concerns, or because of his or her immigration status or of pending criminal charges in the State of habitual residence;
- the child's separation from his or her siblings;
- severe security, educational, health or economic concerns related to the child in the State of habitual residence.

39. The Convention does not provide for different tests to assess a grave risk on the basis of the type of risk or the underlying circumstances raised by the person opposing the return. All assertions of grave risk are therefore evaluated based on the same standard or threshold and step-by-step analysis. That said, certain types of situations – for example, those that are more likely to put the physical or psychological integrity of the child at immediate risk – are more often found to meet the high threshold set by the grave risk exception.

40. As a first step, the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk;<sup>54</sup> broad or general assertions are very unlikely to be sufficient.<sup>55</sup>

41. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered,

<sup>54</sup> See, for example: *Ryan v. Ryan*, 7 December 2010, Newfoundland and Labrador Supreme Court (Canada) [INCADAT Reference: HC/E/CA 1124] where the Court said that the father's recreational use of marijuana, carefully concealed from the children who had no knowledge of his habit, was not of such nature that it could be a concern to the children's safety; *March v. Levine*, 249 F.3d 462 (6th Cir. 2001), 19 April 2001, United States Court of Appeals for the Sixth Circuit (the US) [INCADAT Reference: HC/E/USf 386] where the court ruled that where the father had been caring for the children since the mother's disappearance (for which no one had been charged) and the grandparents alleged he had murdered the mother and obtained a civil default judgment, was not per se of such nature that would presuppose a grave risk to the children if returned, especially since no allegations of harm against the children had been made against the father; *Foster v. Foster*, 654 F.Supp.2d 348 (W. D. Pennsylvania, 2009), 4 September 2009, United States District Court, W.D. Pennsylvania (the US) [INCADAT Reference: HC/E/USf 1110] where the Court held that the physical discipline and name-calling employed by the father against the child, taking into account the good psychological state of the child, did not constitute a grave risk of physical harm; *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*, 8 February 1995, Family Court of Australia at Brisbane (Australia) [INCADAT Reference: HC/E/AU 280] where the Court found that the father's adaptation of the Hari Krishna faith and his intended "betrothal" of his daughters to older men were lifestyle issues, involving value judgments about different cultural and religious beliefs, which cannot be raised as a basis for refusing to return the child; *N° de pourvoi 93-19058*, 15 June 1994, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 516] where the Court found that, while the father belonged to a sect, his beliefs were limited to the art of physiognomy, the science of astrology or even the practice of yoga, and were not matters relevant for a grave risk evaluation; *Reshut ir'ur ezrachi (leave for civil appeal) 7994/98 Dagan v Dagan* 53 P.D (3) 254, 14 June 1999, Supreme Court (Israel) [INCADAT Reference: HC/E/IL 807] where the Court rejected an argument that a grave risk may stem from a very high chance that the court seized of custody proceedings in the United States of America would allow the mother to relocate to Israel and that therefore a return order would amount to an unnecessary disruption for the child. A similar finding was made in *X. (the mother) against De directie Preventie, en namens Y. (the father)* (ELRO nr. AA 5524, Zaaksnr.R99/076HR), 14 April 2000, Hoge Raad der Nederlanden (the Netherlands) [INCADAT Reference: HC/E/NL 316].

<sup>55</sup> See, for example: *E.S. s/ Reintegro de hijo*, 11 June 2013, *Corte Suprema de Justicia de la Nación* (Argentina) [INCADAT Reference: HC/E/AR 1305] where the Court found that a mere mention of mistreatment or violence, without any evidence adduced, was too general to amount to a grave risk to the child; *Gsponer v. Johnson*(*op. cit.* note 50) where general and non-specific evidence adduced by the mother of significant episodes of violence, assault or mistreatment by the father against herself and the child was held to be insufficient to amount to a grave risk.

including in respect of any protective measures available in the State of habitual residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to mitigate such harm or intolerable situation, when evaluating whether the grave risk exception has been established.

42. Once this evaluation is made:

- where the court is *not* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it orders the return of the child;<sup>56</sup>
- where the court *is* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to return the child.

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<sup>56</sup> Where the asserted grave risk is not established and the child is returned, the taking parent may present evidence regarding his or her concerns for the child in custody proceedings in the State of habitual residence.

Questions considered by the court in the analysis of the Article 13(1)(b) exception

Courts shall act expeditiously in the proceedings for the prompt return of the child [Preamble and Art. 11(1)].

Gathering and evaluating the information or evidence is done according to the laws, procedures and practices of each jurisdiction.

In regard to protective measures, the court should consider seeking the co-operation of Central Authorities or IHNJ judges.

*Are the facts asserted of sufficient detail and substance that they could constitute a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation?*

NO

The court orders the return of the child.

YES

*In some jurisdictions, courts begin by asking: are there adequate and effective measures of protection available and/or in place which would mitigate the asserted grave risk?*

After the evaluation of the information or evidence:

NO

YES

*Has the person, institution or other body which opposes the child's return (in most cases, the taking parent) satisfied the court 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, taking into account any adequate and effective measures available or in place in the State of habitual residence to mitigate such grave risk?*

NO

The court orders the return of the child.

YES

**The grave risk exception is established** and the court is NOT bound to order the return of the child.

**b. Protective measures and practical arrangements**

43. Courts commonly assess the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk; alternatively, they do so only after the existence of a grave risk and an understanding of its nature has been established by the party objecting to return.<sup>57</sup> Ideally, potential protective measures should be raised early in proceedings so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures. In some jurisdictions, in the interest of expedition, where the court is satisfied in a particular case that adequate and effective measures of protection are available or in place in the State of habitual residence to address the asserted grave risk, the court may order the return of the child without having to enter into a more substantive evaluation of the facts alleged.

44. In some cases, given the circumstances, it may not be possible to mitigate the established grave risk through the use of protective measures.<sup>58</sup> An example may be where the left-behind parent has repeatedly violated protection orders.<sup>59</sup>

45. Protective measures are more often considered in situations where the asserted grave risk involves child abuse or domestic violence. They cover a broad range of existing services, assistance and support including access to legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence, as well as responses by police and through the criminal justice system.<sup>60</sup> These protective measures may be available in the State of habitual residence or, in some cases, may need to be put in place. Such protective measures, employed in some jurisdictions, can be put in place, for example, through an order in the requested State,<sup>61</sup> which may require the fulfilment of a condition or conditions prior to the child's return<sup>62</sup> (such orders could be

<sup>57</sup> Other approaches exist which the Working Group decided not to include as a good practice in this Guide. For example, some courts consider the protective measures as part of the exercise of their discretion not to return, see: *State Central Authority, Secretary to the Department of Human Services v. Mander*, 17 September 2003, Family Court of Australia (Australia) [INCADAT Reference: HC/E/AU 574].

<sup>58</sup> See, for example: *Ostevoll v. Ostevoll*, 2000 WL 1611123 (S.D. Ohio 2000), 16 August 2000, United States District Court in Ohio (the US) [INCADAT Reference: HC/E/US 1145] where the risk and level of psychological harm to the children were considered to be so grave that the Court found that the Norwegian authorities could not protect the children from the harm they would suffer just from being returned to Norway; *D.T. v. L.B.T.* [2010] EWHC 3177, 7 December 2010, High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 1042] where there were no demonstrated or potential protective measures that could be taken to protect the children from the difficulties that were likely to arise, taking into account the combination of the mother's acute emotional state and the child's particular needs (autism); *Re D. (Article 13B: Non-return)* [2006] EWCA Civ 146, 25 January 2006, Court of Appeal of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 818] where the Court accepted that the facts were such that there was no measure which could diminish the risk to an acceptable level; *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013), 5 August 2013, United States Court of Appeals for the Eighth Circuit (the US) [INCADAT Reference: HC/E/US 1266] where the Court held that that the children must in fact, and not just in theory, be protected if returned, and that this was not the case considering the father's inability to control his temper outbursts.

<sup>59</sup> See, for example: *Achakzad v. Zemaryalai* [2011] W.D.F.L. 2, 20 July 2010, Ontario Court of Justice (Canada) [INCADAT Reference: HC/E/CA 1115] where the Court held that, given the father's disregard for the judicial system (e.g., lying throughout his evidence) and past breaches of court orders, enforceable undertakings were inadequate to manage and control the father's behavior in order to mitigate the risk of harm to the child; .

<sup>60</sup> See, for example: *(Ra) No. 742 Appeal case against an order of the return of a child*, 15 September 2017, Osaka High Court (9th Civil Division) (Japan) [INCADAT Reference: HC/E/JP 1390] where an already existing protective measure in form of a personal protection order in the State of habitual residence was evaluated by the Court; *X. (the mother) against Y. (the father)*, 22 February 2018, Rechtbank's-Gravenhage (District Court of The Hague) (the Netherlands) [INCADAT Reference: HC/E/NL 1391] where the court considered that the State of habitual residence has institutions and facilities available for protecting victims of domestic violence;

<sup>61</sup> See, for example: *A.S. v. P.S. (Child Abduction)* [1998] 2 IR 244, 26 March 1998, Supreme Court (Ireland) [INCADAT Reference: HC/E/IE 389] where extensive undertakings from the father were arranged in the judgment to mitigate the grave risk: to lodge money for their travel and maintenance, to vacate the family home, and for the solicitor for the defendant to undertake the transfer of information to the Central Authority in Ireland and confirmation that it has been received by the High Court, Family Division, in London; *Police Commissioner of South Australia v. H.*, 6 August 1993, Family Court of Australia at Adelaide (Australia) [INCADAT Reference: HC/E/AU 260] where the father offered to give the mother his own accommodation and to contribute whatever maintenance he could afford.

<sup>62</sup> See, for example: *Re W. (Abduction: Domestic Violence)* [2004] EWHC 1247, 28 May 2004, High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 599] where return was ordered, provided all the conditions set out in the judgment were fully complied with by the father, including obtaining a mirror

made under Art. 11 of the 1996 Convention, where it is in force between Contracting Parties, or by a mirror order in the State of habitual residence – if possible and available, considering the legal systems of the interested Parties). But the court in the requested State cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk. These protective measures could also, in certain situations and where feasible, be based on undertakings offered by the left-behind parent<sup>63</sup> to make the family home available for sole occupation of the child and taking parent, and to provide financial support. It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence, they should be used with caution, especially in cases of domestic violence.

46. In some jurisdictions, having found that there is no grave risk, courts ordering the prompt return can make practical arrangements to facilitate the implementation of the return of the child to the State of habitual residence.<sup>64</sup> The arrangements should neither create unnecessary obstacles to the child's return or overburden either party (particularly the left-behind parent), nor exceed the courts' jurisdiction, and are intended to be enforced only until the State of habitual residence can adopt measures related to the child to address the situation.

