

Compilation of relevant sections of the Guides to Good Practice under the 1980 Child Abduction Convention for the participants to the *Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Child Abduction Convention*

Forum participants may find it useful to have a compilation of all relevant paragraphs in the Guides to Good Practice (Part V and Part VI) under the 1980 Child Abduction Convention relating to domestic violence. However, the PB wishes to remind everyone of Conclusion & Recommendation (C&R) No 25 adopted at the Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention which highlights the importance of reading the Guides as a whole. C&R No 25 reads as follows:

“The SC welcomed the publication of the GGP on Article 13(1)(b) and encouraged its dissemination. The SC, underlining that the Guide must be read as whole, noted that, as set out in paragraph 33, “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”.

The full versions of the Guides can be found on the HCCH website using the links below:

- [Guide to Good Practice Child Abduction Convention: Part V – Mediation](#)
- [Guide to Good Practice Child Abduction Convention: Part VI – Article 13\(1\)\(b\)](#)

“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.¹

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,² when evaluating whether the grave risk exception has been established.

¹ [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.

² [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;³
- 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.”

Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b), pages 34-35

“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.⁴ 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

³ [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.

⁴ [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 [...]”

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.⁵

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.⁶ 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 Parties⁷ 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.⁸ 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

⁵ [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 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.

⁶ [61] Art. 11 of the 1996 Convention.

⁷ [62] Art. 23 of the 1996 Convention.

⁸ [63] Art. 26 of the 1996 Convention.

the situation, thus highlighting the importance of coordination between the competent authorities.⁹”

Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b), page 36

“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.¹⁰ 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,¹¹ 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.”

Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b), pages 37-39

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

[...]

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.¹² In some situations, the grave risk to the child may also be based on

⁹ [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.

¹⁰ [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”.

¹¹ [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”.

¹² [70] See, e.g., *Miltiados 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.

potential harm to the taking parent by the left-behind parent upon return,¹³ 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.¹⁴ 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.¹⁵

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

¹³ [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".

¹⁴ [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.

¹⁵ [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".

risk.¹⁶ Where legal protection and police and social services are available in the State of habitual residence of the child to assist victims of domestic violence, for example, courts have ordered the return of the child.¹⁷ In some instances, however, courts may deem such legal protection and services to be insufficient to protect the child from the grave risk,¹⁸ for example where the left-behind parent has repeatedly violated protection orders,¹⁹ which may put the child at grave risk of physical or psychological harm, or given the extent of psychological vulnerability of the child.²⁰

¹⁶ [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 [...] 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.

¹⁷ [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).

¹⁸ [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 “[i]t 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.

¹⁹ [77] See, e.g., *Achakzad v. Zemaryalai* [2011] W.D.F.L. 2, 20 July 2010, Ontario Court of Justice (Canada) [INCADAT Reference: HC/E/CA 1115] where the Court 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.

²⁰ [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 posttraumatic 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

“2. Good case management practices

[...]

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.²¹ Depending on the relevant laws, procedures and practices of each State, mediation²² 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.²³ 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;²⁴
- encourage the parties to consider mediation or other forms of alternative dispute resolution mechanisms;

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”.

²¹ [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.

²² [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).

²³ [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.

²⁴ [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 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.

– 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.²⁵ 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.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 11

“Domestic violence and child abuse

The term ‘domestic violence’ may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical or psychological; it may be directed towards the child (‘child abuse’) and / or towards the partner (sometimes referred to as ‘spousal abuse’) and / or other family members.

This Guide uses the term ‘domestic violence’, unless stated otherwise, in the broad sense outlined above. Regarding domestic violence against a child, the Guide will distinguish between indirect and direct violence. The first is domestic violence towards a parent or other members of the household, which affects the child, and the second is domestic violence towards the child. Only the latter will be referred to as ‘child abuse’ in this Guide.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 23

“39 Even where both parties agree to mediation, attention needs to be paid to specific circumstances such as possible indications of domestic violence. The very fact of a joint meeting between the parties in the course of a mediation session might put the physical or psychological integrity of one of the parties, and indeed that of the mediator, at risk. Also, consideration may have to be given to the possibility that drug or alcohol abuse by one of the parties may result in that person’s inability to protect his or her interests.

