

The Article 13(b) Guide to Good Practice

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In 2012, State Parties to the Hague Convention on the Civil Aspects of International Child Abduction recommended the creation of a Guide to Good Practice (Guide) on the article 13(b) “grave risk” defense. This Guide will join previous guides created by the Permanent Bureau to facilitate the Convention’s implementation, although this newest Guide will have a decisively different emphasis. Earlier guides were aimed at *preventing and remedying* abduction,¹ and the new Guide is concerned with an *exception* to States’ obligation to return abducted children.

This new Guide should be of interest to those who work with survivors of domestic violence. “One of the principal reasons” the Guide was drafted was, according to Lady Brenda Hale (President of the UK Supreme Court), “to protect victims of domestic violence and abuse from the hard choice of returning to a place where they do not feel safe and losing their children.”²

This article offers my assessment of the Guide. My opinion rests on my educated guess about the Guide’s content, as the Guide has not been finally approved yet. Only Permanent Bureau staff and Member States have seen the latest version. However, my analysis is grounded in the fact that I attended several of the Special Sessions leading up to the Guide, read several drafts of the Guide, participated in the public comment process, and reviewed the State Department’s last set of comments.

An Unexceptional Resource Born of Caution and Compromise

In my opinion, the Guide will be an unexceptional resource because it is the product of caution and compromise, two conservative forces. Member States have always been cautious about article 13(b). At the Third,

Fourth, and Fifth Special Commission meetings,³ Member States concluded that article 13(b) must be interpreted “restrictively” and only applied in “exceptional” cases.⁴ Despite advocates and scholars urging,⁵ Member States refused to grapple with the topic of domestic violence until the Permanent Bureau issued a report in 2011 on domestic violence and article 13(b).⁶ Only then did Member States agree, consistent with the Permanent Bureau’s recommendation, that there should be “a Working Group composed of judges, Central Authorities and cross-disciplinary experts” to craft a guide “to promote consistency in the interpretation and application of Article 13(1)(b) including, but not limited to, allegations of domestic and family violence.”⁷ The final Guide will undoubtedly reflect this caution. The 2019 draft reiterated that the article 13(b) defense was for “exceptional circumstances,” “must be applied restrictively,” and should not become “a full ‘best interest assessment.’”⁸

The Guide will also reflect the many compromises that were necessary to move the project forward. The project has taken more than seven years, and is not yet finished at the time of press. According to a member of the Working Group, delays were due, in part, to “the very real difficulty in achieving consensus amongst representatives” from the different legal systems, and “the intractable nature of the problem we are trying to address.”⁹ Disagreements were not confined to the Working Group, but also emerged among Member States. When the first draft of the Guide to Good Practice was discussed at the Seventh Meeting of the Special Commission in October 2017,¹⁰ many State Parties were not ready to vote. Instead, they invited the Working Group “to continue its work with a view to the finalization of the Guide.”¹¹ The Working Group’s subsequent draft is much shorter. Consensus appears to have been reached by removing points of contention from the Guide. The most recent draft, for example, is only 42 pages compared to 121 pages of text and annexes in the original.¹²

Even this shorter second draft has not received all Member States’ approval. A handful of countries, including the U.S. State Department, have sent in comments.¹³ In March 2019, the Council on General Affairs and Policy did not approve the Guide,¹⁴ but set forth its plan for the Guide going forward:

Council asked that the draft Guide be re-circulated to Members to provide additional comments within a two-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. The draft Guide would then be revised by the Working Group. The finalised draft Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Guide would be taken to be approved; in the case of one or more objections, the draft Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections.¹⁵

Thin in Substance

This backdrop of caution and compromise means the final Guide will be thin in substance as well as pages. On the one hand, items that might have made the Guide very helpful to survivors, like an entire appendix on the dynamics and international norms surrounding domestic violence,¹⁶ have been removed. The 2019 draft no longer informs readers (and neither will the final Guide) about post-separation violence¹⁷ or that “a range of studies have found a correlation between instances of spousal abuse and child abuse.”¹⁸ The 2019 draft even omits an admonishment that Central Authorities should not share the location of the child if sharing that information might put the child’s or parent’s safety at risk.¹⁹ On the other hand, the final Guide is likely to

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be free of some statements that could have undermined survivors' cases in the U.S. For example, the 2019 draft no longer cites "anecdotal[]" evidence that allegations of domestic violence may be on the increase as a "litigation or delay tactic"²⁰ Gone are categorical statements that all children suffer detrimental effects from abduction;²¹ obviously such statements disregarded the benefits to children from being removed from an abusive household.

