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1980 Child Abduction Convention

Guide to Good Practice

Part VI

Article 13(1)(b)

Guide to Good Practice
under the
Convention of
25 October 1980 on the
Civil Aspects of International
Child Abduction

Part VI
Article 13(1)(b)

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Foreword

On the occasion of the 40th anniversary of the conclusion of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, it is my great pleasure to present Part VI of the Guide to Good Practice under the HCCH 1980 Child Abduction Convention, which deals with a crucial provision of the Convention: Article 13(1)(b) (the grave risk of harm exception).

This publication intends to provide guidance to judges, Central Authorities, attorneys and other practitioners working in the field of international family law and who are faced with the application of Article 13(1)(b) of the 1980 Child Abduction Convention. This provision sets out one of the exceptions to the prompt return of the child under the Convention. The increasing use in recent years of this defence in child abduction cases, and a growing concern amongst the expert community that an incorrect application of this provision would compromise the delicate balance struck by the Child Abduction Convention, prompted the Council on General Affairs and Policy, the governing body of the HCCH, to task the Permanent Bureau, with the assistance of a Working Group composed of a broad range of national experts, to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b) of the Convention.

I would like to take this opportunity to express my gratitude to all those who have contributed to the development and finalisation of this Guide. First of all, I would like to extend special thanks to the many members of the Working Group (full list of members available in the Guide), and, in particular, to The Honourable Diana Bryant who has chaired the Working Group since its very first meeting in 2013. Justice Bryant's expert guidance, unreserved commitment and patience have been instrumental in the successful completion of this Guide. My sincere thanks also go to the staff and the many interns of the Permanent Bureau who have successively been involved in the project. Following the sound and proven practice of the HCCH, this Guide to Good Practice was submitted for approval to its Members. The fact that it met the approval of all the (then) 83 Members of the HCCH surely reinforces the authoritative value of this Guide as a secondary source of information on the operation of the Convention.

It is crucial that all professionals, whether they deal with international child abduction cases on a regular, indeed daily basis, or once in a lifetime, be equipped with the necessary tools to assist children and families caught in these highly critical situations. With this publication, it is hoped that professionals, in particular judges, now have such a tool to assist them in the delicate analysis of the grave risk of harm exception. It is crucial that they be in a position to make an informed and prompt decision on the return of the child. Central Authorities and other practitioners will also find helpful guidance to assist them in dealing with cases where the Article 13(1)(b) defence has been raised. The decisions referenced in the Guide – all of which can be accessed on INCADAT, the international child abduction database of the HCCH – will further provide readers with concrete examples of how the provision has been applied in a specific case.

Against this background, I am convinced that this important publication will contribute to the enhanced operation and a more uniform application of Article 13(1)(b) of the Child Abduction Convention – in the interest of children and families across the world.

Christophe Bernasconi | *Secretary General*

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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.¹

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, sexual 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.

¹ 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 > under "Child Abduction" then "Direct Judicial Communications").

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.²

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 cooperation 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 to, or retained in, another Contracting Party, in breach of rights of custody under the 1980 Convention.

Listing:

"Listing" refers to the procedure of placing a case on 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.

Practical arrangements:

Practical arrangements are arrangements that a court may set out as part of the return order to facilitate and implement the return of the child. Practical arrangements are not intended to address a grave risk and are to be distinguished from protective measures.

Protective measures:

For the purposes of this Guide, the term is to be understood broadly as measures available to address a 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.³

² See Section I.2 of this Guide.

³ See Arts 11(2), 12(3), 13(1), 14, 17, 20 and 24 of the 1980 Convention.

Requesting State:

The State whose Central Authority or from which an individual party has made an application for the return of the child, thus requesting the child's return under the 1980 Convention. It is usually the State of habitual residence of the child before the child's removal or retention.⁴

Return proceedings:

The concept of "return proceedings" refers 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").⁵

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 such as, e.g., a public prosecutor.

Rights of custody:

The concept of "rights of custody" as used in this Guide refers to 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 return proceedings who or which 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.

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.⁶

⁴ See Art. 9 ("requesting Central Authority") and Art. 11(2) of the 1980 Convention.

⁵ See Art. 12(1) of the 1980 Convention.

⁶ This Guide adopts the definition of "undertakings" 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), 2003 (hereinafter, the "Guide to Good Practice on Central Authority Practice") (also available on the HCCH website at < www.hcch.net > under "Publications").



Introduction

1. This Guide to Good Practice addresses **Article 13(1)(b)** of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the "1980 Convention" or simply "the Convention"),⁷ also known as the "**grave risk exception**".⁸
2. Article 13(1)(b)⁹ 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,¹⁰ as well as past Conclusions and Recommendations of the Special Commission,¹¹ 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 practice taken from a variety of jurisdictions.
4. The Guide is divided into 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 practice intended to assist courts¹² 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

⁷ This Guide is Part VI 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 VI of the series).

⁸ See, *supra*, "Grave risk" and "Grave risk exception" in Glossary.

⁹ 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.

¹⁰ 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, see path indicated in note 6). 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.

¹¹ Special Commissions are set up by the HCCH and convened by its Secretary General to develop and negotiate new HCCH Conventions, or to review the practical operation of existing HCCH Conventions. The Special Commission is composed of experts designated by Members of the HCCH and by Contracting Parties to the Convention. It may be attended by representatives of other interested States (in particular those that have expressed an interest to the Permanent Bureau in joining the Convention) and relevant international organisations in an observer capacity. The Conclusions & Recommendations ("C&R") adopted by the Special Commission play an important role for the uniform interpretation and practical operation of the Convention.

¹² A reference to a "court" in this Guide is a reference to the judicial or administrative competent authority seized of the proceedings for the return of children under the 1980 Convention (Art. 11).

role of Central Authorities designated under the Convention,¹³ to assist them in dealing with incoming and outgoing cases where the Article 13(1)(b) exception has been raised. 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 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.¹⁴ The website of the HCCH (<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.¹⁵ 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.¹⁶ The 1980 Convention supports the right of children to be informed of the process and consequences of return proceedings, and to express views in return proceedings. If the child is of sufficient age and maturity, due account should be taken of the child's views.

¹³ See Art. 6 of the 1980 Convention.

¹⁴ 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 (see path indicated in note 6), Chapter 13, Section A. See also N. Lowe and M. Nicholls, *The 1996 Convention on the Protection of Children*, Jordan Publishing, 2012, Chapter 7.

¹⁵ See *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, Supreme Court of Canada (Canada) [INCADAT Reference: HC/E/CA 1389] at para. 34, where the Court held that both the 1980 Convention and the UNCRC seek "to protect the best interests of children", "to protect the child's identity and family relations", and "to prevent the illicit transfer and retention of children", and that both Conventions "accept the principle that a child of sufficient maturity should have a say in where the child lives as discussed below in connection with Article 13(2) of the Hague Convention".

¹⁶ See, e.g., Art. 12 of the UNCRC.

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”,¹⁷ 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 practice described in this Guide is purely advisory in nature, and is subject to the relevant 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. Finally, it should be understood that the cases referenced are meant to provide examples of how some courts have approached assertions of grave risk,¹⁸ 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 INCADAT¹⁹ 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 two of these languages, 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. It should be noted that more recent case law can overturn or modify older decisions. Readers of the Guide should verify, on INCADAT or from other sources, whether there is more recent case law on the specific aspect of Article 13(1)(b) that is relevant to the case at issue.
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.