40 Assessment of cases for suitability for mediation is an essential tool to identify cases of special risk. Potential mediation cases should be screened for the presence of

²⁵ [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).

domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation. Where mediation in a domestic violence case is still considered feasible, necessary safeguards need to be taken to protect the security of those affected. Also, attention needs to be paid to differences in bargaining power, whether due to domestic violence or other circumstances or simply resulting from the personalities of the parties.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 38

“**100** Generally, the mediator must possess the socio-psychological and legal knowledge necessary for conducting mediation in high conflict family cases. The mediator must have adequate training in assessing the suitability of an individual case for mediation. He or she must be able to assess the parties’ capacity to mediate, e.g., recognise mental impairment and language difficulties, and must be able to identify patterns of domestic abuse and child abuse and to draw the necessary conclusions.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, pages 47-48

“**148** Before commencing mediation in international child abduction cases, an initial screening should be conducted to assess the suitability of the individual case for mediation. This helps to avoid delays that can be caused by attempting mediation in cases poorly suited to it. At the same time, initial screening helps to identify cases that carry special risks, such as cases involving domestic violence or alcohol or drug abuse, where either special precautions must be taken or mediation might not be appropriate at all.

[...]

151 Among the many issues that may affect the suitability of an international child abduction case for mediation, are:

- willingness of the parties to mediate,
- whether the views of one or both of the parties are too polarised for mediation,
- indications of domestic violence and its degree,²⁶
- incapacity resulting from alcohol or drug abuse,
- other indications of a severe imbalance in bargaining powers,
- indications of child abuse.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 52

“**174** Long-distance mediation might also be of interest for cases where there are allegations of domestic violence and one of the parties indicates that, though wishing to

²⁶ [191] In cases involving alleged domestic violence for example, some mediators generally refuse to conduct mediation. Others may consider a case with alleged domestic violence suitable for mediation, depending on the alleged degree of violence and on the protective measures available to avoid any risks associated with the mediation process, see Chapter 10 below.

mediate, the prospect of being in the same room with the other party would be very difficult.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 63

“**221** The decision on whether to use direct or indirect mediation, or a combination of the two, will depend on the circumstances of the case, such as the costs related to geographical location, and possible allegations of domestic violence (see Chapter 10), etc. The decision is also closely linked to that of determining the place of mediation, once a face-to-face meeting has been identified as the way forward (see above, section 4.4).”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, page 69

“**250** Whether and the means by which the voice of the child can be introduced in the mediation process will to some extent depend on the parents’ agreement to a certain procedure. This is due to the fact that in most jurisdictions mediators do not have interrogative powers, i.e., in contrast to judges, mediators are generally not in a position to summon the child to a hearing or to order an expert interview of the child and a report being drawn up. The mediator can only draw the parents’ attention to the importance of hearing the child’s voice and indicate, where applicable, that the court requested to render the agreement legally binding and enforceable may examine whether the child’s views have been sufficiently taken into account. The mediator should recommend a procedure of introducing the child’s voice into mediation taking into consideration the circumstances of the individual case (e.g., the age of the children, the risk of re-abduction, whether there is a history of domestic violence, etc.). One possible option is the direct participation of the child in one or more of the mediation sessions. Another possibility is arranging for a separate interview of the child and reporting back to the parents.²⁸⁵ However, the person interviewing the child needs to have specialised training,²⁸⁶ to guarantee that the consultation with the child is conducted in a ‘supportive, and developmentally appropriate manner’ and to ensure ‘that the style of consultation avoids and removes any burden of decision-making from the child’.”