Unfortunately, the Guide will leave out many issues that it should have addressed because they were too "controversial."²² Information about the dynamics of domestic violence is included in this category.²³ Also, in this category is a statement that judges hearing these cases should have training on domestic violence. It is especially disappointing that the Guide will not take a position on the appropriate burden of proof for adjudicating the defense. The U.S. is one of the only countries that uses a clear-and-convincing-evidence standard; most countries use the more appropriate preponderance-of-the-evidence standard. It is also unfortunate that the Guide does not elaborate on how the return of a child after the caregiver's escape from domestic violence can place "the child in an intolerable situation."²⁴

The Advantages and Disadvantages

Despite its many limitations, the Guide should have one important effect that may justify the entire project. It should stop U.S. courts from ignoring domestic violence because the abuser did not physically abuse the child. Courts have repeatedly done this, although this problem has decreased over time. The Guide is expected to say clearly that domestic violence toward a parent can be sufficient to establish the article 13(b) defense even if the child is not abused directly. The Guide will make evident that an article 13(b) defense can exist when a child is exposed to domestic violence or when the child's caregiver cannot give care because of the domestic violence.²⁵

The Guide, however, may have a downside that could undermine this achievement and make the adjudication

of these cases even worse for domestic violence victims who abduct their children. Most worrisome is the Guide's discussion of protective measures. The 2017 and 2019 drafts tell courts to consider protective measures as a way to mitigate a grave risk so that a child can be returned.²⁶ "Protective measures" include "a broad range of existing services, assistance and support," such as shelters, the criminal justice system's response, conditions to be satisfied by the left-behind parent prior to return, undertakings, and mirror orders.²⁷ The Guide makes clear, however, that courts must evaluate not only the "availability," but also the "adequacy and effectiveness" of such measures.²⁸

This emphasis on protective measures may seem innocuous at first

"adequacy and effectiveness." The 2019 Guide has some frightening guidance in this regard. It suggests that legal protection may be insufficient when the left-behind parent has "repeatedly" violated protection orders.³³ One certainly hopes this does not become a standard, as any violation of a protection order should be sufficient to establish the insufficiency of legal protection. No judge is clairvoyant and can know how protective measures will actually work. There are way too many stories of judges in Hague cases who have miscalculated the risks; survivors and their children have paid the price. Because a court can never assure the safety of the accompanying parent and the child, the Guide's recommended approach undermines

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glance, but it is not. Not all courts in the U.S. believe protective measures should be considered.²⁹ The Convention and the commentary say nothing of them.³⁰ It puts an additional burden on a survivor who is already disadvantaged in many ways in the litigation, including by the higher burden of proof. Moreover, there is a big difference between protective measures in theory and protective measures in practice.³¹ An assessment of the "adequacy and effectiveness" of protective measures is fraught with peril. Not only is it difficult to produce evidence to show future ineffectiveness, but much of the information on protective measures will come from the central authority or a network judge in the child's habitual residence.³² Rarely will these people indict their own country's ability to protect domestic violence victims and children, for to do so is to admit that their country violates public international law. Rarely will a judge in the U.S. distrust the assurances given by the representatives from another country, as mutual trust is the ethos of the Convention.