¹⁷ “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 > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” and “Previous Special Commission meetings”).

¹⁸ See, *supra*, “Grave risk” in Glossary.

¹⁹ The International Child Abduction Database of the HCCH. See Section V of this Guide.

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.²⁰

²⁰ 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, The Honourable Queeny Au-Yeung (China, Hong Kong SAR), 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), Lord Justice Moylan (United Kingdom), 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), Ms Juhee Han (Republic of Korea), Mr Christian Höhn (Germany), Ms Emmanuelle Jacques (Canada), Ms Leslie Kaufman (Israel), Mr Luiz Otávio Ortigão de Sampaio (Brazil), Mr Francisco George Lima Beserra (Brazil), Ms Tuskasa Murata (Japan), 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).



**Article 13(1)(b)
as part of
the framework
of the
1980 Convention**

1. The principle: return of the child

a. Purpose and underlying concepts 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 1.²¹
12. The Convention is based on the following related concepts.

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

13. The first underlying concept is that the removal or retention of a child is wrongful when in breach of rights of custody.²² A parent who shares or does not have rights of custody should therefore seek and obtain consent from any other person – usually the other parent –, institution or body having rights of custody²³ or, if this is not possible, permission from the court, before removing the child to, or retaining him or her in, another State.

ii. Wrongful removal or retention is harmful to the child

14. The second underlying concept is that the wrongful removal or retention of a child is prejudicial to the child's welfare²⁴ 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.

²¹ 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.

²² 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) IINCADAT Reference: HC/E/USf 1029J at p. 3, where the Court, discussing its view of the 1980 Convention in the Syllabus, found that its view is "also substantially informed by the views of sister contracting states on the issue", that "*ne exeat* rights are rights of custody within the Convention's meaning".

²³ See, *supra*, "Rights of custody" in Glossary.

²⁴ See the Preamble of the 1980 Convention.

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

15. The third underlying concept 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 assess effectively the child's best interests.²⁵ This third underlying concept is founded on international comity, which requires that the Contracting Parties

"[...] 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."²⁶

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

16. The above-mentioned purpose of the Convention and underlying concepts 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,²⁷ subject only to the limited exceptions provided for by the Convention.²⁸ In doing so, rights of custody existing 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 para. 15 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").²⁹ This application takes place before the competent court or authority of the "Contracting State where the child is" (Art. 12(1)), *i.e.*, in the "requested State",³⁰ in accordance with its internal procedures and

²⁵ Art. 16 reinforces the application of this concept 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 taken to be a determination on the merits of any custody issue".

²⁶ See the Explanatory Report (*op. cit.* note 10), paras 34 and 41.

²⁷ Art. 21 which deals with rights of access is not the subject of this particular Guide.

²⁸ See the Explanatory Report (*op. cit.* note 10), para. 35.

²⁹ See, *supra*, "Return proceedings" in Glossary.

³⁰ See, *supra*, "Requested State" in Glossary.

practices. For this purpose, the court shall use the most expeditious procedures available (Arts 2 and 11).³¹

d. Cooperation between Contracting Parties

18. To implement its purpose and to support its proper operation, the Convention also creates a system of close cooperation among the judicial and administrative authorities of the Contracting Parties.³² This is done through Central Authorities³³ designated in each of the Contracting Parties whose duties are outlined mainly in Article 7. Information about the duties of the Central Authorities in cases where the grave risk exception is raised and related good practice is presented in Section IV of the Guide. Judicial cooperation may be facilitated through the IHNJ.³⁴

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 competent court or authority hearing the return application has a duty to order the return of the child forthwith (Art. 12(1)).³⁵
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 concept that the issue of who will care for the child upon the child's return should be determined by the competent court or authority in the State of habitual residence in accordance with the law governing rights of custody, including any order that may apply as between the parents or other interested persons.³⁶
21. The duty to return the child *forthwith* is reinforced by Article 11 which requires that competent courts or authorities should act expeditiously in proceedings for the return of children and that, if a decision has not been reached within six weeks from the commencement of the proceedings, there is a right to request a statement of the

³¹ 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", see the Explanatory Report (*op. cit.* note 10), para. 63.

³² *Ibid.*, para. 35.

³³ The list of designated Central Authorities and their contact details are available on the HCCH website at < www.hcch.net > under "Child Abduction" then "Authorities".

³⁴ The list of designated members of the IHNJ is available on the HCCH website at < www.hcch.net > under "Child Abduction" then "The International Hague Network of Judges".

³⁵ 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 competent court or authority to order the return of the child at any time. It authorises the competent court or authority seised of 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*, paras 47-48.

³⁶ See the Explanatory Report (*op. cit.* note 10), para. 110.

reasons for the delay.³⁷ There is a “double aspect” to this duty: “firstly, the use of the most speedy procedures known to their legal system;[³⁸] secondly, that applications are, so far as possible, to be granted priority treatment”.³⁹

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, 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 may then exercise discretion not to order the return of the child. These exceptions appear in Articles 12(2),⁴⁰ 13(1)(a),⁴¹ 13(1)(b), 13(2)⁴² and 20.⁴³
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 concept 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

³⁷ 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), 2003 (hereinafter, the “Guide to Good Practice on Implementing Measures”) (also available on the HCCH website, path indicated in note 6), e.g., Point 1.5 of Chapter 1, and Chapters 5 and 6.

³⁸ On the obligation to “use the most expeditious procedures available”, see Art. 2.

³⁹ The request for a statement may be made by the applicant or the Central Authority of the requested State either on its own initiative or if asked by the Central Authority of the requesting State (Art. 11). See the Explanatory Report (*op. cit.* note 10), paras 104 and 105. 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 > under “Child Abduction” then “Country Profiles”), Section 10.3(d).

⁴⁰ 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.

⁴¹ 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.

⁴² 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.

⁴³ If ordering the return would breach the fundamental principles of the requested State related to the protection of human rights and fundamental freedoms.

letter".⁴⁴ 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".⁴⁵

26. In particular, while the exceptions derive from a consideration of the interests of the child,⁴⁶ 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 nor mandate a full "best interests assessment" for a child within return proceedings. The competent court or authority 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.⁴⁷
27. This said, the exceptions serve a legitimate purpose, as the Convention does not contemplate an automatic return mechanism. Allegations that there is a grave risk should be promptly examined to the extent required by the exception, within the limited scope of return proceedings.
28. This means that while the purpose of the Convention is to address 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, 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".⁴⁸

a. Three types of "grave risk"

30. Article 13(1)(b) contains the following three different types of risk:
- a grave risk⁴⁹ 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,

⁴⁴ See the Explanatory Report (*op. cit.* note 10), para. 34.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, para. 29.

⁴⁷ See Art. 16 of the 1980 Convention.

⁴⁸ See the Explanatory Report (*op. cit.* note 10), para. 29.

⁴⁹ See, *supra*, "Grave risk" and "Grave risk exception" in Glossary.

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 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".
33. But harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. 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, because of a risk of harm directed to a taking parent, there is a grave risk to the child.

c. Level of "grave risk"

34. 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".⁵⁰ As for the level of harm, it must amount to an "intolerable situation",⁵¹ 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.⁵²

⁵⁰ *Re E. (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 A.C. 144, 10 June 2011, United Kingdom Supreme Court (England and Wales) (the UK) IINCADAT Reference: HC/E/UKe 1068] at para. 33. See also the Explanatory Report (*op. cit.* note 10), 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 *Actes et documents de la Quatorzième session (1980)* (*op. cit.* note 10), p. 362.