Guide to Good Practice Child Abduction Convention: Part V – Mediation, pages 72-77

“10 Mediation and accusations of domestic violence

261 Domestic violence, unfortunately, is a widespread phenomenon that can take many forms: it can consist of physical or psychological abuse;²⁷ it can be directed towards the

²⁷ [299] Physical and psychological abuse can extend to sexual, emotional and even financial abuse. Domestic violence is ‘a complex and culturally nuanced phenomenon’ and ‘cuts across gender, race, ethnicity, age and socio-economic lines’, see J. Alanen, ‘When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense’, 40 U. Miami Inter-Am. L. Rev. 49 (2008-2009), p. 64.

child ('child abuse')²⁸ and / or towards the partner;²⁹ and it can range from a single isolated incident to being part of a sustained and recurring pattern. Where domestic violence is recurring, a typical cycle of violence can consist of: (1) a tension-building phase with minor assaults; (2) an acute incident with an escalation of violence; and (3) a reconciliation phase, in which the perpetrator often begs for forgiveness and promises never to be violent again while the victim tries to believe the assurances, sometimes even feeling responsible for the abuser's psychological well-being.³⁰ It is a characteristic of recurring violence that the victim feels trapped in the cycle of violence and helpless, believing that the situation cannot change and afraid to leave the perpetrator for fear of retaliatory violence.³¹

262 In international child abduction cases, allegations of domestic violence are not rare. Some of these accusations may prove to be unfounded but others are legitimate and may be the reason why the taking parent left the country with the child. Domestic violence is a very sensitive issue and needs to be dealt with accordingly.

263 Views differ widely as to whether family disputes involving domestic violence are suitable for mediation. Some experts consider mediation in such cases generally inappropriate, for a number of reasons. They point out that mediation may put the victim at risk. Based on the consideration that the moment of separation from the abuser is the most dangerous time for the victim, they argue that a possible face-to-face contact with the abuser at that time carries the risk of further violence or traumatisation.³² Furthermore, it is reasoned that mediation as a means of solving disputes amicably is ineffective in cases involving domestic violence, since mediation is based on co-operation³³ and its success depends on the parties having equal bargaining powers. It is argued that, since victims of domestic violence often have difficulties in advocating their own interests when facing the abuser, mediation is bound to lead to unfair agreements.³⁴ Some of those opposed to the use of mediation in domestic violence cases point out that mediation would legitimise domestic violence instead of punishing abusers.

264 By contrast, many experts are against a general exclusion of mediation in cases involving domestic violence, provided that well-trained professionals knowledgeable in the subject matter are involved.³⁵ They point to the fact that cases of domestic violence differ significantly, and that a case-by-case assessment is key: some cases may be amenable to a mediation process while some should clearly be dealt with by the courts.³⁶

²⁸ [300] Regarding violence against the child, the Guide distinguishes direct from indirect violence. Direct violence is defined as violence directed towards the child and the latter is violence directed against a parent or another member of the household, which affects the child. See also the definition of domestic violence in the Terminology section above and at para. 270 below.

²⁹ [301] In the majority of cases, the woman in a couple is the victim of domestic violence; see, e.g., 'Domestic Violence Parliamentary Report of the United Kingdom', published in June 2008, Summary in IFL 2008, pp. 136, 137, 'the vast majority of serious and recurring violence was perpetrated by men towards women'; see also H. Joyce (op. cit. note 228), p. 449, 'Women are the victims in 95 percent of reported domestic violence incidents.'

³⁰ [302] Ibid., pp. 499, 450.

³¹ [303] Ibid.

³² [304] For further references regarding this view, see *ibid.*, p. 452.

³³ [305] For further references regarding this view, see *ibid.*

³⁴ [306] For further references regarding this view, see *ibid.*, p. 451.

³⁵ [307] See, for example, the 2006 Report on the reunite Mediation Pilot Scheme (op. cit. note 97), p. 53.

³⁶ [308] See, with further references, N. ver Steegh (op. cit. note 8), p. 665.

Where a victim has received sufficient information to make an informed choice, the victim's wish to participate in a process that could be beneficial – if safe – should be respected.³⁷ Some authors have stated that a victim's involvement in an appropriate and well-run mediation process can be empowering for that person.³⁸ Concerns about victims' safety in the course of mediation are met with the counter-argument that mediation does not necessarily have to involve in-person mediation sessions, but can also be conducted as a telephone conference or as shuttle mediation.