Most important, the batterer is unpredictable and this reality undermines the judge's ability to assess

the reason for the article 13(b) exception: the Convention places a "higher premium on children's safety than on their return."³⁴

Another Arrow in the Attorneys' Quivers

What will this new Guide mean for survivors who face a petition for the return of their child? The language in the Guide will become arrows in the attorneys' quivers. Yet, importantly, despite the seven years of fussing, the Guide is not binding on courts or central authorities.³⁵ Nor is it "intended to direct the interpretation of Article 13(1)(b) in individual cases."³⁶ Consequently, attorneys should encourage courts to follow it when it aids survivors, and to disregard it when it disadvantages survivors. The Guide itself encourages this flexibility in more than one place. For example, with respect to protective measures, the 2019 draft Guide says they should be examined "when considered necessary and appropriate."³⁷ Survivors' attorneys should argue that they are never appropriate when domestic violence exists. They should cite the U.S. State

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Department's last set of comments to the Permanent Bureau, as it expressed concern about "an overemphasis on the value of protective measures," in part because judges may erroneously focus on the "general availability" of protective measures rather than their "accessibility" to particular parents and children, and in part because the State Department does not like drawn out undertakings.³⁸

When the final Guide emerges, practitioners may still find the previous drafts useful. The last set of comments from the State Department asked the Working Group to remove all case law citations from the final Guide.³⁹ Consequently, the final Guide may contain no, or fewer, case law citations. That change should be beneficial since the earlier drafts cited to cases that could undermine survivors' attempt to use the defense and failed to cite to some of the most important U.S. cases that could help survivors. However, that recommendation, if followed, will eliminate some helpful citations that attorneys might otherwise overlook. For instance, the U.S. seeks to eliminate the provisions in the draft Guide that suggest the article 13(b) defense may exist when the taking parent is unable to return with the child due to immigration obstacles. The 2019 draft cites cases that support this position.⁴⁰ While most of the draft's cases are cited in INCADAT (the Hague Permanent Bureau's tool for finding relevant case-law), not all cited cases are found there. Similarly, litigators might find other gems in the older drafts. For instance, in the 2017 draft, the Work Group conceded that the approach to protective measures was not universal.⁴¹

Its Utility Will Be Determined With Time

Overall, the purpose of the Guide is admirable: to "promote, at the global level, the proper and consistent application of the grave risk exception."⁴² The Guide should make a difference on the most obvious problem in the U.S., that is, the incorrect legal interpretation of article 13(b). It will now be clear that domestic violence is relevant to the article 13(b) defense even if the child is not physically abused.

Time will tell if the courts "application" of the defense will improve and if domestic violence victims who abduct their children will be more successful in using the defense. I worry about the emphasis on "protective measures," the Guide's caveats, its enormous silences (including a failure to address misconceptions about domestic violence), and the language about article 13(b)'s "restrictive" interpretation. I hope my worry is misplaced.

End Notes

1. The other Guides to Good Practice were on the topics of Central Authority practice, Implementing Measures, Preventive Measures, Enforcement, and Mediation. See <https://www.hcch.net/en/publications-and-studies/publications2/guides-to-good-practice>.

2. Hale, Brenda (Aug. 13, 2017). Taking Flight—Domestic Violence and Child Abduction. *Current Legal Problems*, 70(1), 3-16. Available at <https://academic.oup.com/clp/article/70/1/3/4082282>.

3. Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction ¶¶ 58-59 (March 17-21, 1997). Available at <https://assets.hcch.net/upload/abduc97e.pdf>.

4. 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 ¶ 4.3 (March 22-28, 2001); 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 ¶ 1.4.2. (October 30 – November 9, 2006). Available at <https://www.fjc.gov/sites/default/files/2016?COnclusions%20and%20Recommendations%20the%20Fourth%20Special%20Commission%20E2%80%93202001.pdf>. Also available at https://assets.hcch.net/upload/concl28sc5_e.pdf.

5. *Domestic and Family Violence and The Article 13 "Grave Risk" Exception in The Operation of The Hague Convention Of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper*, Prelim. Doc. No 9 of May 2011 for the attention of the Special Commission of June 2011 on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, at 3.

6. *Id.*

7. Conclusions and Recommendations (Part II) of the Sixth Meeting of the Special Commission to Review the Practical Operation of the 1980 and 1996 Hague Conventions ¶¶ 81, 82 (January 25-13, 2012). At the first part of the Sixth meeting, Member States agreed that "regard should be given to the impact on a child of violence committed by one parent against the other" when considering "the protection of the child." Conclusions and Recommendations (Part I) of the Sixth Meeting of the Special Commission to Review the Practical Operation of the 1980 and 1996 Hague Conventions ¶42 (June 1-10, 2011). The Council on General Affairs and Policy of the Hague Conference on Private International Law authorized the project in April 2012. See Council on General Affairs and Policy of the Conference, Conclusions and Recommendations Adopted by the Council ¶6 (April 17-20, 2012). Available at <https://assets.hcch.net/docs/179adaaa-9417-40dd-9ee3-87de105dc3af.pdf>.