⁵¹ See, e.g., *Thomson v. Thomson*, [1994] 3 SCR 551, 20 October 1994, Supreme Court of Canada (Canada) IINCADAT Reference: HC/E/CA 11] at p. 596, where the Court held that "the physical or psychological harm contemplated by the first clause of Article 13(1)(b) is harm to a degree that also amounts to an intolerable situation". See also *Re E. (Children) (Abduction: Custody Appeal)* (see, *supra*, note 50), at para. 34 and *EW v. LP*, HCMP1605/2011, 31 January 2013, High Court of the Hong Kong Special Administrative Region (China) IINCADAT Reference: HC/E/CNh 1408] at para. 11, where, in both decisions, the respective Courts quoted from the judgment in *Re D*, [2006] 3 WLR 0989, 16 November 2006, United Kingdom House of Lords (England and Wales) (the UK) IINCADAT Reference: HC/E/UKe 880] at para. 52, "['Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'".

⁵² *Re E. (Children) (Abduction: Custody Appeal)* (see, *supra*, note 50), 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."

d. A "forward-looking" grave risk exception

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 usually require an analysis 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 of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.⁵³
37. However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk⁵⁴ 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 *per se* determinative of the fact that effective protective measures are not available to protect the child from the grave risk.⁵⁵

⁵³ See, *infra*, paras 43 *et seq.* on protective measures in Art. 13(1)(b) cases.

⁵⁴ See, *supra*, "Grave risk" in Glossary.

⁵⁵ See, *e.g.*, 12 UF 532/16, 6 July 2016, *Oberlandesgericht München Senat für Familiensachen* (Germany) [INCADAT Reference: HC/E/DE 1405] at para. 42, where the Court found that a risk upon return could not be inferred from alleged past violent behaviour and noted that there was a binding restraining order in place so that the taking parent could seek adequate protection from any such alleged behaviour of the left-behind parent; *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] at para. 40 where, in discussing past violent and inappropriate behaviour, the judge found that "[w]hile the past can be a good indicator of the future, it is not determinative", and that the availability of lawful protection against such behaviour prevented a finding of a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.



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 of the child due to security, health or economic concerns, or because of his or her immigration status or of pending criminal charges in the child's 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. Broad or general assertions are very unlikely to be sufficient.⁵⁶
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, and by taking into account the evidence / information pertaining to 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 protect the child from the grave risk of such harm or intolerable situation,⁵⁷ when evaluating whether the grave risk exception has been established.

⁵⁶ See, e.g., *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*, 23 December 1988, Full Court of the Family Court of Australia at Melbourne (Australia) [INCADAT Reference: HC/E/AU 255], where "very general and non-specific" evidence adduced by the taking parent of significant episodes of violence, assault or mistreatment by the left-behind parent against the taking parent and the child was held to be insufficient to amount to a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

⁵⁷ See, *infra*, paras 43 *et seq.* on the discussion of such measures of protection.

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;⁵⁸
 - 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 order the return of the child, which means that it is within the court's discretion to order return of the child nonetheless.

⁵⁸ 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.

With regard to protective measures, the court should consider seeking the cooperation of Central Authorities and / or IHNJ judges.

Are the facts asserted by the person, institution or other body which opposes the child's return 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

After the evaluation of the information or evidence:

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 protect the child from the 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.

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

b. Protective measures

43. Protective measures are more often considered in situations where the asserted grave risk involves child abuse or domestic violence, but not exclusively. 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.
44. Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child.⁵⁹ In certain circumstances, while available and accessible in the State of habitual residence, measures of protection may not be sufficient to address effectively the grave risk. An example may be where the left-behind parent has repeatedly violated protection orders.
45. 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. Ideally, given that any delays could frustrate the objectives of the Convention, 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 interests 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 of the child 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.
46. In some States, the court hearing the return application may have internal jurisdiction under national law to order measures of protection as part of its return order. In other States, the court may not have such jurisdiction. In these cases, however, the court may consider protective measures in the form of voluntary undertakings given to the court by the left-behind parent.⁶⁰

⁵⁹ See, for an example of a case involving protective measures, *Re E. (Children) (Abduction: Custody Appeal)* (see, *supra*, note 50). See also *J.D. v. P.D.*, (2010) ONCJ 410, 9 September 2010, Ontario Court of Justice (Canada) [INCADAT Reference: HC/E/CA 1421] at para. 47 where the Court found that it could “impose undertakings to assist the return and to protect the children in the transitional period before the court in Scotland takes over”. In *Mbuyi v. Ngalula*, (2018) MBQB 176, 8 November 2018, Court of Queen’s Bench of Manitoba (Canada) [INCADAT Reference: HC/E/CA 1416] at para. 62, the Court noted that, in determining whether or not the exception provided for in Art. 13(1)(b) was made out by the factual situation, “the Court must in any Hague *Convention* proceeding start from the basis that, except in the most extraordinary of cases or where evidence is sufficient to establish the contrary, the Courts and the authorities in the state of the children’s habitual residence will be able to take measures to protect the children [...]”

⁶⁰ See, e.g., *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 the specific conditions that the return take place after the left-behind parent had arranged to have the temporary custody order in his favour vacated, so that the underlying temporary custody order in favour of the taking parent is reinstated, and after

47. Whether in the form of a court order or voluntary undertakings, the efficacy of the measures of protection will depend on whether and under what conditions they may be rendered enforceable in the State of habitual residence of the child, which will depend on the domestic law of this State. One option may be to give legal effect to the protective measure by a mirror order in the State of habitual residence – if possible and available. 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. 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 of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence.
48. With 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.⁶¹ 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 Parties⁶² and can be declared enforceable at the request of any interested party in accordance with the procedure provided in the law of the State where enforcement is sought.⁶³ 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.⁶⁴

c. Practical arrangements

49. In some jurisdictions, courts ordering the prompt return of the child may provide for practical arrangements to facilitate the implementation of the return of the child to the State of habitual residence. An example of practical arrangements is where the return order states who is to buy the airplane tickets for the child's return. Such arrangements are different from protective measures in that they are not intended to address a grave risk of harm. Practical arrangements should neither create obstacles to the child's return nor overburden either party (particularly the left-behind parent), nor exceed the court's limited jurisdiction.

he has arranged to have the criminal charges against the taking parent dismissed or the investigation closed. Note, however, that the conditions ordered in this case may not be possible in a number of Contracting Parties.

⁶¹ Art. 11 of the 1996 Convention.

⁶² Art. 23 of the 1996 Convention.

⁶³ Art. 26 of the 1996 Convention.

⁶⁴ See also Art. 27(5) of Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178/1 of 2 July 2019 which will be applicable as of 1 August 2022. Art. 27(5) of the Regulation specifies that where a court orders the return of the child, the court may, where appropriate, take provisional, including protective, measures in accordance with Art. 15 of the Regulation in order to protect the child from the grave risk referred to in Art. 13(1)(b) of the 1980 Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings.

d. Procedural and evidentiary rules

50. The 1980 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** (or quantum) of proof.⁶⁵ However, the question of the **burden** of proof is addressed explicitly in the Convention.

i. Burden of proof

51. The burden of establishing the exception rests on the person, institution or other body which opposes the child's return,⁶⁶ 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

52. While rules and practices regarding the admissibility and gathering of evidence vary among Contracting Parties,⁶⁷ 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 custody⁶⁸).

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

53. 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.

⁶⁵ 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".