265 In relation to the mediation process, the argument is that there are many ways in which it can be adapted to protect and empower the victim. For example, the rules set out for the mediation session can prohibit degrading behaviour combined with a provision for the mediation's immediate termination if these rules are not respected. Mediation professionals should be aware of rehabilitation programmes and other resources that might be available for an abusive parent.

266 The different views are also reflected in legislation. In some jurisdictions statutory provisions explicitly bar the use of mediation in family disputes involving children where there is evidence of a 'history' of domestic violence, or make mediation in such cases subject to certain conditions.³⁹

267 It should be emphasised that the domestic violence itself often constitutes a serious offence and is not, of course, the subject of the mediation; at issue in mediation are such matters as child custody and access, support stipulations, and other family organisation matters.⁴⁰

10.1 Treatment of domestic violence in Hague return proceedings

268 Before addressing the question of mediation in child abduction cases involving accusations of domestic violence, it is important to say a few words on domestic violence accusations in Hague return proceedings in general.

269 Where a child abduction has occurred, Central Authorities are under the obligation 'to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures' in accordance with Article 7(2) b) of the 1980 Hague Child Abduction Convention. Thus, if there is a risk that the taking parent could harm the child, the Central Authority could, depending on the powers given to it by the relevant Contracting State, take provisional measures or cause the competent authority to take such measures. This provision works hand in hand with Article 11 of the 1996 Hague Child Protection Convention which, in cases of urgency, confers jurisdiction to take necessary protective measures on the authorities of the Contracting State where the child is present.

270 In the majority of cases, however, accusations of domestic violence are not made against the taking parent but against the left-behind parent.⁴¹ An immediate safety risk for

³⁷ [309] See, with further references, *ibid.*

³⁸ [310] J. Alanen (*op. cit.* note 299), p. 69, note 69.

³⁹ [311] See also H. Joyce (*op. cit.* note 228), pp. 459 et seq.

⁴⁰ [312] J. Alanen (*op. cit.* note 299), pp. 87-88, note 151.

⁴¹ [313] Art. 7(2) b) of the 1980 Hague Child Abduction Convention was drawn up mainly with a view to avoiding another removal of the child. See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), para. 91.

the taking parent and / or the child will be met by the authorities in the requested State in accordance with that State's procedural law. Measures may for example be taken by the Central Authority and / or the court to avoid revealing the current whereabouts of the victim of domestic violence to the other parent, or to otherwise ensure that an unaccompanied meeting of the parties does not occur.⁴²

271 In the course of Hague return proceedings, domestic violence accusations play a role when it comes to deciding whether an exception to the child's return in accordance with Article 13(1) b) of the 1980 Hague Child Abduction Convention can be established. According to that Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if it is established that 'there is a grave risk that (the child's) return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. Not just child abuse, but also domestic violence against the taking parent which indirectly affects the child, may be the cause of such a risk. However the exceptions of Article 13, in line with the objectives of the 1980 Convention, are construed narrowly.⁴³ Whether the conditions for the grave risk exception are fulfilled in a case with domestic violence allegations, will, besides the circumstances of the individual case, also depend on the ability to arrange for protective measures to ensure the safe return⁴⁴ of the child and possibly the taking parent to the State of his / her habitual residence.

272 Even though the 1980 Hague Child Abduction Convention deals with the return of the child, the safe return of the taking parent will often be a matter of concern for the court seised with the Hague return proceedings, particularly where the taking parent is the sole primary carer of the child. Arranging for the safe return of the taking parent can be a necessary condition to ordering the child's return, if the separation of parent and child due to the inability of the taking parent to return would expose the child to a grave risk of harm. See also above section 2.8 regarding criminal proceedings as an obstacle to the taking parent's return.

273 Where it is established that the return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, the court seised with the return application is not obligated to order the return of the

⁴² [314] See also para. 277 below.

⁴³ [315] See E. Pérez-Vera (ibid.), p. 434, para. 34; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission (op. cit. note 34), No 4.3, p. 12, and the Conclusions and Recommendations of the Fifth Meeting of the Special Commission (id.), No 1.4.2, p. 8.