47. In regard to protective measures, the 1996 Convention may facilitate the prompt return of children, where it is in force between the States involved. The 1996 Convention contains a specific ground of jurisdiction enabling the court in the Contracting Party where a child is *present* (as opposed to habitually resident) to take the necessary measures to protect the child in cases of urgency.<sup>65</sup> The 1996 Convention adds to the efficacy of any such measures by ensuring that they are recognised by operation of law in all other Contracting Parties<sup>66</sup> and enforceable at the request of any interested party in accordance with the procedure provided in the law of the State where enforcement is sought.<sup>67</sup> Any measures to protect the child taken on the basis of this specific ground of jurisdiction would lapse as soon as the courts of the State of habitual residence (that is, that of the child's habitual residence) have taken measures required by the situation, thus highlighting the importance of coordination between the competent authorities.<sup>68</sup>

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order in the High Court of South Africa, providing money for the mother's maintenance for six months, security if she so wished, and to fund litigation, as well as not to approach, harass or in any way annoy the mother. The father failed to comply with the undertakings and the return order was subsequently dismissed by the Court of Appeal, see: *Walley v. Walley* [2005] EWCA Civ 910 [INCADAT Reference: HC/E/UKe 826]. See also *Sabogal v. Velarde*, 106 F.Supp.3d 689 (2015), 20 May 2015, United States District Court for the District of Maryland (the US) [INCADAT Reference: HC/E/USf 1383] where the Court was prepared to order the children's return subject to specific conditions that the father was to arrange for the criminal charges or investigation against the mother to be dismissed or closed, and to have the temporary custody order in his favor vacated (effectively reinstating the underlying temporary custody order in favor of the mother).

<sup>63</sup> See for example, *A.S. v. P.S. (Child Abduction)* (*op. cit.* note 61) where the Court accepted that there was prima facie evidence of sexual abuse by the father and that returning the children to his custody would create a great risk. However, considering the extensive undertakings given by the father, the Court held that returning the children to England and to the family home in the sole care of their mother did not constitute a grave risk.

<sup>64</sup> See, for example: *G. M. c. V. M. de H. s/ reintegro de hijo*, 30 September 2013, *Corte de Apelación de Niños, Niñas y Adolescentes* (Dominican Republic) [INCADAT Reference: HC/E/DO 1338] where the Court ordered the mother to turn over the passport of the child to the Central Authority in the Dominican Republic until the procedures related to the return of the child were completed, and to entrust the child to the Central Authority so that return could be effected as soon as the procedures are completed; *B. v. G.*, 8 April 2008, Supreme Court (Israel) [INCADAT Reference: HC/E/IL 923] where the Court ordered that social services prepare the child for return (i.e., providing a period of almost eight weeks for the child to adjust) and arrange meetings between the child and the father; *A. v. A.*, 5 October 2001, Buenos Aires Court of First Instance (Argentina) [INCADAT Reference: HC/E/AR 487] where the Court delayed the execution of the decision to return by two months, allowing for the situation in the State of habitual residence to stabilize and for the mother and the child to prepare to go back; *Hoskins v. Boyd*, (1997) 28 RFL (4th) 221, 24 April 1997, British Columbia Court of Appeal (Canada) [INCADAT Reference: HC/E/CA 13] where arrangements to ameliorate the disruptive effects of transferring the child included agreement by the father to cooperate in expediting a custody hearing on the merits, allowing the mother supervised access to the child pending disposition of the merits, and the father bearing the costs of mother and child to travel to Oregon.

<sup>65</sup> Art. 11(1) of the 1996 Convention.

<sup>66</sup> Art. 23 of the 1996 Convention.

<sup>67</sup> Art. 26 of the 1996 Convention.

<sup>68</sup> Art. 11(2) of the 1996 Convention. See the Practical Handbook on the 1996 Convention (*op. cit.* note 14).

### **c. Procedural and evidentiary rules**

48. The Convention provides for very few procedural and evidentiary rules. These matters are left to the *lex fori*, *i.e.*, the law of the requested State where the court is located. This includes rules regarding the standard of proof.<sup>69</sup> However, the question of the burden of proof is addressed explicitly in the Convention.

#### **i. Burden of proof**

49. The burden of establishing the exception rests on the person, institution or other body which opposes the child's return,<sup>70</sup> hence, in most cases, on the taking parent. Even if a court *ex officio* gathers information or evidence (in accordance with domestic procedures), or if the person or body which has lodged the return application is not actively involved in the proceedings, the court must be satisfied that the burden of proof to establish the exception has been met by the party objecting to return.

#### **ii. Limiting information and evidence to the issue of return**

50. While rules and practices regarding the admissibility and gathering of evidence vary among Contracting Parties,<sup>71</sup> they should always be applied with due regard to the requirement for expeditious proceedings and the importance of confining the court's enquiry only to matters in dispute which are directly relevant to the issue of return (not custody<sup>72</sup>).

#### **iii. Admissibility of information on the social background of the child**

51. Article 13(3) facilitates the receipt of evidence or information from abroad by providing that a 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" such as welfare reports, school reports, medical reports, if available and directly relevant to the issue of grave risk, and if they can be obtained under the domestic law of the State of habitual residence. This evidence or information should be obtained only where necessary and having due regard to the need for expeditious proceedings.

#### **iv. Admissibility of the application for return and attached documents**

52. To facilitate the admission of evidence and information, Article 30 provides that any return application submitted to a Central Authority or directly to a court, together with supporting documents and information appended or provided by a Central Authority, "shall be admissible in the courts or administrative authorities of the Contracting States". Article 30, however, does not stipulate the evidential (probative) value which is to be placed on these documents, which is left to domestic law.

## **2. Examples of assertions that can be raised under Article 13(1)(b)**

53. An Article 13(1)(b) analysis is highly fact-specific. Each court determination as to the application or non-application of the exception is therefore unique, based on the particular circumstances of the case. A careful step-by-step analysis of an asserted grave risk is therefore always required, in accordance with the legal framework of the Convention, including the exception as explained in this Guide.

54. This Section provides some orientation as to how assertions of grave risk have been approached by the courts, using various fact patterns and a non-exhaustive list of relevant considerations or factors. It does not deal with the relative weight to be given to each of the

<sup>69</sup> The standard of proof applied by Contracting Parties may differ. *E.g.*, many Contracting Parties 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>70</sup> See the Explanatory Report (*op. cit.* note 11), 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>71</sup> Some information about applicable rules in return procedures is provided by Contracting Parties in their Country Profiles (*op. cit.* note 38). *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.

<sup>72</sup> See *supra* "Rights of Custody", in Glossary

considerations or factors, as this will depend on the particular circumstances of the case. This Section also provides some limited reference to international jurisprudence in order to illustrate the specific issues under discussion. Courts and other actors are encouraged to consult INCADAT and national case law for details and for the most current information on how various issues under Article 13(1)(b) may be approached.

**a. Domestic violence against the child and / or the taking parent**

55. Assertions of a grave risk resulting from domestic violence may take various forms. The taking parent may claim that there is a grave risk of direct harm because of physical, sexual or other forms of abuse of the child. It may also be asserted that the grave risk results from the child's exposure to domestic violence by the left-behind parent directed to the taking parent, although evidence of such violence does not automatically result in a grave risk to the child upon return.<sup>73</sup> In some situations, the grave risk to the child may also be based on potential harm to the taking parent by the left-behind parent upon return,<sup>74</sup> including where such harm may significantly impair the ability of the taking parent to care for the child.

56. The specific focus of the grave risk analysis in these instances is the effect of domestic violence on the child upon his or her return to the State of habitual residence, and whether such effect meets the high threshold of the grave risk exception, in light of such considerations as the nature, frequency and intensity of the violence, as well as the circumstances in which it is likely to be exhibited.<sup>75</sup> The focus of the grave risk analysis is not limited, therefore, to whether the person opposing the return has demonstrated the existence of a situation of domestic violence.

57. In cases where the taking parent has established circumstances involving domestic violence that would amount to a grave risk to the child, courts should consider the availability, adequacy and effectiveness of measures protecting the child from the grave risk.<sup>76</sup> Where legal

<sup>73</sup> See, for example: *Harris v. Harris* [2010] FamCAFC 221, 5 November 2010, Family Court of Australia (Australia) [INCADAT Reference: HC/E/AU 1119] where the Court determined that violence against the mother within earshot of the child was sufficient to cause a grave risk of psychological harm despite a finding that no physical harm had been inflicted on the child; *Miltiadous v. Tetervak*, 686 F.Supp.2d 544 (E.D. Pa. 2010), 19 February 2010, United States District Court, Eastern Division Pennsylvania (the US) [INCADAT Reference: HC/E/US 1144] where the Court found that the father's abuse of the mother, including death threats and excessive drinking, as well as other factors such as the inability of the Cypriot authorities to protect her, and the daughter's resulting chronic post-traumatic stress disorder were sufficient to amount to a grave risk.

<sup>74</sup> See, for example, *P. (N.) v. P. (A.)*, 1998 CanLII 9569 (QC CS), 12 November 1998, Quebec Superior Court (Canada) [INCADAT Reference: HC/E/CA 1404] where the Court found that the mother was genuinely in a state of fear and could not be expected to return to Israel. The mother was taken to Israel on false pretences, sold to the Russian Mafia and re-sold to the father who forced her into prostitution. She was locked in, beaten by the father, raped and threatened. The Court stated that it would be wholly inappropriate to send the child back without his mother to a father who had been buying and selling women and running a prostitution business. The decision of the Quebec Superior Court was upheld on appeal in *N.P. v. A.B.P.*, 1999 R.D.F. 38, 22 April 1999, Quebec Court of Appeal (Canada) [INCADAT Reference: HC/E/CA 764]. In *Taylor v. Taylor*, 502 Fed.Appx. 854, 2012 WL 6631395 (C.A.11 (Fla.)) (11th Cir. 2012), 20 December 2012, United States Court of Appeals for the Eleventh Circuit (the US) [INCADAT Reference: HC/E/US 1184] the Court had accepted evidence that the father had threatened to use third parties to physically harm (and maybe even kill) the mother. The Court noted that the case was unique in that the risk to the child stemmed not only from threats made by her father but also from threats made by an unknown third party, but the father's fraudulent activities had created, and were likely to continue to create, a grave risk to the child if returned. See also the opinion of LJ Wall in *Re W. (A Child)* [2004] EWCA Civ 1366 (the UK) [INCADAT Reference: HC/E/UKe 771], at para. 49. In *Gomez v. Fuenmayor*, No. 15-12075, United States Court of Appeal (11th Circuit), 5 February 2016 (the US) [INCADAT Reference: HC/E/US 1407] the Court found that, while the proper inquiry focuses on the risk faced by the child and not the parent, sufficiently serious threats and violence directed against a parent can nonetheless pose a grave risk to the child as well.