⁶⁶ Art. 13(1); see also the Explanatory Report (*op. cit.* note 10), para. 114, where it is stated, *inter alia*, 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".

⁶⁷ Some information about applicable rules in return procedures is provided by Contracting Parties in their Country Profiles (*op. cit.* note 39). *E.g.*, in Section 10.3, information is provided, *inter alia*, 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.

⁶⁸ See, *supra*, para. 16.

iv. Admissibility of the application for return and attached documents

54. To facilitate the admission of evidence and information, Article 23 provides that no formalities such as legalisation may be required. Additionally, 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 and to the discretion of the court.

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

55. 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. However, courts⁶⁹ must be mindful of the Convention's requirement to decide cases expeditiously.
56. This Section provides some examples as to how assertions of grave risk have been approached by some 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 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 others with an interest are encouraged to consult INCADAT and national case law for details and for the most recent information on how various issues under Article 13(1)(b) have been approached.

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

57. 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.⁷⁰ 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

⁶⁹ See, *supra*, note 12.

⁷⁰ See, e.g., *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 left-behind parent's abuse of the taking parent, 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.

upon return,⁷¹ including where such harm may significantly impair the ability of the taking parent to care for the child.

58. 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 of the child, 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.⁷² Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child.⁷³
59. 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.⁷⁴ Where legal protection and police and social services are available in the

⁷¹ See, e.g., *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 left-behind parent had threatened to use third parties to physically harm (and maybe even kill) the taking parent. The Court noted that the case was unique because the risk to the child stemmed not only from threats made by the left-behind parent but also from threats made by an unknown third party, and the left-behind parent's fraudulent activities had created, and were likely to continue to create, a substantial risk of serious harm to the family, and a grave risk of harm 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, "[w]hile the proper inquiry focuses on the risk faced by the child, not the parent [...] sufficiently serious threats and violence directed against a parent can nonetheless pose a grave risk of harm to the child as well".

⁷² 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 left-behind parent's history of abuse of the taking parent was found not to constitute a grave risk to their child, because the child was present on only two past occasions on which the left-behind parent was violent towards the taking parent, and because, since the removal, the parents had arranged visits without difficulties and there was no evidence that the left-behind parent had abused or harassed the taking parent. See also *Secretary for Justice v. Parker*, 1999 (2) ZLR 400 (H), 30 November 1999, High Court (Zimbabwe) [INCADAT Reference: HC/E/ZW 340] at p. 408, where the Court noted that the left-behind parent's violent and intimidating conduct was directed at the taking parent and not the children, and that the stressful environment to which the taking parent said the children were exposed was caused by the strained relations between the parents. The Court further noted that the taking parent made no objection to the left-behind parent's demand for access and, on the contrary, seemed to have encouraged the left-behind parent to have contact with the minor children.

⁷³ See also *Souratgar v. Fair*, 720 F.3d 96 (2nd Cir. 2013), 13 June 2013, United States Court of Appeals for the Second Circuit, (the US) [INCADAT Reference: HC/E/US 1240] at pp. 12 and 16, in which the taking parent's allegations of spousal abuse on the part of the left-behind parent were considered by the Court to be "only relevant under Article 13(1)(b) if it seriously endangers the child. The Article 13(1)(b) inquiry is not whether repatriation would place the [taking parent's] safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm." In that case, the Court affirmed the finding of the district court that, while there were instances of domestic abuse, "at no time was [the child] harmed or targeted", and that "in this case, the evidence [...] does not establish that the child faces a grave risk of physical or psychological harm upon repatriation".

⁷⁴ See, e.g., *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] at paras 13 and 14, where the Court noted that, if it "was (or is) satisfied that the child would be given adequate protection by the courts of the requesting State and/or the left-behind parent had provided sufficient protective undertakings, the abducting parent would usually not be able to rely on the Article 13(1)(b) exception, especially in the cases where domestic violence has been raised." The Court further noted that, in this case, the left-behind parent had submitted that he would "co-operate with any [...]"

State of habitual residence of the child to assist victims of domestic violence, for example, courts have ordered the return of the child.⁷⁵ In some instances, however, courts may deem such legal protection and services to be insufficient to protect the child from the grave risk,⁷⁶ for example where the left-behind parent has repeatedly violated protection orders,⁷⁷ which may put the child at grave risk of physical or psychological harm, or given the extent of psychological vulnerability of the child.⁷⁸

proceedings and provide non molestation and harassment undertakings". See, *supra*, "Questions considered by the court in the analysis of the Article 13(1)(b) exception" at p. 33.

⁷⁵ See, e.g., *X. (the mother) against Y. (the father)*, 22 February 2018, *Rechtbank 's-Gravenhage* (the Netherlands) [INCADAT Reference: HC/E/NL 1391] at p. 6, where the Court found that the taking parent's claims of being regularly exposed to domestic violence in the presence of the child was insufficient for a finding of grave risk, since "all circumstances must be duly taken into consideration, including whether child protection measures or other adequate arrangements can be made to ensure that the consequences of domestic violence do not pose a risk to the minor (or no longer pose a risk)." See also *Mbuyi v. Ngalula* (see, *supra*, note 59).

⁷⁶ See, e.g., *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] at paras 109 and 111 where the Court noted that "it is clear that the existence of court orders and criminal sanctions has not abated the degree of violence", such that the Court was "satisfied of the existence of a grave risk of harm in this case". 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 taking parent having filed a complaint that the child had been the victim of rape at the family residence by the left-behind parent'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 the left-behind parent.

⁷⁷ See, e.g., *Achakzad v. Zmaryalai* [2011] W.D.F.L. 2, 20 July 2010, Ontario Court of Justice (Canada) [INCADAT Reference: HC/E/CA 1115] where the Court accepted the taking parent's evidence that the left-behind parent had assaulted or threatened to assault her on multiple occasions, including threatening to rape her, and bearing a loaded firearm while she held the child. The Court moreover found that given the particular circumstances the left-behind parent's clear resentment of the taking parent's allegations raised against him under Art. 13(1)(b) could not be ignored. Although undertakings would be enforceable given that the left-behind parent 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 and breaching court orders. Furthermore, he had shown himself to be incapable of controlling his behaviour when angry. Therefore, the Court held that returning to California posed a grave risk to the taking parent and child that could not adequately be controlled by undertakings.

⁷⁸ See, e.g., *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] at para. 15, where two psychologists testified on behalf of the taking parent. The first psychologist diagnosed the children with post-traumatic stress disorder, having "sustained considerable trauma, physical abuse, emotional abuse and verbal abuse" themselves, as well as having witnessed the abuse of the taking parent. Specifically, the first psychologist "opined that returning the children to Norway would create an intolerable situation for the children". The second psychologist's "diagnostic impression was at the very least severe stress disorder for each of the children", with each child describing the left-behind parent's excessive drinking and various incidents of abuse, directed at them and at the taking parent. The second psychologist opined that the left-behind parent suffered from a narcissistic character disorder that "would pose a grave risk of harm to the children and place them in an intolerable situation were they to be returned to Norway", and that "the children would suffer irreparable psychological harm merely by being ordered to return to Norway regardless of whether they are ordered to return to [the left-behind parent's] custody".

b. Economic or developmental disadvantages to the child upon return

60. Where assertions of grave risk based on economic or developmental disadvantages upon the return of the child are made,⁷⁹ 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.⁸⁰ More modest living conditions⁸¹ and / or more limited developmental support⁸² 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.⁸³

⁷⁹ See, e.g., *A.S. v. P.S. (Child Abduction)* [1998] 2 IR 244, 26 March 1998, Supreme Court (Ireland) [INCADAT Reference: HC/E/IE 389]; *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]; *Police Commissioner of South Australia v. H.*, 6 August 1993, Family Court of Australia at Adelaide (Australia) [INCADAT Reference: HC/E/AU 260]; *Re E. (Children) (Abduction: Custody Appeal)* (see, *supra*, note 50).