⁴⁴ [316] Measures to ensure the safe return can include mirror orders, a safe harbour order or other protective measures. See further the Guide to Good Practice on Enforcement (op. cit. note 23), Chapter 9, pp. 35 et seq.; see also J.D. Garbolino, *Handling Hague Convention Cases in U.S. Courts* (3rd ed.), Nevada 2000, pp. 79 et seq.

child.⁴⁵ A non-return decision will, in most cases, ultimately result in a shift of jurisdiction⁴⁶ on custody issues to the State of the child's new habitual residence.⁴⁷

274 Dealing with domestic violence accusations in Hague return proceedings is a very sensitive issue and cannot, particularly in view of the many facets of cases in which domestic violence is alleged, be generalised. The Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions highlighted the autonomy of the court seised with the return proceedings regarding 'the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) b)), including allegations of domestic violence, (...) having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child'.⁴⁸ At the same time, the Special Commission suggested measures to promote greater consistency in the interpretation and application of Article 13(1) b).⁴⁹ Following this suggestion the Council decided in April 2012 'to establish a Working Group, composed of a broad range of experts, including judges, Central Authorities and cross-disciplinary experts, to develop a Guide to Good Practice on the interpretation and application of Article 13(1) b) of the 1980 Child Abduction Convention, with a component to provide guidance specifically directed to judicial authorities'.⁵⁰

10.2 Safeguards in mediation / Protection of the vulnerable party

- The use of mediation in cases where there is an issue of domestic violence should be considered carefully. Adequate training in assessing the suitability of a case for mediation is necessary.
- Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members or the mediator. The choice between direct and indirect mediation, the mediation venue and the mediation model and method must be adapted to the circumstances of the case.

⁴⁵ [317] The Brussels Ila Regulation, which works hand in hand with the 1980 Hague Child Abduction Convention, contains the additional rule in Art. 11(4) that '(a) court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.

⁴⁶ [318] Regarding questions of jurisdiction, see Chapter 13 below; see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention (op. cit. note 223) regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention.

⁴⁷ [319] According to Art. 11(8) of the Brussels Ila Regulation, the child might have to be returned despite the non-return decision in the event of 'any subsequent judgment (requiring) the return of the child issued by a court having jurisdiction under this Regulation'.

⁴⁸ [320] See the Conclusions and Recommendations adopted by Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012) (available at < www.hcch.net > under 'Child Abduction Section'), Recommendation No 80.

⁴⁹ [321] Ibid., Recommendations Nos 81 and 82: '81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) b) including, but not limited to, allegations of domestic and family violence. 82. The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) b), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.'

⁵⁰ [322] See Conclusions and Recommendations adopted by the 2012 Council (op. cit. note 39), Recommendation No 6.

- Where mediation is considered suitable in a case involving an issue of domestic violence, it needs to be conducted by experienced mediators specially trained to mediate in such circumstances.

275 The suitability of mediation for an international child abduction case in which accusations of domestic violence are raised against one parent needs to be given careful consideration. The person assessing whether the case is suitable for mediation needs to be trained accordingly.⁵¹ Even where no accusations of domestic violence have been made, an assessment of the suitability of the case for mediation needs to take into consideration that domestic violence may nevertheless be involved in a given case.

276 The following factors may be of particular relevance when assessing the suitability of a specific case for the available mediation service:⁵² the severity and frequency of the domestic violence;⁵³ the target of the domestic violence; the pattern of violence;⁵⁴ the parties' physical and mental health;⁵⁵ the likely response of the primary perpetrator;⁵⁶ the availability of mediation specifically designed for domestic violence cases; how the mediation service available can address safety issues; whether the parties are represented.⁵⁷ It should also be emphasised that if, in the course of initial screening or later in the mediation process, a mediator learns of circumstances that suggest a criminal offence (e.g., sexual abuse of a child), he or she will in many jurisdictions be under an obligation to report to the authorities, for example the police and child protection agencies. This obligation may exist despite the principle of confidentiality of mediation.⁵⁸