<sup>75</sup> In the following cases, the Court found that there was no evidence of a grave risk to the child. *Tabacchi v. Harrison*, 2000 WL 190576 (N.D.Ill.), 2 August 2000, United States District Court for the Northern District of Illinois, Eastern Division (the US) [INCADAT Reference: HC/E/USf 465] where the father's history of abuse of the mother was found not to constitute a grave risk to their child, because the child was only present during two past violent incidents, and because, since the removal, the parents had arranged visits without difficulties and there was no evidence that the father had abused or harassed the mother; *Secretary For Justice v. Parker* 1999 (2) ZLR 400 (H), 30 November 1999, High Court (Zimbabwe) [INCADAT Reference: HC/E/ZW 340] where the Court noted that the father's conduct was directed at the mother and not the children, and that the stressful environment to which the mother says the children were exposed was caused by the strained relations between the parents. The Court further noted that the mother had not objected to contact between the father and the children in the past.

<sup>76</sup> *F. v. M. (Abduction: Grave Risk of Harm)* [2008] 2 FLR 1263, 6 February 2008, Family Division of the High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 1116] where the mother alleged that

protection and police and social services are available in the State of habitual residence to assist victims of domestic violence, for example, courts have ordered the return of the child.<sup>77</sup> In some instances, however, courts may deem such legal protection and services to be insufficient to mitigate the grave risk,<sup>78</sup> for example where the left-behind parent has repeatedly violated protection orders,<sup>79</sup> which may put the child at grave risk of physical or psychological harm, or given the extent of psychological vulnerability of the child.<sup>80</sup>

58. Other protective measures that courts have considered to mitigate the grave risk include the availability of safe housing and / or of avenues for receiving legal advice concerning the possibility of obtaining an effective protection order in the State of habitual residence.<sup>81</sup>

**b. Economic or developmental disadvantages to the child upon return**

59. Where assertions of grave risk based on economic or developmental disadvantages upon the return of the child are made,<sup>82</sup> the analysis should focus on whether the basic needs of the child can be met in the State of habitual residence. The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis.<sup>83</sup> More

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she had been the victim of domestic abuse and that returning the children to France would expose them to a grave risk of physical or psychological harm, but the Court found no grave risk since, until the removal, the mother had allowed the father unsupervised contact overnight and had originally applied for joint custody with the father who had also offered undertakings to neutralize any risks; 5A\_285/2007/frs, 16 August 2007, *Tribunal fédéral, II<sup>e</sup> cour de droit civil* (Switzerland) [INCADAT Reference: HC/E/CH 955] The court determined that there was no grave risk since, prior to the removal, the father had only a restricted and supervised right of contact with the child, and had respected the terms of his access and the orders not to approach the mother or family home. See “Questions considered by the court in the analysis of the Article 13(1)(b) exception” at p 18.

<sup>77</sup> See, for example: *X. (the mother) against Y. (the father)* (*op. cit.* note 60) where the mother’s claims that she was regularly exposed to domestic violence in presence of the child was found insufficient for a finding of grave risk, considering available measures of protection and institutional support in the State of habitual residence.

<sup>78</sup> See, for example: *State Central Authority, Secretary to the Department of Human Services v. Mander* (*op. cit.* note 57) where having found that a grave risk existed the trial judge noted that whilst the English legal system provided ample legal protection and the English police and social services excellent care for “battered women” the reality of life for the children was that the presence of the parents in the same State would inevitably lead to further violence. The return of the children was therefore refused; No de RG 06/00395, 30 May 2006, *Cour d’appel de Paris* (France) [INCADAT Reference: HC/E/FR 1010] where the Court found that, despite the father having filed a complaint that the child had been the victim of rape at the family residence by her mother’s live-in partner, no effective preventive measures had been taken when the child had made serious accusations and expressed great reservations about returning to live with her mother; see also *W. v. G.*, 10 June 1993, *Tribunal de Grande Instance d’Abbeville* (France) [INCADAT Reference: HC/E/FR 298].

<sup>79</sup> See, for example, *Achakzad v. Zemaryalai* (*op. cit.* note 59) where the Court accepted the mother’s evidence that the father had assaulted or threatened to assault her on multiple occasions, including threatening to rape her, and bearing a loaded firearm while the mother held the child. The Court moreover found that the father’s clear resentment with the mother’s Article 13(1)(b) claim could not be ignored. Although undertakings would be enforceable given that the father was willing to accept a safe harbour order in California, the Court considered that the real issue was whether his future behaviour could be adequately managed and controlled by the California courts, given that he had shown a disregard for the judicial system by lying throughout his evidence. Furthermore, he had shown to be incapable of controlling his behaviour when angry. Therefore, the Court held that returning to California posed a grave risk to the mother and child that could not adequately be controlled by undertakings.

<sup>80</sup> See, for example, *Ostevoll v. Ostevoll* (*op. cit.* note 58) where two psychologists testified that to return the children to Norway would expose them to a grave risk of physical and psychological harm even if they were not returned to their father’s custody. The risk stemmed from the father’s past abuse of the children, his refusal to seek counselling, excessive drinking, and narcissistic character disorder as well as his abuse of the children’s mother, which caused the children, who witnessed the abuse, to be diagnosed with post-traumatic stress disorder. The court found that the trauma caused by an order to return them would re-traumatize them to the point of emotional shut down, and that the Norwegian authorities could not protect the children from such grave risk.

<sup>81</sup> See *supra* para. 45 for a more detailed description of protective measures that courts have considered in regard to allegations of grave risk related to domestic violence.

<sup>82</sup> See, for example: *A.S. v. P.S. (Child Abduction)* (*op. cit.* note 61); *K.M.A. v. Secretary for Justice* (*op. cit.* note 48); *Police Commissioner of South Australia v. H.*, 6 August 1993, Family Court of Australia at Adelaide (Australia) [INCADAT Reference: HC/E/AU 260]; *BDU v BDT* [2014] SGCA 12, 17 February 2014, Court of Appeal (Singapore) [INCADAT Reference: HC/E/SG 1286]; *Re E. (Children) (Abduction: Custody Appeal)* (*op. cit.* note 49).

<sup>83</sup> See N° de pourvoi 08-18126, 25 February 2009, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1013] where the Court rejected the mother’s arguments that it should compare the living conditions of the children at the time with their living conditions in the event of their return to evaluate grave risk.



modest living conditions<sup>84</sup> and / or more limited developmental support<sup>85</sup> in the State of habitual residence are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, *e.g.*, because his / her living standard would be lower, he / she is unable to find employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order.<sup>86</sup> Particularly, dependency on State benefits or other institutional support does not in itself amount to a grave risk.<sup>87</sup> Only very exceptional circumstances might lead to a grave risk to the child, *e.g.*, if the child would be left homeless and / or without any viable recourse to State benefits.<sup>88</sup>

60. In assessing such circumstances, courts may examine evidence or information presented by the taking parent regarding his or her financial and employment status, *e.g.*, their savings or assets, employment possibilities, and alternative means of support,<sup>89</sup> as well as his or her

<sup>84</sup> See, for example: *G., P. C. c. H., S. M. s/ reintegro de hijos*, 22 August 2012, *Corte Suprema de Justicia de la Nación* (Argentina) [INCADAT Reference: HC/E/AR 1315] where the Court considered an argument regarding the financial situation of the father (the left-behind parent) but found that the mother did not prove that it was such that it would imply the possibility of an extreme situation for the children; *Y.D. v. J.B.*, [1996] R.D.F. 753, 17 May 1996, Superior Court of Quebec (Canada) [INCADAT Reference: HC/E/CA 369] where the mother argued that the financial incapacity of the father would lead to the children facing a grave risk but the court ruled that financial weakness as such was not a valid reason to refuse to return a child; No de RG 11/02919, 19 September 2011, *Cour d'appel de Lyon* (France) [INCADAT Reference: HC/E/FR 1168] where the mother claimed that the children's return to Germany would expose them to a grave risk due to the poor standard of the father's accommodation but the Court concluded that she did not show that it did not meet the minimum required standards, noting that the alleged fact that the children enjoyed more favorable living conditions in France could not be taken into consideration by the requested country, "which was not required to appraise the merits of the foreign decision"; 17 UF 56/16, 4 May 2016, *Stuttgart Senat für Familiensachen* (Germany) [INCADAT Reference: HC/E/DE 1406] where it was held that a potentially less favourable economic situation in the State of habitual residence upon return did not constitute a grave risk of physical or psychological harm for the child.

<sup>85</sup> See, for example, No de RG 11/01062, 28 June 2011, *Cour d'appel de Bordeaux* (France) [INCADAT Reference: HC/E/FR 1128] where the father claimed that the child complained of malnutrition, lack of hygiene and neglect in the State of habitual residence, but the Court observed that this was insufficient to establish a grave risk, and it was up to the courts in the State of habitual residence to determine who was best suited to provide the child's day-to-day care, and that the State of habitual residence had the appropriate facilities and infrastructure to monitor children living on its territory.

<sup>86</sup> See, for example, *N. R. c. J. M. A. V. s/reintegro de hijo*, 28 February 2013, *Corte Suprema* (Chile) [INCADAT Reference: HC/E/CL 1318] where the Court found that the mere fact that a return could be difficult for a mother because she would have problems with finding a job was not enough to reasonably justify the mother's refusal to return, and that such matters are further to be taken into account in custody proceedings; *G. M. c. V. M. de H. s/ reintegro de hijo*, 30 September 2013, *Corte de Apelación de Niños, Niñas y Adolescentes* (Dominican Republic) [INCADAT Reference: HC/E/DO 1338] where the mother asserted that she had returned to her State because she lived in poor conditions in Germany and had no job, and therefore she would not return, but the Court found these reasons insufficient to warrant the retention of the child; No de RG 12-19382, 20 March 2013, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1213] where the mother claimed that she was unemployed and had a minimum income and low-rent housing in France, which she could not get in England, but the Court emphasized that the English authorities had made appropriate arrangements to ensure the protection of children after their return and that the mother was in a different situation regarding the benefit of a minimum income since her stay in England was now imposed by an English decision, so there is no grave risk; 5A\_285/2007/frs, 16 August 2007, *Tribunal fédéral, IIè cour de droit civil* (Switzerland) (*op. cit.* note 76) where the Court found that in light of absence of objective reasons to justify the mother's refusal to return, it did not seem practically difficult or economically unbearable for her to return to live in Israel, at least for the time of court proceedings there; *Secretary For Justice v. Parker* 1999 (2) ZLR 400 (H), 30 November 1999, High Court (Zimbabwe) [INCADAT Reference: HC/E/ZW 340] where the Court ruled that the financial and personal hardships the mother might face upon return were not sufficiently weighty for a return order not to be made.

<sup>87</sup> See, for example, *Re A. (Minors) (Abduction: Custody Rights)* [1992] Fam 106, 12 February 1992, Court of Appeal (the UK) [INCADAT Reference: HC/E/UKe 48] where the Court found dependency on Australian state benefits upon return to be as such insufficient to constitute an intolerable situation.