⁸⁰ See No de pourvoi 08-18126, 25 February 2009, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1013] where the Court rejected the taking parent'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.

⁸¹ See, e.g., *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 left-behind parent but found that the taking parent 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 taking parent argued that the financial incapacity of the left-behind parent 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 taking parent claimed that the children's return to Germany would expose them to a grave risk due to the poor standard of the left-behind parent's accommodation but the Court concluded that the taking parent 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, *Oberlandesgericht 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.

⁸² See, e.g., No de RG 11/01062, 28 June 2011, *Cour d'appel de Bordeaux* (France) [INCADAT Reference: HC/E/FR 1128] where the taking parent 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.

⁸³ See, e.g., *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 taking parent because of problems with finding a job was not enough to reasonably justify the taking parent's refusal to return, and that such matters are further to be taken into account in custody proceedings; No de RG 12-19382, 20 March 2013, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1213] where the taking parent 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 emphasised that the English authorities had made appropriate arrangements to ensure the protection of the children after their return and that the taking parent 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 was no grave risk; 5A_285/2007/frs, 16 August 2007, *Tribunal fédéral, Ilè cour de droit civil* (Switzerland) [INCADAT Reference: HC/E/CH 955] where the Court found that in light of the

In particular, dependency on State benefits or other institutional support does not in itself amount to a grave risk.⁸⁴ Only very exceptional circumstances might lead to a grave risk to the child.⁸⁵ Where circumstances have been established that would amount to a grave risk, courts may consider whether protective measures can protect the child from such risk, such as the provision of some urgent financial assistance for the short-term period until the court of competent jurisdiction in the State of habitual residence can make any necessary orders.

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,⁸⁶ 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 trigger the grave risk exception.⁸⁷ Similarly, (isolated) violent incidents in an unsettled political environment will typically not amount to grave risk.⁸⁸ Even where the facts asserted are of such a nature that they could constitute a grave risk,

absence of objective reasons to justify the taking parent'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.

⁸⁴ See, e.g., *Re A. (Minors) (Abduction: Custody Rights)* [1992] Fam 106, 12 February 1992, Court of Appeal of England and Wales (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.

⁸⁵ See, e.g., the considerations of the Court in No de RG 08/04984, 18 February 2009, *Cour d'appel de Nîmes* (France) [INCADAT Reference: HC/E/FR 1135].

⁸⁶ 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 that, while there was evidence that American businessmen faced a heightened risk of kidnapping and violence in Colombia and that the taking parent himself had been threatened, there was no clear and convincing evidence of serious danger in the town where the left-behind parent lived to a 13-year old with dual U.S. and Colombian citizenship and who lives there with his Colombian parent and family.

⁸⁷ See, e.g., No de RG 11/02685, 28 June 2011, *Cour d'appel de Rennes* (France) [INCADAT Reference: HC/E/FR 1129] where the taking parent 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; No de pourvoi 14-17.493, 19 November 2014, *Cour de cassation* (France) [INCADAT Reference: HC/E/FR 1309] where the taking parent 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.

⁸⁸ See, e.g., cases involving returns to Israel where the alleged potential dangers inherent in every-day life are usually found to be too general to establish a case under Art. 13(1)(b): *A. v. A.*, 5 October 2001, Buenos Aires Court of First Instance (Argentina) [INCADAT Reference: HC/E/AR 487]; No 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.

the court must still determine whether protective measures could address the risk and, if so, the court would then be bound to order the return of the child.⁸⁹

d. Risks associated with the child's health

62. In cases involving assertions associated with the child's health, the grave risk analysis usually should focus on the availability of treatment in the State of habitual residence of the child,⁹⁰ and not on a comparison between the relative quality of care in each State.⁹¹ 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.⁹² The mere fact that the State of habitual residence may have a different standard of health care or a different climatic environment will typically not be sufficient to establish the Article 13(1)(b) exception. For example, that the climate condition in the requesting State is different from that in the requested State is not, in and of itself, sufficient to establish the grave risk exception associated with the child's health. When assertions associated with the child's health are established, the court may consider, for example, measures of protection to protect the child from the grave risk upon return, such as: the provision of financial support, health insurance, and / or the preparation of medical support for the child upon return.

⁸⁹ See, e.g., *A. v. A.* (see, *supra*, note 88) 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 stabilise. See also *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 both parents were victims of pre-meditated and targeted shootings and other attacks in Venezuela. The Court agreed with the trial judge at para. 28 that "the children have not been subject to any attack and are less likely to be targeted victims than their parents, but [were] in danger of physical injury if present with either of their parents at the time of such attacks". The Court also noted that the trial judge found that "24 hour constant supervision by armed guards [...] in itself would not provide complete protection but would diminish the risk somewhat".

⁹⁰ See, e.g., 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.

⁹¹ See, e.g., No de rôle: 07/78/C, 25 January 2007, *Tribunal de première instance de Bruxelles* (Belgium) [INCADAT Reference: HC/E/BE 857] where the taking parent claimed a grave risk to the child because the left-behind parent 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 taking parent claimed that return to the left-behind parent, who suffered from multiple sclerosis and depression, would constitute a grave risk. However, the Court noted a good relationship between the child and the left-behind parent, and the left-behind parent'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] at para. 144, where, in relation to the treatment of a child with autism, the Court noted that "facilities exist in Greece for the treatment of autism in children", 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) (Canada) [INCADAT Reference: HC/E/CA 1403].

⁹² See *State Central Authority v. Maynard*, 9 March 2003, Family Court of Australia (Australia) [INCADAT Reference: HC/E/AU 541] at paras 27, 28 and 30, where, as extensive medical evidence showed that the child's serious medical condition (epileptic seizures) meant that "travel could result in significant and serious damage to [the child] or her death", the Court, while rejecting the taking parent'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.

These measures should not, however, place undue burdens 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 which 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 of the child

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, however, that the courts have only rarely upheld the Article 13(1)(b) exception in cases where the taking parent cannot or will not return with the child to the child's State of habitual residence.⁹³
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 address the grave risk.⁹⁴ The circumstances or reasons for the taking parent's inability to return to the State of habitual residence of the child are distinct from, although they may form part of, the assessment of the effect on the child of a possible separation.
65. Where the separation from the taking parent would meet the high threshold of grave risk, the circumstances or reasons for the taking parent's inability to return to the State of habitual residence of the child may in particular be relevant in determining what protective measures are available to lift the obstacle to the taking parent's return and address the grave risk.⁹⁵ Examples are provided below (paras 67-72) of some common obstacles raised by taking parents and the types of measures that courts may wish to consider under various scenarios. Alternatively, where the obstacles to the return of the taking parent cannot be lifted, other considerations in assessing possible protective measures may include the option for the left-behind parent or other person to care for the child upon his or her return to the child's State of habitual residence until a court in that State is able to make a custody determination.

⁹³ See, *infra*, paras 67-72.