277 Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members and the mediator. A face-to-face meeting, be it in the course of the mediation or as a preparatory meeting, should only be convened where safety can be ensured. Depending on the circumstances of the case, the assistance of State authorities might be necessary.⁵⁹ In other cases, avoiding the risk of the parties meeting unaccompanied may be sufficient. In such cases for example, the chance for the parties to inadvertently meet on their way to the mediation venue should be eliminated; thus separate arrivals and departures should be arranged.⁶⁰ Further measures may include an emergency button in the room where the mediation session is to take place. In the course of the mediation session, the parties should never be left alone. In this regard, the use of co-mediation may be particularly helpful. The presence of

⁵¹ [323] Regarding the importance of skilled screening procedures, see L. Parkinson, *Family Mediation – Appropriate Dispute Resolution in a new family justice system*, 2nd ed., Family Law 2011, Chapter 3, pp. 76 et seq.

⁵² [324] See also Art. 48 of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011, available at < <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> > (last consulted 16 June 2012), which requests State parties to 'take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention'.

⁵³ [325] See, with further references, N. ver Steegh (op. cit. note 8), p. 665.

⁵⁴ [326] Ibid.

⁵⁵ [327] Ibid.

⁵⁶ [328] Ibid.

⁵⁷ [329] Ibid.

⁵⁸ [330] Regarding the exceptions to the principle of confidentiality, see para. 211 above.

⁵⁹ [331] The more severe the circumstances, the less likely is the case's general suitability for mediation.

⁶⁰ [332] See also L. Parkinson (loc. cit. note 323).

two experienced mediators will be reassuring for the victim and may help to defuse any tensions. Should one mediator have to leave the session for whatever reason, this also ensures an experienced mediator will remain in the parties' presence. The presence of other persons, such as a lawyer or provider of support, may also be considered where appropriate.⁶¹

278 Where the available mediation service is not equipped to eliminate the safety risks associated with a face-to-face meeting, or if such a meeting proves inappropriate for other reasons, the use of indirect mediation through separate meetings between the mediator with each party (so-called caucus meetings) or the use of modern technology such as a video link or Internet communications may be considered.

279 Once safeguards have been established against the risk of harm in mediation, measures must be taken to guarantee that mediation is not prejudiced by unequal bargaining powers.⁶² Mediation needs to be conducted by experienced and specially trained mediators; mediators need to adapt the mediation process to the challenges of each individual case. Safety issues associated with implementing the mediated agreement at a later stage need to be given due consideration.

280 In general, close co-operation with the judicial and administrative authorities is conducive to avoiding safety risks.⁶³

281 Mediators should in general pay attention to and need to be able to recognise⁶⁴ signs of domestic violence and / or risks of future violence, including where no accusations have been made by one of the parties, and must be prepared to take the necessary precautions and measures.⁶⁵

10.3 Information on protective measures

- Information should be available regarding the possible protective measures for the parent and child in the jurisdictions concerned.

⁶¹ [333] See, with further references, N. ver Steegh (op. cit. note 8), p. 666.

⁶² [334] See also Council of Europe Recommendation No R (98) 1 on family mediation (supra note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

⁶³ [335] See sections 19.4 g) and h) of the Country Profiles under the 1980 Convention (supra note 121) for information on the availability of certain specific safeguards.

⁶⁴ [336] Regarding the different types of violence and abuse a mediator should be able to recognise and distinguish, for example, see L. Parkinson (loc. cit. note 323).

⁶⁵ [337] See also Council of Europe Recommendation No R (98) 1 on family mediation (supra note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

282 Information regarding the possible protective measures which may be taken for the parent and the child in the State of the child’s pre-abduction residence, as well as in the State to which the child has been abducted, should be available to inform the discussion in the mediation session. The provision of this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation.⁶⁶ In addition, the Country Profiles under the 1980 Hague Child Abduction Convention can be a helpful source of information regarding available protective measures.⁶⁷”

⁶⁶ [338] On the role of Central Contact Points for international family mediation in facilitating the provision of information, see section 4.1 above.

⁶⁷ [339] See section 11.2 of the Country Profiles under the 1980 Convention (supra note 121).