<sup>88</sup> See, for example, No de RG 08/04984, 18 February 2009, *Cour d'appel de Nimes* (France) [INCADAT Reference: HC/E/FR 1135] where the factual circumstances were such that the mother (the left-behind parent) had been imprisoned for a time in 2007, and again starting in May 2008. One of the children had been placed with its maternal grandparents and an aunt, and the other with a friend's mother. The father was in touch with the education and social services and had organised the children's travel to France during their mother's imprisonment. The Court found that it had been proved that the mother failed to provide for their basic needs of food, clothing, care and education, schooled them irregularly, had no permanent residence, frequently sleeping with the children in their car in car parks, and was addicted to medication. It deduced that the combination of circumstances was such that a return would expose the children to a grave risk and did not order the return.

<sup>89</sup> See, for example, *Harris v. Harris* (*op. cit.* note 73) the mother, who experienced extensive abuse from the father, would be in a financially precarious position in Norway and was unlikely to be able to meet the

eligibility for social security or welfare payments, either from the requested State or the State of habitual residence. Courts may also consider the financial and employment status of the left-behind parent and the time expected for a maintenance ruling to be acquired in favour of the child / taking parent upon return, if necessary.<sup>90</sup> Courts may consider imposing pre-conditions for return which provide some urgent essential financial assistance to the taking parent and the child. However, only the taking parent's and the child's most immediate financial needs should be addressed in this manner. Assistance would be a matter of days or weeks, not months, following return, and be calculated by reference to the time in which one of the parties could reasonably expect to have proceedings before the court of competent jurisdiction. The Central Authority would generally be the body tasked with ascertaining whether these pre-conditions have been met before the child is returned.

**c. Risks associated with circumstances in the State of habitual residence**

61. The grave risk analysis associated with the circumstances in the State of habitual residence must focus on the gravity of the political, economic or security situation and its impact on the individual child,<sup>91</sup> and on whether the level of such impact is sufficient to engage the grave risk exception, rather than on the political, economic or security situation in the State generally. Assertions of a serious security, political or economic situation in the State of habitual residence are therefore generally not sufficient to establish the grave risk exception.<sup>92</sup> Similarly, (isolated) violent incidents in an unsettled political environment will typically not amount to grave risk.<sup>93</sup> A case that has met the high grave risk threshold involved a situation where there were additional factors that might have exacerbated the risk of harm to the individual child subject to the return proceedings (e.g., where prior targeted attacks have placed the child at risk of harm).<sup>94</sup> If a grave risk is established in such circumstances, it may be very difficult to mitigate this grave risk with measures of protection.<sup>95</sup>

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shortfall between her housing and other costs and the child support provided by the father. Taking into account the complexity of the situation, and the past abuse, the Court accepted the conclusion of the trial judge that no undertakings would be sufficient to mitigate the vulnerability and financial hardship of the mother and prevent the child being placed in an intolerable situation on his return to Norway.

<sup>90</sup> See, for example, *K.M.A. v. Secretary for Justice* (*op. cit.* note 48) where the father (the left-behind parent) had agreed to pay the airfares of the mother and the two children, to provide child maintenance, the use of a car, a contribution to accommodation costs and health insurance for the children. The Court considered it most unlikely that authorities in the State of habitual residence would not provide some form of special financial and legal assistance, if required.

<sup>91</sup> See *Escaf v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va. 2002), 6 May 2002, United States District Court for the Eastern District of Virginia, Alexandria Division (the US) [INCADAT Reference: HC/E/USf 798] where the Court accepted evidence that American businessmen faced a heightened risk of kidnapping and violence in Colombia and that the father himself had been threatened, but nevertheless held that there was no clear and convincing evidence of serious danger in the town where the mother lived to a thirteen-year old with dual citizenship and who lives there with his Colombian mother and family.

<sup>92</sup> See, for example: No de RG 11/02685, 28 June 2011, *Cour d'appel de Rennes* (France) [INCADAT Reference: HC/E/FR 1129] where the mother asserted the pollution of Mexico City, the insecurity due to crime in the Mexico City metropolis, and earthquake risks, but did not manage to show how these risks affected the children personally and directly; N° de pourvoi 14-17.493, 19 November 2014, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1309] where the mother alleged that in case of return to South Africa, the child would be exposed to a risk of serious physical danger by returning to live on the Makalali reserve due to general life conditions there, but these arguments were rejected by the Court.

<sup>93</sup> See, for example, cases involving returns to Israel where the alleged potential dangers inherent in an everyday life are usually found to be too general to establish a case under Article 13(1)(b): *A. v. A.*, 5 October 2001, Buenos Aires Court of First Instance (Argentina) [INCADAT Reference: HC/E/AR 487]; N° 03/3585/A, 17 April 2003, *Tribunal de première instance de Bruxelles* (Belgium) [INCADAT Reference: HC/E/BE 547]; B-2939-01, 11 January 2002, *Vestre Landsret* (Denmark) [INCADAT Reference: HC/E/DK 519]; *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996), 4 October 1996, United States District Court for the Eastern District of Michigan, Southern Division (the US) [INCADAT Reference: HC/E/USf 133]. See also: *Procedure for International Return of Children*, Case No 2926/2008, 16 February 2009, *Tercera Sala Familiar del Honorable Tribunal Superior de Justicia del Distrito Federal* (Mexico) [INCADAT Reference: HC/E/MX 1038] where the political demonstrations interrupting daily life in Venezuela, and the resulting general uncertainty, were not held to be a grave risk.

<sup>94</sup> See, for example: *Re D. (Article 13b: Non-return)* (*op. cit.* note 58) where both parents were victims of pre-meditated and targeted shootings and other attacks in Venezuela. The judge concluded that the children were in danger of physical injury if present with either of their parents and held a 24-hour protection to be insufficient to mitigate the grave risk. The grave risk was established, and a non-return order issued.

<sup>95</sup> See *Re D. (Article 13b: Non-return)* (*op. cit.* note 58), where – in light of violent targeted attacks on both parents – even 24-hour protection was held to be insufficient to mitigate the grave risk.

**d. Risks associated with the child's health**

62. In cases involving assertions associated with the child's health, the grave risk analysis must focus on the availability of treatment in the State of habitual residence,<sup>96</sup> and not on a comparison between the relative quality of care in each State.<sup>97</sup> A grave risk will typically be established only in situations where a treatment is or would be needed urgently and it is not available or accessible in the State of habitual residence, or where the child's health does not allow for travel back to this State at all.<sup>98</sup> The mere fact that the State of habitual residence may have a different standard of health care will typically not be sufficient to establish the Article 13(1)(b) exception. When assertions associated with the child's health are established, the court may consider, for example, measures of protection to mitigate the grave risk upon return, such as: the provision of financial support, health insurance, and / or for the preparation of medical support for the child upon return. These measures should not, however, place undue conditions on the left-behind parent and should be limited in time, allowing only for the taking parent to access the courts in the State of habitual residence who are best placed to deal with these issues.

**e. The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence**

63. Assertions of grave risk of psychological harm or of being placed in an intolerable situation resulting from a separation of the child from the taking parent when this parent is unable or unwilling to return are frequently raised in return proceedings in a wide range of circumstances. Judicial decisions from numerous Contracting Parties demonstrate that the courts take a very restrictive approach to such cases. 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.<sup>99</sup>

64. The primary focus of the grave risk analysis in these instances is the effect on the child of a possible separation in the event of an order for return or of being left without care, and whether the effect meets the high threshold of the grave risk exception, taking into account the availability of protective measures to mitigate the grave risk. The primary focus of the analysis is not necessarily the circumstances or reasons for the taking parent's unwillingness or inability to return to the State of habitual residence.<sup>100</sup>

<sup>96</sup> See, for example, *No de pourvoi* 17-11031, 4 May 2017, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1346] where the Court had established that the quality of the healthcare system in Israel was satisfactory, and that the antiviral HIV treatment received by the child in Israel was the same as that prescribed to her in France. Therefore, adequate treatment was available and there were no grounds to refuse her return.

<sup>97</sup> See, for example: *No de rôle*: 07/78/C, 25 January 2007, *Tribunal de première instance de Bruxelles* (Belgium) [INCADAT Reference: HC/E/BE 857] where the mother claimed a grave risk to the child because the father refused to heed the urgent recommendation of the school psychologist to give the child speech therapy but the Tribunal found these facts to be insufficient to establish a grave risk; V.L. B-1572-09, 23 September 2009, *Vestre Landsret* (Denmark) [INCADAT Reference: HC/E/DK 1101] where the child needed special attention at school, and the father claimed that return to the mother, who suffered from multiple sclerosis and depression, would constitute a grave risk. However, the court noted a good relationship between the child and the mother, and the mother's efforts to take care of the child in the best manner possible, and did not find those assertions to be sufficient to establish a grave risk; *DP v. Commonwealth Central Authority*, [2001] HC 39, (2001) 180 ALR 402 (Australia) [INCADAT Reference HC/E/AU 346] where the court considered whether appropriate treatment and care were available in Greece, to which return was sought, but did not enter into a comparison between the relative quality of care between Australia and Greece. See also *Solis v. Tibbo Lenoski*, 2015 BCCA 508 (CanLII) [INCADAT Reference HC/E/CA 1403].

<sup>98</sup> See *State Central Authority v. Maynard*, 9 March 2003, Family Court of Australia (Australia) [INCADAT Reference: HC/E/AU 541] where, as extensive medical evidence showed that the child's serious medical condition (neonatal seizures) meant that any air travel would potentially be fatal, the Court, while rejecting the mother's arguments relating to the quality of the English medical system, found that the return of the child to England would expose her to a grave risk of physical harm.

<sup>99</sup> See *infra* paras 69-74.

<sup>100</sup> See, for example: *No de RG* 11/01437, 1 December 2011, *Cour d'appel d'Agen* (France) [INCADAT Reference: HC/E/FR 1172] where the Court concluded that a separation of the child from the mother (the abducting parent) was not a grave risk, even though the mother was the one who had always taken care of the child, because the child had a good relationship with the father and a fond family in the State of habitual residence; 7 UF 660/17, 5 July 2017, *Oberlandesgericht Nürnberg Senat für Familiensachen* (Germany) [INCADAT Reference: HC/E/DE 1409] where the Court focused on whether the grave risk of psychological harm to the child would be to an extent that would significantly exceed the emotional strain

65. Where the grave risk exception is engaged, protective measures may include the possibility for the left-behind parent to care for the child upon his or her return to the State of habitual residence. This may require consideration by the court of this parent's ability to meet the needs of the child, at least until a court in the State of habitual residence is able to make a custody determination. Protective measures may also include obtaining sufficient assurances that the child will be able to have regular contacts with the taking parent (*e.g.*, by phone or other means such as through the Internet). If appropriate, the requested court could seek the assistance of the Central Authority, as permitted under domestic law, or engage in direct judicial communications to assess the availability and adequacy of such measures.