⁹⁴ See, e.g., 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 taking parent was not a grave risk, even though the taking parent was the one who had always taken care of the child, because the child had a good relationship with the left-behind parent 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 that a child would normally experience due to a return, and found that in that case there was no evidence that it would.

⁹⁵ The courts in some jurisdictions may consider possible measures to lift the obstacle to the taking parent's return before assessing the factual allegations of grave risk. 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.

66. Where to address a grave risk it is important that pending custody proceedings in the State of habitual residence are listed promptly,⁹⁶ the court ordering the return could require, as a measure of protection for the child, that custody proceedings should take place as soon as possible in the State of habitual residence of the child upon return. Where appropriate under the relevant laws and procedures, the parties could be informed about accelerated procedures which might exist in the child's State of habitual residence. In addition, depending on the circumstances, and where this is possible in both States concerned, the court ordering the return could also help facilitate the prompt listing of proceedings through direct judicial communications.⁹⁷

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

67. The taking parent may refuse to return because of the risk of being held criminally liable for wrongfully removing or retaining 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. 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 child's State of habitual residence may provide an assurance that they will not pursue criminal or other proceedings, or at least not to arrest the taking parent, if possible.⁹⁸ The dismissal or withdrawal of pending charges or, where appropriate, of an arrest warrant may be secured with the assistance of criminal or judicial authorities, including, where appropriate, using direct judicial communications, if this is permitted in the requested State and in the State of habitual residence.⁹⁹ The Central Authorities may also be able to offer assistance or provide

⁹⁶ See, *supra*, "Listing" in Glossary.

⁹⁷ See, e.g., *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] at para. 78, where the Court issued a return order upon the basis that the parties will 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 with the Justice of the Court of Queen's Bench in Alberta designated as the contact for the province of Alberta in 1980 Convention matters and was assured that, on application by either party, arrangements could be made for a speedy hearing in that province.

⁹⁸ See, e.g., *Motion for Leave to Appeal (Family Matters)* 5690/10, 10 August 2010, Supreme Court (Israel) [INCADAT Reference: HC/E/1290] at paras 3 and 5, where the Court, following the taking parent's assertions that there was substantial risk that she would be arrested due to the wrongful removal, noted that the arrest warrant had been quashed, and that the left-behind parent's lawyer had written to the local prosecutor in the United States advising that the left-behind parent was not interested and had no intention of effecting the administration of criminal proceedings against the taking parent, requesting that substantial weight be afforded to his position on the matter. The Court noted that, although the prosecutor was not bound by the letter, "experience indicates that except for extraordinary cases [...] the chance that the [taking parent] will be arrested [was] not high"; *Sabogal v. Velarde* (see, *supra*, note 60) 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 taking parent to be dismissed or closed as the children, due to the circumstances, could not be placed with the left-behind parent upon their return.

⁹⁹ See, e.g., *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

information in this respect as permitted under domestic law. If the charges or, where appropriate, the arrest warrant 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 66, including eventual protective measures arranging for the care of the child during a separation. In such instances, a distinction may need to be drawn between a taking parent who will be incarcerated pending the criminal proceedings immediately upon return to the State of the child's habitual residence, and a taking parent who may face eventual incarceration in due course following his or her criminal trial in that State. The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception.¹⁰⁰

ii. Immigration issues faced by the taking parent

68. 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 and appropriate by cooperation 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.¹⁰¹ It needs to be emphasised that, as a rule, the parent should not – through their inaction or delay in applying for the necessary immigration 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

69. 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 barriers to access to a court for

a significant period of imprisonment if they chose to return. In an out of court procedure, each person or institution with an interest 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.

¹⁰⁰ See, again, *Motion for Leave to Appeal (Family Matters)* (see, *supra*, note 98) where the Court, following the left-behind parent's efforts to withdraw charges, noted that while those efforts do not bind the authorities, the chance that the taking parent would be arrested was low. The Court emphasised that the taking 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.

¹⁰¹ See, e.g., 2Ob90/10i, 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].

custody proceedings.¹⁰² If there is concern that the taking parent will not have effective access to justice, the court may consider coordinating with the relevant Central Authorities or using direct judicial communications to evaluate these claims and / or make arrangements, if possible, to facilitate 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.¹⁰³ 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

70. Where medical reasons involving the taking parent are established, the characteristics and seriousness of the medical condition (physical or psychological) and the possibility of suitable medical treatment in the State of habitual residence may be considered to assess the merits of the taking parent's inability to return.¹⁰⁴ If necessary treatment is accessible or can be arranged, the alleged obstacles to the taking parent's return may be lifted. There may be instances, however, where the

¹⁰² See, *e.g.*, No de RG 11/02685, 28 June 2011, *Cour d'appel de Rennes* (France) (see, *supra*, note 87) where the taking parent's unsubstantiated claims that her right to a fair trial in Mexico would be jeopardised 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 taking parent about her legal situation in Chile, noting that there was a system of specialist family courts in that State 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] at p. 2, where the Court upheld the district court's finding and dismissed the taking parent's arguments that "there is grave risk of an 'intolerable situation' because the [left-behind parent's] diplomatic status undermine[d] the ability of the Turkish courts to properly adjudicate custody". The Court found, at p. 8, that "[t]he text of Article 13(1)(b) supports the interpretation that an 'intolerable situation' can encompass situations where one parent seeks to return a child to a country where courts are unable to adjudicate custody", but that the taking parent had failed to establish an "intolerable situation" under the facts of the case at hand (p. 11).

¹⁰³ See, *e.g.*, *F. v. M. (Abduction: Grave Risk of Harm)* (see, *supra*, note 74) at para. 15, where the taking parent argued that a return would place the children in an intolerable situation as a result of her position *vis-à-vis* the French legal system. She claimed she would not be able to obtain representation, that the courts and welfare advisers in France were against her, that she had not been able to get them to acknowledge or consider her detailed allegations, and that she was at risk, given their view of her present cohabitee, of losing her third child into state care. The Court held at para. 18 that it was "near impossible to assert without a specific and detailed case that [France's] legal process is such that it, of itself, produced intolerability; in other words the actual circumstances of the intolerability must be pleaded". The Court held in para. 19 that "[c]omity and respect for the policy of the Convention obliges [it] [...] unless there is the most persuasive compelling evidence to the contrary, to determine that the French courts are just as capable of fairly investigating and adjudicating on the competing claims of the parties".

¹⁰⁴ See, *e.g.*, *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 taking parent 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 left-behind parent's busy working schedule, lack of affection for the children, and poor temperament. The Court rejected the taking parent's unsubstantiated allegations, stating in para. 48 that Art. 13(1)(b) was primarily concerned with the child and not with the impact of the return on the taking parent; *Re E. (Children) (Abduction: Custody Appeal)* (see, *supra*, note 50) where the Court found that, if the taking parent'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 left-behind parent's undertakings to make the family home available for sole occupation of the taking parent and the children and to provide financial support.

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,¹⁰⁵ 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, as described above in paragraphs 63 to 66. As part of its assessment, the court would consider any protective measures to protect the child from the grave risk upon his or her return to the State of habitual residence.