8. *Revised Draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention*, Prel. Doc. No. 7, Council on General Affairs and Policy of the Conference ¶¶ 25-28. (Mar. 2019) (hereinafter "2019 Draft Guide"). Available at <https://assets.hcch.net/docs/1e6f828a-4120-47b7-83ac-a1185277128.pdf>.

9. Hale, *supra* note 2, at 11.

10. *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prel. Doc. No. 3 of June 2017, for the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, Oct. 2017 (hereinafter "2017 Draft Guide"). Available at <https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf>.

11. Conclusions and Recommendations of the Seventh Meeting of the Special Commission to Review the Practical Operation of the 1980 and 1996 Hague Conventions ¶54 (Oct. 10-17, 2017). Available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>.

12. Compare 2019 Draft Guide, *supra* note 8, with 2017 Draft Guide, *supra* note 10, Annex 3.

13. General Comments of the United States of American on the 13(b) Guide to Good Practice (undated, on file with author) (hereafter "U.S. General Comments").

14. *6th Meeting of the Working Group on the draft Guide to Good Practice on Article 13(1)(b)* (September 27, 2018). Available at <https://www.hcch.net/de/news-archive/details/?varevent=639>.

15. Conclusions and Recommendations, Council on General Affairs and Policy (March 5-8, 2019), ¶ 24. Available at <https://assets.hcch.net/docs/c4af61a8-d8bf-400e-9deb-afcd87ab4a56.pdf>.

16. 2017 Draft Guide, *supra* note 10, Annex 3.

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17. *Id.* at ¶ 277; *Id.* at Annex 3 ¶ 17.
 18. *Id.* at ¶ 274.
 19. *Id.* at ¶ 221.
 20. *Id.* at Annex 3, p. 9 ¶ 5.
 21. *Id.* at 9 n.39.
 22. Hale, *supra* note 2, at 14-15.
 23. *Id.*
 24. *See, e.g., Harris v. Harris*, [2010] Fam. CAFC 221 (2010) FLC 93-454. Available in INCADAT, HC/E/AU. *See* <https://www.incadat.com/en/case/1119>.
 25. *See* 2019 Draft Guide, *supra* note 8, ¶¶ 33, 55.
 26. *See Id.* ¶ 57; 2017 Draft Guide, *supra* note 10, pp. 25-29.
 27. 2019 Draft Guide, *supra* note 8, ¶ 45.
 28. *See Id.* ¶ 57.
 29. Letter to Michael Coffee from Merle H. Weiner, Sept. 2, 2017, p. 4. In *Eight Letters Submitted to the United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law*. Available at <https://law.uoregon.edu/explore/merle-weiner/scholarly-work>.
 30. **Van De Sande v. Van De Sade**, 431 F.3d 567, 571 (7th Cir. 2005).
 31. *Id.* at 570-71.
 32. 2019 Draft Guide, *supra* note 8, ¶ 91. Note, however, that the U.S. has requested that Central Authorities not be tasked with providing such information. *See* U.S. General Comments, *supra* note 13, at 8 (regarding ¶ 99 of 2019 Draft Guide).
 33. 2019 Draft Guide, *supra* note 8, ¶¶ 44, 57.
 34. **Baran v. Beaty**, 526 F.3d 1340, 1348 (11th Cir. 2008).
 35. *See* 2019 Draft Guide, *supra* note 8, ¶ 8.
 36. *Id.* at ¶ 7.
 37. *Id.* at ¶ 36.
 38. U.S. General Comments, *supra* note 13, at 2-3.
 39. *Id.* at 1.
 40. *See, e.g.,* 2019 Draft Guide, *supra* note 8, at 29 n.109, 110; U.S. General Comments, *supra* note 13, at 6-7.
 41. 2017 Draft Guide, *supra* note 10, ¶ 107.
 42. 2019 Draft Guide, *supra* note 8, ¶ 3. ■
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