66. Where it is important that pending custody proceedings in the State of habitual residence are listed<sup>101</sup> promptly, the court ordering the return could impose, as a condition for the return and a measure of protection for the child, that custody proceedings should take place as soon as possible in the State of habitual residence upon return. Depending on the circumstances, the court ordering the return could practically pre-arrange the prompt listing of proceedings through direct judicial communications.<sup>102</sup>

67. In many instances involving assertions of grave risk resulting from a possible separation from the taking parent upon return, measures may be available to address the obstacles allegedly preventing the return of the taking parent to the State of habitual residence. Where such measures can be put into place, the court may be able to dispose of the return application without having to assess the taking parent's assertions of grave risk to the child resulting from a separation. Where measures to address the obstacles cannot be put into place, or where the taking parent unequivocally refuses to return despite the fact that the obstacles to his or her return have been or could be lifted,<sup>103</sup> the court will need to assess the assertions of grave risk to the child resulting from a possible separation upon return, as described above.<sup>104</sup> The following are examples of some common obstacles raised by taking parents and the types of measures that courts may wish to consider under various scenarios.

***i. Criminal prosecution against the taking parent in the State of habitual residence due to wrongful removal or retention***

68. The taking parent may refuse to return because of the risk of being held criminally liable for removing the child, and where incarceration of the taking parent may lead to a separation from that parent that may create a grave risk to the child. A distinction may be drawn between a taking parent who will be incarcerated and thereby separated from the child immediately upon return, and a taking parent who may face criminal prosecution in due course without immediate incarceration and with an ability to mount a defence and plan for the contingency of incarceration in the longer term. In such cases, the court may consider seeking information on the status of an arrest warrant or pending criminal proceedings, as well as on the possibility of the warrant or charges being withdrawn. For example, either the left-behind parent or the relevant authorities in the State of habitual residence may assure not to pursue criminal or other proceedings, or at least not to arrest the taking parent, if possible.<sup>105</sup> The dismissal or

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that a child would normally experience due to a return, and found that in that case there was no evidence that it would; I CKN 992/99, 1 December 1999, Decision of the Supreme Court (Poland) [INCADAT Reference: HC/E/CY 701] where the Court found that assertions of an unspecified psychological harm that could result from a separation were not as such enough to establish a grave risk, especially where the mother had not even established objective grounds that made it impossible for her to return with the child.

<sup>101</sup> See *supra* "Listing" in Glossary.

<sup>102</sup> See, for example, *Re G. (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2807 (Fam), 30 November 2007, High Court (Family Division) of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 966] where the Court issued a return order obliging the parties to take immediate steps to bring the matter before the court in Canada (the State of habitual residence) for a decision based on a full welfare investigation as to the future arrangements for the children. To this end, the judge made inquiries of the Justice of the Court of Queen's Bench in Alberta designated as the contact for Alberta in 1980 Convention matters and was assured that, on application by either party, arrangements can be made for a speedy hearing in Calgary.

<sup>103</sup> See below, paras 68 *et seq.*

<sup>104</sup> See *supra* note 74.

<sup>105</sup> See, for example: *Motion for Leave to Appeal (Family Matters)* 5690/10, 10 August 2010, Supreme Court of Israel (Israel) [INCADAT Reference: HC/E/1290] where the Court, following the mother's assertions, noted that the father's lawyer had written to the local prosecutor in the United States advising that the father was not interested in the mother being subjected to criminal proceedings, and the arrest warrant issued against her had been withdrawn; *Sabogal v. Velarde* (*op. cit.* note 62) where the Court ordered a return under the condition that the left-behind parent arranges *inter alia* for the criminal charges or investigation against the mother to be dismissed or closed.

withdrawal of pending charges may be secured with the assistance of criminal or judicial authorities, in particular using direct judicial communications, if this is permitted in the requested State and in the State of habitual residence.<sup>106</sup> The Central Authorities may also be able to offer assistance in this respect as permitted under domestic law. If the charges are withdrawn, the alleged impediment for the parent to return no longer exists. On the other hand, if the charges or the warrant cannot be withdrawn, the court may need to assess the asserted grave risk resulting from a possible separation from the taking parent, as described in paragraphs 63 to 65. In such instances, the fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception.<sup>107</sup>

## **ii. Immigration issues faced by the taking parent**

69. Claims of obstacles to a taking parent's return involving immigration issues – *e.g.*, where a taking parent asserts that he or she cannot enter the State of habitual residence due to the expiration of the relevant visa or the lack of residence rights – can typically be addressed early on in the return proceedings by obtaining the relevant immigration permissions, either by the taking parent's own efforts, or where possible by co-operation between Central Authorities and / or other competent authorities, which should be involved as soon as possible in relevant cases. Even where this is not possible, courts are usually reluctant to consider the assertions of grave risk to the child resulting from a possible separation if the parent is able to return to the requesting State for at least a short period necessary to attend custody proceedings, or where the entry of the taking parent in the State of habitual residence is subject to certain conditions.<sup>108</sup> In exceptional cases, if all efforts to obtain permission to enter the State fail, courts may consider assertions of grave risk to the child resulting from a possible separation from the taking parent upon return, in light of the considerations mentioned in paragraphs 63 to 65.<sup>109</sup> If they determine that such grave risk has been established, courts may nevertheless decide to order the return of the child on the condition that the taking parent receives the necessary immigration approval within a specified timeframe having regard to the need for a prompt return as soon as possible.<sup>110</sup> It needs to be emphasised that, as a rule, the parent should not – through their inaction or delay in applying for the necessary immigration

<sup>106</sup> See, for example, *Re M. and J. (Abduction) (International Judicial Collaboration)* [1999] 3 FCR 721, 16 August 1999, High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 266] where a voluntary return was secured through international collaboration between the High Court of England and Wales, the English Central Authority, the Superior Court of California, the District Attorney of California, and the Supervising Judge of the Family Law Department of the Los Angeles Superior Court. In this case, the taking parent breached probation when removing the children, and was facing a significant period of imprisonment if returned. Each actor in this case took it in turns to work towards the quashing of criminal proceedings against the taking parent, to expedite substantive custody proceedings, and to prioritise the necessary welfare investigations. A negotiated agreed undertaking between the parents later enabled the taking parent to voluntarily return with the children to the State of habitual residence.

<sup>107</sup> See, again, *Motion for Leave to Appeal (Family Matters)* (*op. cit.* note 105) where the Court, following the father's efforts to withdraw charges, noted that while those efforts do not bind the authorities, the chance that the mother would be arrested was low. The Court emphasized that the abducting parent should not be entitled to argue that a child ought to be left in the State to which he was taken due to concerns regarding the parent's arrest in the State from which the child was abducted.

<sup>108</sup> See, for example: 20b90/10i, 8 July 2010, Oberster Gerichtshof (Austria) [INCADAT Reference: HC/E/AT 1047]; *H. v. H.* [1995] 12 FRNZ 498, 4 December 1995, High Court at Wellington (New Zealand) [INCADAT Reference: HC/E/NZ 30].

<sup>109</sup> See, for example, *State Central Authority of Victoria v. Ardito*, 29 October 1997, Family Court of Australia at Melbourne (Australia) [INCADAT Reference: HC/E/AU 283] where the mother had taken all reasonable steps to re-enter the United States, but was denied a visa because the father had instituted divorce proceedings. The fact that the mother was denied entry into the United States of America was found to constitute a grave risk that the child, who was approximately two years old, would be placed in an intolerable situation if sent back alone.

<sup>110</sup> See, for example, 5A\_105/2009, II. zivilrechtliche Abteilung, 16 April 2009, Bundesgericht (Switzerland) [INCADAT Reference: HC/E/CH 1057] where the Tribunal found that even the visa held by the mother did not necessarily permit her to enter the United States of America, the decision being incumbent, on arrival, upon a customs inspector. As the child was aged only 21 months, still being partly breast-fed by the mother, and had not seen his father for nine months, the Tribunal concluded that a separation from his mother would put the child in an intolerable situation. The return was therefore made contingent upon the mother's obtaining a binding assurance in writing from the competent US authorities that she could enter the United States of America with her visa and remain there until a final ruling on custody. Only if her application was officially denied by the authorities would she be released from her obligation to return the child. See also: *W. v. W.*, 2004 S.C. 63 IH (1 Div), 6 December 2003, Inner House Court of Session in Scotland (the UK) [INCADAT Reference: HC/E/UKs 805] where the Court held that since the mother was the main carer of the children for all their lives and their separation would amount to a grave risk, the order for the children's return was suspended until suitable visas for both the mother and children had been received.

approvals – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish grave risk.

**iii. Lack of effective access to justice in the State of habitual residence**

70. The taking parent may assert, for example, that he or she is unwilling to return to the State of habitual residence because he or she cannot afford legal representation, that the courts in that State are biased, or that there are other barriers to access to a court for custody proceedings.<sup>111</sup> If there is concern that the taking parent will not have effective access to justice, the court may consider co-ordinating with the relevant Central Authorities or using direct judicial communications to evaluate these claims and / or make arrangements, if possible, to secure access to court proceedings soon after return. The mere fact that the parent may be unable to afford legal representation has been found to be insufficient to establish lack of effective access to justice.<sup>112</sup> In any case, the Convention being based on mutual trust between States, the evaluations in return proceedings should not compare the relative quality of judicial systems in both States (e.g., as to the speed of proceedings).

**iv. Medical or family reasons concerning the taking parent**

71. Where medical reasons involving the taking parent are raised, the characteristics and seriousness of the medical condition (physical or psychological) and the possibility of suitable medical treatment in the State of habitual residence should be considered to assess the merits of the taking parent's unwillingness to return.<sup>113</sup> If necessary treatment is accessible or can be arranged, the obstacles to the taking parent's return may be lifted.<sup>114</sup> There may be instances,

<sup>111</sup> See, for example, No de RG 11/02685, 28 June 2011, *Cour d'appel de Rennes* (France) (*op. cit.* note 92) where the mother's unsubstantiated claims that her right to a fair trial in Mexico would be jeopardized were rejected by the Court; *Secretary for Justice v. N., ex parte C.*, 4 March 2001, High Court at Wellington (New Zealand) [INCADAT Reference: HC/E/NZ 501] where the court rejected arguments made by the mother about her legal situation in Chile, noting that there was a system of specialist family courts in that country where the interests of children would be upheld as paramount in deciding custody issues; *Pliego v. Hayes*, 843 F.3d 226 (6th Cir. 2016), 5 December 2016, Court of Appeals for the Sixth Circuit (the US) [INCADAT Reference: HC/E/US 1386] where the mother's arguments that the Turkish authorities would be unable to properly adjudicate custody or protect the child upon return due to the father's diplomatic immunity and his "undue influence" was dismissed. The Court concluded that an "intolerable situation" can include circumstances where courts of the State of habitual residence are practically or legally unable to adjudicate custody, but that the father's diplomatic immunity had been waived to the extent necessary and that the mother had failed to prove that there had been corruption or undue influence over the Turkish authorities.