71. 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.¹⁰⁶ 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 breastfed. 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 child, as described in paragraphs 63 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.¹⁰⁷

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

72. 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 protect the child from 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 the wrongful removal or retention of the child – be allowed to create a situation that

¹⁰⁵ See, e.g., *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 were returned there would be a grave risk the taking parent would commit suicide, and that the effect of the taking parent's suicide on the child would have been devastating. See also: *Re S. (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 A.C. 257, 14 March 2012, United Kingdom Supreme Court (England and Wales) (the UK) [INCADAT Reference: HC/E/UKe 1147] where the Court accepted medical evidence at trial that the health of the taking parent, who suffered from a form of Post-Traumatic Stress Disorder known as Battered Women's Syndrome, would suffer greatly if she were required to return to Australia, and in the light of the fragility of the taking parent's psychological health, the protective measures offered would not obviate the grave risk that, if returned to Australia, the child would be placed in an intolerable situation.

¹⁰⁶ See, e.g., *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 new partner of the taking parent would be unable to return to the State of habitual residence for immigration reasons, and that the taking parent and her partner, who were aware of the potential problems, had created the adverse conditions upon which they now sought to rely.

¹⁰⁷ See, e.g., *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 taking parent 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 breastfeeding. Moreover, her new partner refused to allow his newborn child to go to South Africa. The Court held that the situation the taking parent found herself in was one largely of her own making, and that the taking parent's uncomfortable dilemma did not lead to a conclusion that the return of the older child would expose that child to a grave risk.

is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child.¹⁰⁸

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

73. The court seized of 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.¹⁰⁹ 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 (for example, where the child has attained the age of 16 years or where the left-behind parent has no rights of custody as defined in the Convention in respect of that child).
74. 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.¹¹⁰ This analysis must be made for each child individually, without turning into a "best interests" analysis.¹¹¹ 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 usually result in a grave risk determination for the other child.¹¹²
75. As stated in paragraph 72, 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 claim grave risk. This applies not only to a claim of grave risk of harm 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 therefore consider whether or not the claim of a possible separation of the siblings by the return of just one of them would result from the taking parent's actions or behaviour, e.g., where the taking parent essentially decides not to return the sibling whose situation

¹⁰⁸ See, e.g., *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* (see, *supra*, note 81) where the Court held that allowing for the return mechanism to deactivate automatically on the sole account of the refusal of the taking parent to return would subject the system designed by the international community to the unilateral will of the defendant.

¹⁰⁹ See, e.g., *In the Matter of L.L. (Children)*, 22 May 2000, Family Court of New York (the US) [INCADAT Reference: HC/E/USs 273].

¹¹⁰ See, e.g., *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 three children of the taking parent's new partner, but no specific or definite grave risk of physical or psychological harm was established. See, also, *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.

¹¹¹ *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".

¹¹² See, e.g., *LM v. MM Nevo*, RFamA 2338/09, 3 June 2009, Supreme Court (Israel) [INCADAT Reference: HC/E/IL 1037].

is not covered by the Convention,¹¹³ not because such return is not possible or would cause harm to that sibling, but in order to claim grave risk to the other child whose situation is before the court on the basis of a possible separation of the siblings should the court order the child's return. In such cases, the courts should be especially cautious in assessing the claim of grave risk so as not to allow the parent to benefit from a situation resulting from his or her actions or behaviour.¹¹⁴

76. In a 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.¹¹⁵ It may be possible either by agreement or by an order of the court in the State of habitual residence or the court seized of the return proceedings to maintain contact between the siblings, face to face or by other means. Courts should keep in mind that the courts of 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.

¹¹³ See, *supra*, para. 73.

¹¹⁴ See, e.g., *DZ v. YVAMVD*, RFAmA 2270, 30 May 2013, Supreme Court (Israel) [INCADAT Reference: HC/E/IL/1211].

¹¹⁵ See, e.g., *K.M.A. v. Secretary for Justice* (see, *supra*, note 79).



**Good practice
for courts in
Article 13(1)(b)
cases**

77. Any good practice shared in this Section of the Guide should only be considered if appropriate to, and permitted under, the relevant 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

78. The purpose of this Section is to identify good practice that is intended to facilitate the court's ability to deal with assertions of grave risk effectively and in a highly focused and expeditious manner. Good practice is presented as part of effective case management in an effort to ensure that the proceedings remain centred on the limited object / scope of the return proceedings, including the grave risk exception, and to expedite the resolution of the matter.
79. 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.
80. Case management should start as early as possible and be continuous at least until the decision on return or even, depending on the role of the courts at the enforcement stage and where appropriate under national laws and procedures, until the order has been enforced or otherwise implemented. It is the judge's responsibility to dispose of the proceedings instituted under the Convention as expeditiously as possible. This will include rendering the decision as soon as possible and taking all steps to ensure that orders made are in a form that ensures they take effect as soon as possible.
81. As part of effective case management, the court should, where appropriate under the relevant laws and procedures:
- 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 / through 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,¹¹⁶ where available, 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.

¹¹⁶ See the Emerging Guidance on Judicial Communications (*op. cit.* note 1).

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,¹¹⁷ the judge should, where appropriate under the relevant laws and procedures:

- 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 if it has been raised;
- 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 in procedures other than court proceedings.¹¹⁸ Depending on the relevant laws, procedures and practices of each State, mediation¹¹⁹ 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, and 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, where appropriate under the relevant laws and procedures:

- assess carefully, as is generally required, whether mediation or any other forms of alternative dispute resolution mechanisms are suitable.¹²⁰ Such assessment may 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;¹²¹

¹¹⁷ In many jurisdictions, a preliminary hearing is organised to address these issues.

¹¹⁸ *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 > under "Publications" then "Judges' Newsletter"), pp. 45-48.

¹¹⁹ On mediation in international child abduction cases, see: 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, see path indicated in note 6).

¹²⁰ 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.

¹²¹ 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

- 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.¹²² 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.

After a preliminary judicial assessment, the detailed assessment of suitability for mediation should be made by qualified mediators.

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, and where appropriate under the relevant laws and procedures, the court should in particular:
- 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 if appropriate, the Central Authority, and is able to participate in the proceedings in a manner which the court determines;¹²³
 - 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 or, where applicable, the public prosecutor;
 - determine the procedure, if not already set out in the legislation, by which the parties will view, exchange and serve documents, where applicable.

assertions in relation to domestic violence; some mediation programmes will not conduct mediation in cases which involve serious domestic violence. See Section 19.4 of the Country Profiles of Spain and the United States of America (*op. cit.* note 39). See also the Guide to Good Practice on Mediation (*op. cit.* note 119), Chapter 10, para. 266.

¹²² 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)", C&R 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)", C&R 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).

¹²³ 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 relevant laws and procedures of the States concerned.

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, depends upon the relevant national laws and practices.¹²⁴

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 in the jurisdictions that are also Party to the UNCRC, including where the Article 13(1)(b) exception is raised.¹²⁵
87. Whether and how a child is heard, and how his or her views are obtained and introduced before the court varies 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.¹²⁶
88. As part of effective case management, the court should, where appropriate under the relevant laws and procedures:

¹²⁴ See Art. 26, as well as the status table for the States that have taken a reservation to this Article, in accordance with Art. 42, and thus are not obliged to provide free legal assistance except insofar as provided by the relevant legal aid system. 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 6), Section 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. Information on legal representation and assistance in relation to return applications is included in the Country Profiles (*op. cit.*, note 39), Section 8.

¹²⁵ 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. The Regulation has been revised and replaced by Regulation (EU) No 2019/1111 of 25 June 2019 (see, *supra*, note 64). The recast strengthens the right of children to be provided with an opportunity to express their views even more.)

¹²⁶ 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).