<sup>112</sup> See, for example: *F. v. F.*, 24 May 1993, High Court of Northern Ireland (the UK) [INCADAT Reference: HC/E/UKn 101] where the Court noted that while the mother would not receive any legal aid in Australia were she to petition to relocate with the children to Northern Ireland, she would nevertheless be able to proceed as a party litigant; *F. v. M. (Abduction: Grave Risk of Harm)* (*op. cit.* note 76) where the mother argued that a return would place the children in an intolerable situation as a result of her position within the French legal system. She claimed she would not be able to obtain representation, that the French courts and social services were biased against her and had not considered her allegations, and that her third child was at risk of being taken into care given their view of her present cohabitee. The Court held that it was near impossible to assert without a specific and detailed case that the legal process produced intolerability of itself. The actual circumstances of the intolerability would have to be pleaded. The Court emphasized 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.

<sup>113</sup> See, for example: *LPQ v. LYW* [2014] HKCU 2976, 15 December 2014, High Court of the Hong Kong Special Administrative Region (China) [INCADAT Reference: HC/E/CNh 1302] where the father claimed that he could not himself return to Japan as it would "break him mentally" and the return of the children without him, their main caregiver, would place them in an intolerable situation, also because of the mother's lack of affection for the children. The Court rejected the father's unsubstantiated allegations, stating that Article 13(1)(b) was concerned with the impact of the return on the child and not on the taking parent; *Re E. (Children) (Abduction: Custody Appeal)* (*op. cit.* note 49) where the Court found that, if the mother's mental health were to deteriorate there would be a grave risk of psychological harm to the children, but that appropriate protective measures were in place to address these concerns, including the father's undertakings to make the family home available for sole occupation of the mother and to provide financial support.

<sup>114</sup> See, for example, *BDU v. BDT* (*op. cit.* note 82) where the Court stated that if the taking parent could in fact be treated for his or her medical condition but refused to be so, then it could be persuasively argued that the taking parent was attempting to take advantage of his or her own wrong. The Court noted that the mother had significant psychological problems, but that separation of the child from his mother would not have been in his best interests. To facilitate the return, the father was required, *inter alia*, to ensure the mother's legal and medical expenses were met. The mother was required to undergo treatment with immediate effect in Singapore and to continue treatment in Germany.

however, where the availability of medical treatment may not be sufficient to lift the obstacles to the taking parent's return. This may be the case, for example, if the taking parent risks an extreme deterioration of his or her psychological health,<sup>115</sup> if he or she were to return to the State of habitual residence. In such instances, the court would have to assess the asserted grave risk to the child resulting from a possible separation from the taking parent upon return, as described above in paragraphs 63 to 65. As part of its assessment, the court would be likely to consider any possible effect on the child of the potential extreme deterioration of the taking parent's psychological condition, as well as any protective measures to mitigate the grave risk to the child upon his or her return to the State of habitual residence.

72. A taking parent could assert that he or she cannot return to the State of habitual residence because of a new family formed in the requested State.<sup>116</sup> Where the taking parent is a mother, her claim may include the fact that she is expecting or has a new child who is being breast-fed. If the taking mother alleges that her circumstances do not allow her to make arrangements for her return, the court will need to assess her assertions of grave risk to the abducted child, as described in paragraphs 64 to 66. In such instances, the fact that the mother would be facing an uncomfortable dilemma may not be deemed sufficient to conclude that the return of the older child would expose that child to a grave risk.<sup>117</sup> Where the taking parent asserts that the father of her new child will not permit that child to be removed from the jurisdiction even temporarily, the requested court may hear a relocation case in parallel to the return application. This parallel procedure would allow for the immediate decision by a judge in that jurisdiction of the taking parent's entitlement vis-à-vis the new child.

#### **v. Unequivocal refusal to return**

73. In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases mitigate the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through their illegal action of abducting the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish grave risk.<sup>118</sup>

<sup>115</sup> See, for example, *Director-General, Department of Families v. R.S.P.* [2003] FamCA 623, 26 August 2003, Full Court of the Family Court of Australia (Australia) [INCADAT Reference: HC/E/AU 544] where the Court found, on the basis of unchallenged evidence of a psychiatrist, that if the child was returned there was a grave risk the mother would commit suicide, and that the effect of the mother's suicide on the child would have been devastating. See also: *Re G. (Abduction: Psychological Harm)* [1995] 1 FLR 64, [1995] Fam Law 116, 15 July 1994, High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 24] where the Court accepted evidence that there was a considerable danger that the mother's depression would be severely exacerbated, with her likely to become psychotic if she were forced to return to the United States of America, exposing the children to a grave risk since they were physically and emotionally dependent primarily on her; *Re S. (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 A.C. 257, 14 March 2012, Supreme Court (the UK) [INCADAT Reference: HC/E/UKe 1147] where the mother who suffered from a form of Post-Traumatic Stress Disorder known as Battered Women's Syndrome, produced evidence at trial that her health would suffer greatly if she were required to return to Australia, placing the children at grave risk.

<sup>116</sup> See, for example, *Re C. (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, 2 December 1999, Court of Appeal of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 269] where the Court held that the trial judge erred in placing too much weight on the fact that the children's stepfather would be unable to return to the State of habitual residence for immigration reasons, and that the mother and stepfather, who were aware of the potential problems, had created the adverse conditions upon which they now sought to rely.

<sup>117</sup> See, for example, *Director-General Department of Families, Youth and Community Care and Hobbs*, 24 September 1999, Family Court of Australia at Brisbane (Australia) [INCADAT Reference: HC/E/AU 294] where it was argued that the child would face a grave risk because the mother did not wish to, and was not in fact able to, return to South Africa. This was due to the fact that, since arriving in Australia, she had given birth to a second child whom she was still breast-feeding. Moreover, her new partner refused to allow his newborn child to go to South Africa. The court held that the situation the mother found herself in was one largely of her own making, and that the mother's uncomfortable dilemma did not lead to a conclusion that the return of the older child would expose that child to a grave risk.

<sup>118</sup> See, for example, *Director General, Department of Community Services Central Authority v. J.C. and J.C. and T.C.*, 11 July 1996, Full Court of the Family Court of Australia at Sydney (Australia) [INCADAT Reference: HC/E/AU 68]. See also *G., P. C. c. H., S. M. s/ reintegro de hijos (op. cit. note 84)* where the court held that allowing for the return mechanism to deactivate automatically on the sole account of the refusal of the mother to return would subject the system designed by the international community to the unilateral will of the defendant.

**f. Separation from the child's sibling(s)**

74. The court seized with return proceedings may deal with an assertion of grave risk resulting from a possible separation of siblings in cases when, for example, one of the siblings objects to being returned under Article 13(2), and the court considers refusing the return of that sibling on that basis.<sup>119</sup> Or, in another scenario, the court finds that a child is wrongfully removed or retained by the taking parent together with the child's (step-)sibling for whom no Hague return application is filed or to whom the Convention does not apply (*i.e.*, where the child has attained the age of 16 years or where the taking parent has sole custody in respect of that child).<sup>120</sup>

75. In some cases, a separation of siblings may be difficult and disruptive for each child. The focus of the Article 13(1)(b) analysis, however, is whether the separation would affect the child in a way and to such an extent as to constitute a grave risk upon return.<sup>121</sup> This analysis must be made for each child individually, without turning into a "best interests" analysis.<sup>122</sup> Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not automatically result in a grave risk determination for the other child.<sup>123</sup> In assessing the grave risk for each child, courts may also consider the broader factual circumstances of the case, and the strength and / or meaning of the sibling relationship.<sup>124</sup>

76. As stated in paragraph 73, as a rule a parent should not, through a wrongful removal or retention, be allowed to create a situation that is potentially harmful to the child, and then rely on that situation to establish a grave risk. This applies not only to a claim of grave risk as a result of a separation of a child from a parent, but also to claims concerning separation of siblings. In each case, courts should consider the cause for the separation. A potential separation of siblings could occur in cases where it is legally justified under the Convention not to order the return of one sibling. An example of such a case is where an older child objects to the return and the court accepts the child's objection under Article 13(2). In such cases, the potential separation is caused by factors that are independent from the taking parent's behaviour. However, there are cases where a potential separation could result due to the inapplicability of the Convention to one of the siblings,<sup>125</sup> and where the taking parent does not want to return to the State of habitual residence and is not obliged to return the other sibling. In such cases, the alleged harm is a direct result of the taking parent's behaviour, since the taking parent could choose to return with the child to whom the Convention does not apply, thereby preventing a separation. Courts should therefore be cautious in situations where a taking parent attempts to rely on an allegation of potential harm that was created by that taking parent.<sup>126</sup>

<sup>119</sup> See, for example, 6Ob230/11h, 24 November 2011, Oberster Gerichtshof (Austria) [INCADAT Reference: HC/E/AT 1160]; *X v Y and Z Police Force* [2012] EWHC 2838 (Fam), 16 October 2012, the High Court of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 1180]; *In the Matter of L.L. (Children)*, 22 May 2000, Family Court of New York (the US) [INCADAT Reference: HC/E/USs 273].

<sup>120</sup> See, for example, *K.M.A. v. Secretary for Justice* (*op. cit.* note 48). See also *Re G. (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* (*op. cit.* note 102) where the elder child was ordered to return based on the Convention and the younger child, whose removal was not wrongful as she was born and had only ever been habitually resident in England, was ordered to return under common law rules.

<sup>121</sup> See, for example, *O. v. O.* 2002 SC 430, 3 May 2002, Outer House of the Court of Session of Scotland (the UK) [INCADAT Reference: HC/E/UKs 507] where it was asserted that the children would find difficulties returning to Ireland, notably because they would be separated from the 3 children of the father's new partner, but no specific or definite grave risk of physical or psychological harm was established.

<sup>122</sup> *Chalkley v. Chalkley* (1995) ORFL (4th) 422, 13 January 1995, Court of Appeal of Manitoba (Canada) [INCADAT Reference: HC/E/CA 14] where the Court noted that Art. 13 applies to a "child" who is the subject of an application for return. It does not speak of "children" or "siblings". See also *W. v. W.* (*op. cit.* note 110).

<sup>123</sup> See, for example, *LM v. MM Nevo*, RFAmA 2338/09, 3 June 2009, Supreme Court (Israel) [INCADAT Reference: HC/E/IL 1037].

<sup>124</sup> See, for example, *Re T. (Abduction: Child's Objections to Return)* [2000] 2 F.L.R. 192, 18 April 2000, Court of Appeal of England and Wales (the UK) [INCADAT Reference: HC/E/UKe 270] where the court held that to return the younger child alone would be to place him in an intolerable situation. He and his sister had lived through difficult days together, and he was dependent upon his sister who at times had been his 'little mother'. In these circumstances the Court concluded that a grave risk to the younger child had been established.

<sup>125</sup> See above, para. 74.

<sup>126</sup> See, for example, *DZ v. YVAMVD*, RFAmA 2270, 30 May 2013, Supreme Court of Israel [INCADAT Reference: HC/E/IL/1211].



77. In the case involving the possible separation of siblings in particular, courts should also consider that the return order need not result in an absence of contact between the children or lead to a permanent separation of the siblings.<sup>127</sup> It may be possible either by agreement or by an order of the court in the State of habitual residence or the court seized with the return proceedings to maintain contact between the siblings, face to face or by other means. Courts should keep in mind that the State of habitual residence will have the opportunity to consider where the siblings should reside, and whether they should reside together, as part of a full best interests assessment, in any custody proceedings upon return.

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<sup>127</sup> See, for example, *K.M.A. v. Secretary for Justice* (*op. cit.* note 48).

### III. Good practices for courts in Article 13(1)(b) cases

78. Any good practices shared in this Section of the Guide should only be considered if appropriate to, and permitted under, internal laws and procedures of the individual Contracting Party, and if considered by a court to be appropriate to a specific case.

#### 1. *Overarching principle: effective case management*

79. The purpose of this Section is to identify good practices that are intended to facilitate the court's ability to deal with assertions of grave risk effectively and in a highly focused and expeditious manner. These good practices are presented as part of effective case management in an effort to ensure that the hearing remains centred on the limited object / scope of the return proceedings, including the grave risk exception, and to expedite the resolution of the matter.

80. Effective case management allows the court to oversee and plan the management and progress of the case in order to ensure that cases are ready to be heard promptly, and that there are no undue delays in the proceedings. It involves the court communicating or meeting with the parties and / or their legal counsel at the early stages of the return proceedings, and throughout the proceedings as necessary.

81. Case management should start as early as possible and be continuous until the decision on return. It is the judge's responsibility to render the decision as soon as possible and to take all steps to ensure that orders made are in the form that ensures their immediate effectiveness.

#### 2. *Good case management practices*

##### a. *Early identification of the relevant issues*

82. It is important to identify precisely the relevant issues as a means of limiting the nature and amount of evidence and arguments to be presented. As part of early case management,<sup>128</sup> the judge should notably:

- ascertain what the relevant issues are;
- identify the matters in dispute and make sure the parties limit their presentations to what is relevant under the limited scope of the exception;
- identify what information / evidence the parties intend to present;
- identify any agreed or undisputed facts.

##### b. *Amicable resolution*

83. Effective case management involves discussing dispute resolution and providing opportunities for the parties to settle their dispute outside of a litigious procedure.<sup>129</sup> Depending on the internal laws, procedures and practices of each State, mediation<sup>130</sup> or other forms of alternative dispute resolution mechanisms may be available to assist parents in agreeing on the arrangements for the child's return or non-return, if appropriate, on substantive matters, which may include arrangements for the relocation of the child to the requested State and contact with the left-behind parent. As part of early case management of the return proceedings, where mediation or other forms of alternative dispute resolution mechanisms are available, the court should notably:

- assess carefully, as is generally required, whether mediation or any other forms of alternative dispute resolution mechanisms are suitable.<sup>131</sup> Such assessment may

<sup>128</sup> In many jurisdictions, a preliminary hearing is organised to address these issues.

<sup>129</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 (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Publications" then "Judges' Newsletter"), pp. 45-48.

<sup>130</sup> On mediation in international child abduction cases, see: Permanent Bureau of the HCCH, *Guide to Good Practice under the 1980 Hague Child Abduction Convention – Mediation*, The Hague, 2012 (hereinafter, the "Guide to Good Practice on Mediation") (also available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Publications").

<sup>131</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 *ibid.*, *i.a.*, Sections 1.2 and 2.1 and Chapter 10.

be of particular importance where assertions of grave risk due to domestic or family violence are made to establish whether the particular case is suitable for mediation;<sup>132</sup>

- encourage the parties to consider mediation or other forms of alternative dispute resolution mechanisms;
- 
- ensure that mediation or any other form of alternative dispute resolution mechanism, when deemed appropriate and where the necessary expertise is available, does not unduly delay the continuation and timely conclusion of the return proceedings by setting strict timeframes.<sup>133</sup> For example, if the left-behind parent intends to attend the court hearing in person, their presence in the requested State could be used for a mediation taking place in a very condensed timeframe before the court hearing. Mediators offering their assistance in such cases should be ready to make themselves available at very short notice.

**c. Participation of the parties in the proceedings**

84. Ensuring fairness so that all parties, regardless of legal representation, can participate fully and bring forward all information / evidence effectively without causing undue delay is a key feature of effective case management. As early as possible, the court should notably:

- ascertain whether the left-behind parent has been made aware of the nature of the assertions of grave risk either through the submissions of the party opposing the return or through legal counsel or the Central Authority, if appropriate, and is able to participate in the proceedings in a manner which the court determines;<sup>134</sup>
- ascertain whether the left-behind parent will be appearing in person and / or be represented by legal counsel, especially if the applicant is the Central Authority;
- determine the procedure, if not already set out in the legislation, by which the parties will view, exchange and serve documents, where applicable.

85. Legal representation, especially by specialist lawyers, is always helpful but whether parties to return proceedings are required to be legally represented, and whether legal aid or *pro bono* representation is available, depend upon internal laws and practices.<sup>135</sup>

<sup>132</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 allow mediation in these cases subject to certain conditions. In Spain, for example, 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 38), Section 19.4. See also the Guide to Good Practice on Mediation (*op. cit.* note 130), Chapter 10, para. 266.

<sup>133</sup> See the Guide to Good Practice on Mediation (*ibid.*), Section 2.1. See also "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)", 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 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)", Recommendation No 1.3.1. All Conclusions and Recommendations of the Special Commission to review the operation of the 1980 Convention are available on the HCCH website (see path indicated in note 17).

<sup>134</sup> There are advantages in both parties being present; if not possible, some jurisdictions provide for other means of communication, such as videoconference, subject to the domestic laws of the States concerned.

<sup>135</sup> The Convention provides in Art. 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". See for more information, *e.g.*, the Guide to Good Practice on Central Authority Practice (*op. cit.* note 3), Chapter 4.13. In any case, 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.

**d. Participation of the child in the proceedings**

86. Since the adoption of the Convention, there have been changes in international legal frameworks. For example, at the global level, the adoption of the UNCRC has affected such issues as the participation of children in return proceedings under the 1980 Convention, including where the Article 13(1)(b) exception is raised.<sup>136</sup>

87. Whether and how a child is heard, and how his or her views are obtained and introduced before the court vary according to internal procedures and practices of Contracting Parties. In some States, the child is heard directly by the court and in other States the child is interviewed by an expert who then reports the child's views to the court. In such cases, the person hearing or interviewing the child should have the proper qualifications for this task and should possess specific knowledge on the 1980 Convention, the return proceedings and the limited scope of the Article 13(1)(b) exception.<sup>137</sup> Where available in a particular jurisdiction, the appointment of a separate representative for the child should be considered.

88. As part of effective case management, the court should:

- consider, where available, the appointment of a separate representative for the child;<sup>138</sup>
- inform or encourage the parties, the separate representative for 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, when obtaining the child's views, tools such as family reports (tailored to the limited scope of return proceedings) prepared by appropriately qualified experts to assist the court in the determination of what weight should be placed on the child's views;
- ensure, when a decision is made to obtain the child's views, that this is done in a manner that does not cause undue delay in the consideration of the case in the return proceedings by setting strict timeframes.

**e. Evidence**

89. One of the overall goals of effective case management is that only relevant evidence be presented to the court, and that the gathering of information and the production of evidence do not cause any undue delay. The good practices set out in this Section are intended to assist the court in achieving these goals.

<sup>136</sup> See, e.g., Art. 12 of the UNCRC. At the regional level, the adoption of the Brussels IIa Regulation within the European Union (EU) has prescribed the way return proceedings ought to be carried out within EU Member States where the Regulation is applicable (see: 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. The Brussels IIa Regulation is directly applicable in all EU Member States with the exception of Denmark. All further references in this Guide regarding the Brussels IIa Regulation are subject to change in the process of the ongoing revision of that instrument and the discussions thereof). To some extent, the interpretation of Art. 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 by the European Court of Human Rights has also influenced the conduct of return proceedings under the 1980 Convention. In respect of States that are Parties to the UNCRC, an important part of child participation is respect for the child's own perspective and views. See Council of the European Union (*op. cit.* note 26).

<sup>137</sup> See also Conclusions and Recommendations of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 HCCH Conventions (see path indicated in note 17).

<sup>138</sup> In the Netherlands, standing practice is now that a 'guardian ad litem' is appointed in all HCCH Convention cases involving children from the age of three. This guardian ad litem – typically a (child) psychologist and / or registered mediator – represents the child during the ensuing procedure (first instance and appeal) by expressing the voice of the child and assessing its maturity and the measure in which the child seems to feel free to express itself.

**f. Expert evidence**

90. With respect to the expert evidence in particular, its use should be limited to be consistent with the nature and narrow scope of the grave risk exception.<sup>139</sup> As part of good case management practices, the court should:

- consider establishing a list of suitable experts who are knowledgeable about the Convention, return proceedings and the specific nature of the grave risk exception, and who would be available on short notice;
- encourage, where both parties intend to produce expert evidence, the use of one suitably qualified expert agreed to jointly or appointed by the court as applicable, rather than each party bringing an expert;
- assess / consider, at the earliest opportunity, whether an issue relating to the allegations of grave risk requires expert opinion / evidence; if expert opinion is deemed necessary:
  - identify the specific questions about which expertise is sought, for example, by way of a letter of instruction, court order or briefing;
  - remind the parties and expert of the limited scope of the return proceedings and narrow focus of the grave risk exception, and of the need to strictly limit the questions about which they may wish to present expert opinion / evidence;
  - set the deadline by which the expert opinion must be provided to the court and / or the parties, where appropriate, orally or in writing to ensure there is no undue delay;
  - select an appropriate expert and ensure that the relevant information be provided to him or her; and
  - set a date to continue the hearing of the case, and ensure that the expert will be available that day to provide evidence and give information, if necessary;
- consider the possibility that the expert report orally in person or by audio or audio-visual connectivity instead of in writing to avoid undue delays in the proceedings.

**g. Assistance from Central Authorities and direct judicial communication**

91. Where it is deemed appropriate in evaluating assertions of grave risk, courts can obtain additional information from Central Authorities in order to better understand the legal framework or child protection system in place in the State of habitual residence, or to clarify certain assertions of facts.<sup>140</sup> Courts may be able to also specifically ask for available information regarding the social background of the child to the Central Authorities. They must be cautious, however, in asking Central Authorities to undertake inquiries or investigations beyond their functions and powers (see Section IV).

<sup>139</sup> See, for example: *BDU v. BDT* (*op. cit.* note 82) where, given that a central question in the proceedings was the mother's alleged inability for medical reasons to return to Germany with the child, the Court appointed an independent court expert to assess the risk of physical and psychological harm to the mother (including any risk of suicide and/or self-harm) should an order to return be made; similarly in *Re S. (A Child) (Abduction: Rights of Custody)* (*op. cit.* note 115) where the Court requested a report by a psychiatrist regarding the mother's condition, the psychiatric or psychological impact on the mother of a return to Australia and protective measures that may be necessary to safeguard the effect on the mother's mental health of such return.