- consider, where available and appropriate, the appointment of a separate representative for the child;¹²⁷
- 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 the process of obtaining the child's views 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 accepted by the court, and that the gathering of information and the production of evidence do not cause any undue delay. The good practice set out in this Section is intended to assist the court in achieving these goals.

f. Expert evidence

90. With respect to expert evidence in particular, its use should be limited to be consistent with the nature and narrow scope of the grave risk exception. As part of good case management practice, the court should, where appropriate under the relevant laws and procedures, and where appropriate in the specific case:
- 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 at 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, with the parties and 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;

¹²⁷ In the Netherlands, standing practice based on Art. 250 of Book 1 of the Civil Code 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 his or her maturity and the measure in which the child seems to feel free to express himself or herself. The same practice takes place in Germany, where a "Verfahrensbeistand" (guardian *ad litem*) is regularly appointed in proceedings under the 1980 Convention in accordance with Section 158 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

- 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, as appropriate, orally or in writing to ensure there is no undue delay;
 - where the court has the power to appoint the expert, 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 communications

91. In line with the relevant laws and procedures and where it is deemed appropriate in evaluating assertions of grave risk, courts can seek additional information through 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.¹²⁸ Courts may be able also to ask specifically for available information regarding the social background of the child through the Central Authorities. They must, however, avoid asking Central Authorities to undertake inquiries or investigations beyond their functions and powers (see Section IV).
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 cooperation between judges at the international level, so as to assist in 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.¹²⁹ If so, judges should contact their member of the IHNJ in

¹²⁸ See, e.g., *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 judgment respecting the conviction was 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 requested State that financial support paid by the requested State would continue to be available for the taking parent even if the taking parent were to be out of the jurisdiction for a maximum period of six months, thereby overcoming allegations by the taking parent that there was a lack of financial and other resources.

¹²⁹ See List of Members of the IHNJ, available on the HCCH website (path indicated in note 34).

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.¹³⁰ If appropriate under the relevant laws and procedures, Central Authorities may also be able to help facilitate direct judicial communications.

¹³⁰ See the Emerging Guidance on Judicial Communications (*op. cit.* note 1).



IV

Good practice for Central Authorities in Article 13(1)(b) cases

93. Any good practice shared in this Section should only be considered if permitted under the relevant laws and procedures of the individual Contracting Party. Moreover, the good practice shared in this Section should not be construed as imposing any mandatory obligations on the Central Authorities of Contracting Parties beyond those provided for in the Convention (Art. 7).

1. General duties of Central Authorities – cooperation 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 to 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 or a public prosecutor 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 a duty to cooperate with each other and to promote cooperation 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 cooperation may notably allow the Central Authorities to respond quickly to requests from the court to provide information on the availability of protective measures to protect the child from the grave risk, subject to the relevant laws. Where relevant, appropriate, and permissible by law, 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.¹³¹ This is important in defining what the role of the Central Authority is *not*: it is not for the Central Authority to evaluate the Article 13(1)(b) assertions or to act upon any evaluation of the assertions.¹³² The Central Authority must be careful

¹³¹ See "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) [...]"; see 2011 SC C&R No 13 & 2006 SC C&R No 1.1.3 (available on the HCCH website, path indicated in note 17).

¹³² Art. 27 of the Convention, which gives very limited discretion to the Central Authority not to accept an application for return, should not be interpreted therefore as allowing the Central Authority to refuse to accept an application for return on the basis of an allegation of grave risk.

therefore not to delay the proceedings by taking initiatives that are not needed, particularly in States where the Central Authority itself or an agent 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.

3. Good practice for the Central Authority of the requesting State

97. As a matter of good practice, where requested to do so and as appropriate under the relevant laws and procedures, the Central Authority of the requesting State should be prepared to:
- provide information about the laws and procedures in their own jurisdiction;
 - provide a report on the social background of the child, provided that it is relevant, appropriate, and permissible by law to share this information;
 - if requested, provide factual information by way of response, where relevant, appropriate, and permissible by law, about particular circumstances in the requesting State;
 - if requested, provide information regarding, and facilitate, the provision of administrative arrangements as may be necessary and appropriate to secure the safe return of the 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; if requested, 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 address the grave risk.

4. Good practice for the Central Authority of the requested State

98. As a matter of good practice, the Central Authority of the requested State should be prepared, where appropriate under the relevant laws and procedures, to:
- 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 the order for the child to return, mirror orders or other orders to protect the child from a 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

99. In order to acquire and enhance knowledge and understanding of 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

100. The Explanatory Report on the Convention¹³³ 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.¹³⁴

2. The Proceedings of the Fourteenth Session (1980)

101. The *Proceedings of the Fourteenth Session*,¹³⁵ 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.¹³⁶

3. The International Child Abduction Database (INCADAT)

102. INCADAT¹³⁷ 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 return proceedings, including Article 13(1)(b).¹³⁸

¹³³ *Op. cit.* note 10.

¹³⁴ See Art. 31 of the *Vienna Convention of 23 May 1969 on the Law of Treaties*.

¹³⁵ *Op. cit.* note 10.

¹³⁶ See Art. 32 of the *Vienna Convention of 23 May 1969 on the Law of Treaties*.

¹³⁷ Available at < www.incadat.com >.

¹³⁸ For an analysis of Art. 13(1)(b), see the HCCH website at < www.hcch.net > under "Child Abduction" then "The Convention" then "Case Law Analysis" then "Exceptions to Return" then "Grave Risk of Harm".

4. The Guides to Good Practice published by the HCCH

103. In addition to the current Guide, the HCCH has published other Guides to Good Practice¹³⁹ 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;
 - Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part V – Mediation; and
 - Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice.

5. The International Hague Network of Judges (IHNJ)

104. 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 jurisdiction and judges in other Contracting Parties, in respect, at least initially, of issues relevant to the 1980 Convention. The IHNJ facilitates communications and cooperation 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.¹⁴⁰

6. The Judges' Newsletter on International Child Protection

105. *The Judges' Newsletter* guarantees the circulation of information relating to judicial cooperation in the field of international protection of children. It was first published by the HCCH in 1999. Currently, the Newsletter is published biannually.¹⁴¹

¹³⁹ All these publications are available on the HCCH website at < www.hcch.net > under "Publications" then "Guides to Good Practice".

¹⁴⁰ See the List of Members of the IHNJ, available on the HCCH website (see path indicated in note 34).

¹⁴¹ 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 118). Vol. V of *The Judges' Newsletter* had as a special focus Art. 13(1)(b).

7. Documents prepared by national authorities

106. 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;¹⁴²
 - the National Domestic and Family Violence Bench Book of Australia;¹⁴³
 - the Argentinean Protocol for the Operation of the International Child Abduction Conventions;¹⁴⁴
 - the electronic guide published by the Office of the Attorney-General of Brazil.¹⁴⁵

¹⁴² The 1980 Hague Convention on the Civil Aspects of International Child Abduction, National Judicial Institute Electronic Bench Book, National Judicial Institute, updated May 2018.

¹⁴³ This bench book is available at: < <https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/> > (last consulted on 5 February 2020).

¹⁴⁴ *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 5 February 2020).

¹⁴⁵ This guide is available at < http://www.agu.gov.br/page/content/detail/id_conteudo/157035 > (last consulted on 5 February 2020).



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All the decisions cited in this Guide and referenced below are available on INCADAT¹⁴⁶ 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 two of these languages, or in all three languages. The individual INCADAT Reference Number indicated in square brackets allows easy access to a decision by entering this number in the relevant search field.

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¹⁴⁶ See Section V of this Guide.

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