<sup>140</sup> See, for example: *Kovacs v. Kovacs* (2002), 59 O.R. (3d) 671 (Sup. Ct.), 23 April 2002, Ontario Superior Court of Justice (Canada) [INCADAT Reference: HC/E/CA 760] where the court ordered parties' counsels to make a joint request to the Canadian Federal Central Authority for the 1980 Convention to take the most effective steps available in the State of habitual residence to determine whether the applicant was convicted and sentenced as alleged, and whether the judgement respecting the conviction is authentic. See also: *M.G. v. R.F.*, 2002 R.J.Q. 2132, 23 August 2002, Quebec Court of Appeal (Canada) [INCADAT Reference: HC/E/CA 762] where the Court heard from counsel acting for the Central Authority of the State of habitual residence that social security support was available for the taking parent, despite allegations by the taking parent that there was a lack of financial and other resources.

92. Courts may also obtain relevant information by initiating direct judicial communications through contact with other judges within their jurisdictions or judges in other Contracting Parties. In that latter case, courts may have recourse to the IHNJ, a network comprised of one or more members of the judiciary of Contracting Parties. The IHNJ facilitates communications and co-operation between judges at the international level, so as to ensure the effective operation of the Convention. Judges can verify on the HCCH website whether there is a judge in their jurisdiction designated to the IHNJ.<sup>141</sup> If so, judges should contact their member of the IHNJ in order to initiate direct judicial communications through the network, and / or obtain support in order to do so. Judges contemplating the initiation of direct judicial communications are invited to consult the Emerging Guidance and General Principles for Judicial Communications document published by the HCCH.<sup>142</sup>

93. As part of effective case management, the court should:

- ensure that the issues are identified at an early stage so that the parties can adduce relevant evidence;
- consider whether information or assistance may be obtained from the Central Authority of the requested and / or requesting States regarding both parties' assertions and / or the availability of protective measures to address the grave risk, as well as to facilitate arrangements for the return of the child;
- consider whether information or assistance may be obtained through the IHNJ or through direct judicial communications,<sup>143</sup> where available, regarding both parties' assertions and / or the availability of protective measures to mitigate the grave risk, as well as to facilitate arrangements for the return of the child.

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<sup>141</sup> See List of Members of the IHNJ, available on the HCCH website (path indicated in note 33).

<sup>142</sup> See the Emerging Guidance on Judicial Communications (*op. cit.* note 1).

<sup>143</sup> *Ibid.*

#### IV. Good Practices for Central Authorities in Article 13(1)(b) cases

##### 1. *General duties of Central Authorities – co-operation and provision of information*

94. An important function of the Central Authority is to take all appropriate measures to facilitate the institution of judicial or administrative proceedings with a view toward obtaining the safe return of the child (Art. 7(2)(f) and (h)). The way in which the Central Authority fulfils this duty differs in each Contracting Party depending on the role it is given within its State and the functions and powers provided by the national legislation under which it is established. One notable difference is that, in some States, the Central Authority initiates the return proceedings by filing an application before the court, while in other States, the left-behind parent brings the application to the court.

95. As part of their responsibilities, Central Authorities also have the duty to co-operate with each other and to promote co-operation among internal authorities to secure the prompt return of the child (Art. 7(1)). In cases where the Article 13(1)(b) exception is raised, such co-operation may notably allow the Central Authorities to respond quickly to requests from the court to provide information on the availability of protective measures to mitigate the grave risk, subject to the relevant laws. Where desirable and appropriate under the relevant laws, Central Authorities also may exchange information on the social background of the child (Art. 7(2)(d)).

##### 2. *Limited role of Central Authorities regarding the grave risk exception*

96. The evaluation of factual and legal issues, including any assertions under Article 13(1)(b), is a matter exclusively for the court deciding upon the return application. This is important in defining what the role of the Central Authority is *not*: it is not for it to evaluate the Article 13(1)(b) assertions or to act upon its evaluation of it. The Central Authority must be careful therefore not to delay the proceedings by taking initiatives that are not needed, particularly in States where the Central Authority itself or an agent on its behalf is charged with initiating the proceedings before the court. If it is within its functions and powers, and without delaying the commencement of the judicial procedure, the Central Authority should, however, take steps early on in the return process to collect information that is likely to be needed or requested to assist the court in a timely manner and to avoid having to adjourn the proceedings to collect such information.

97. Any good practices shared in this Section should only be considered if appropriate to, and permitted under, internal laws and procedures of the individual Contracting Party, and if considered by the Central Authority to be appropriate to a specific case.

##### 3. *Good practices for the Central Authority of the requesting State*

98. As a matter of good practice, where requested to do so and as appropriate under the relevant laws, the Central Authority of the requesting State should be prepared to:

- provide information about the laws and procedures in their own jurisdiction;
- provide any existing report on the social background of the child, provided that its sharing is permissible under the relevant laws;
- provide factual information, where relevant, appropriate and permissible (*e.g.*, information on the existence of an arrest warrant or criminal proceedings against the taking parent);
- provide information pertaining to the availability of protective measures in the requesting State, such as information on laws, procedures, welfare and financial support systems, available protective measures, avenues for obtaining legal advice and effective protection orders, avenues for requesting immigration documents where necessary, and services available in the requesting State upon return;
- act within the shortest possible timeframe and take all steps necessary to respect the deadlines identified by the court in order not to cause any undue delay;

- provide information to the authorities within the requesting State to facilitate, to the extent possible, the effectiveness of protective measures, such as the notification of the child's impending arrival to the relevant welfare authorities for necessary action to mitigate the grave risk.

#### **4. *Good practices for the Central Authority of the requested State***

99. As a matter of good practice, the Central Authority of the requested State should be well prepared to:

- inform the Central Authority of the requesting State, as soon as possible, when it is aware that the grave risk exception is being raised;
- inform the Central Authority in the requesting State immediately of any information requested by the court and of the timeframe set by the court for the provision of this information;
- inform the Central Authority of the requesting State regularly and as necessary of relevant matters including progress and outcomes, as well as any requirement set by the court in relation to undertakings or conditions, mirror orders or other orders to mitigate an established grave risk and to facilitate the safe return of a child;
- act within the shortest possible timeframe and take all steps necessary to respect the deadlines identified by the court in order not to cause any undue delay.



## V. Useful resources

100. In order to acquire and enhance knowledge and understanding on the interpretation and application of Article 13(1)(b), courts, Central Authorities and others may refer to the following resources.

### 1. *The Explanatory Report on the 1980 Convention*

101. The Explanatory Report on the Convention<sup>144</sup> which, among other things, provides information on the preparatory work and the circumstances of the conclusion of the Convention can be used as a supplementary means of interpretation of the Convention.

### 2. *The Proceedings of the Fourteenth Session (1980)*

102. The *Proceedings of the Fourteenth Session*,<sup>145</sup> which include the Explanatory Report, also include all the preparatory work leading to the adoption of the Convention text such as Preliminary Documents, Working Documents prepared by delegations attending the Session and minutes of the meetings of the Session. These documents can be used as a supplementary means of interpretation of the Convention.

### 3. *INCADAT*

103. The International Child Abduction Database (hereinafter, "INCADAT")<sup>146</sup> was established to facilitate mutual understanding and more consistent interpretation of the Convention. It is available online at no charge in English, French and Spanish. INCADAT contains summaries and the full texts of significant decisions relevant to international child abduction from around the world. It also provides compendia of concise legal analysis on issues which are often the subject of litigation and judicial interpretation in child abduction proceedings, including Article 13(1)(b).<sup>147</sup>

### 4. *The Guides to Good Practice published by the Hague Conference on Private International Law*

104. In addition to the current Guide, the HCCH has published six other Guides to Good Practice<sup>148</sup> that pertain to the Convention, which may be helpful to courts, Central Authorities and others in interpreting and applying Article 13(1)(b):

- Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part I – Central Authority Practice;
- Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part II – Implementing Measures;
- Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part III – Preventive Measures;
- Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part IV – Enforcement;
- Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice; and
- Guide to Good Practice under the 1980 Hague Child Abduction Convention – Mediation.

<sup>144</sup> *Op. cit.* note 11.

<sup>145</sup> *Op. cit.* note 49.

<sup>146</sup> Available at: < [www.incadat.com](http://www.incadat.com) >.

<sup>147</sup> For an analysis of Art. 13(1)(b), see the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "The Convention" then "Case Law Analysis" then "Exceptions to Return" then "Grave Risk of Harm".

<sup>148</sup> All these publications are available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Publications" then "Guides to Good Practice".

## 5. *The International Hague Network of Judges (IHNJ)*

105. The creation of the IHNJ specialising in family matters was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children. It was recommended that the relevant authorities (*e.g.*, court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, other judges within their jurisdictions and judges in other Contracting Parties, in respect, at least initially, of issues relevant to the 1980 Convention. The IHNJ facilitates communications and co-operation between judges at the international level with a view to ensuring the effective operation of the Convention. Judges are invited to refer to the List of Members of the IHNJ, available on the HCCH website.<sup>149</sup>

## 6. *The Judges' Newsletter on International Child Protection*

106. *The Judges' Newsletter* guarantees the circulation of information relating to judicial co-operation in the field of international protection of children. It was first published by the HCCH in 1999. Currently, the Newsletter is published biannually.<sup>150</sup>

## 7. *Documents prepared by national authorities*

107. Over the years, national judicial authorities have published bench books and similar documents to assist courts dealing with these complex cases, for example:

- the electronic bench book published by the National Judicial Institute of Canada;<sup>151</sup>
- the National Domestic and Family Violence Bench Book of Australia;<sup>152</sup>
- the Argentinean Protocol for the Operation of the International Child Abduction Conventions;<sup>153</sup>
- the electronic guide published by the Office of the Attorney-General of Brazil.<sup>154</sup>

<sup>149</sup> See the List of Members of the IHNJ, available on the HCCH under "Child Abduction" then "The International Hague Network of Judges".

<sup>150</sup> All volumes of *The Judges' Newsletter* are available in English and French, and for certain volumes in Spanish, on the HCCH website (see path indicated in note 129). Vol. V of *The Judges' Newsletter* had as a special focus Art. 13(1)(b).

<sup>151</sup> The 1980 Hague Convention on the Civil Aspects of International Child Abduction, National Judicial Institute Electronic Bench Book, National Judicial Institute, updated May 2018.

<sup>152</sup> This bench book is available at: < <https://ajja.org.au/publications/national-domestic-and-family-violence-bench-book/> > (last consulted on 1 February 2019).

<sup>153</sup> *Protocolo de actuación para el funcionamiento de los convenios de sustracción internacional de niños*, approved on 28 April 2017. The protocol is available on the website of the Supreme Court of Argentina at: < <http://www.cij.gov.ar/adj/pdfs/ADJ-0.305074001493756538.pdf> > (last consulted on xxx).

<sup>154</sup> This guide is available at < [http://www.agu.gov.br/page/content/detail/id\\_conteudo/157035](http://www.agu.gov.br/page/content/detail/id_conteudo/157035) > (last consulted on 1 February 2019).

**Index of cited case law**

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