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**Good Practice on Article 13(1)(b)  
of the 1980 Hague Convention:  
*An Overview of the 2017 HCCH  
Draft Guide***

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# *Introduction*

- In 2017, the **Permanent Bureau** released the final version of the draft **Guide to Good Practice on Article 13 (1b)** of the **Child Abduction Convention**
- It was evaluated at the **7th Meeting of the Special Commission** on the Practical Operation of the 1980 Convention and the 1996 Convention
- Why does the Draft Guide deal only with the grave risk exception envisaged in Article 13(1)(b)?
- Article 13(1)(b):
- “... the...authority of the requested State **is not bound** to order the return of the child if ...
  - *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.**

- From the **abducting parent's perspective**:
  - the most commonly raised exception
  
- From the **competent authority's perspective**:
  - judges have most commonly relied upon the grave risk exception when refusing to order a return of a child
    - **Croatian experience**: it was established in 7 decisions out of 9 decisions denying the return
  - this exception may be applied differently not only among different national jurisdictions, but also among competent authorities within a same State
  - ***Too broad*** application, as well as an ***overly restrictive*** application, would undermine the Convention.

# *Introduction*

- **What should be kept in mind:**
  - The Draft Guide is **not a “magical formula”**
  - The Draft Guide is **not intended** to direct the interpretation of Article 13(1)(b) in individual cases
  - The Draft Guide **aims to promote**, as much as possible, the consistency in the application of the grave risk exception at the global level
  - The Draft Guide is **purely advisory**
  - The Draft Guide may serve as **an information tool** for all authorities and persons involved in child abduction cases

# *The main issues discussed in the Draft Guide*

- The process of **analysing the grave risk exception**
- Use of the **IHNJ** and direct judicial communication
- The role of the **CA**
- **Protective measures** – interplay of the 1980 and the 1996 Convention
- **Case scenarios/Fact patterns:**
  - **Domestic violence** towards a child or an abducting parent
  - **Separation of the child** from his/her sibling(s)
  - **Economic/education disadvantages** to the child upon the return
  - **Child's health** as a risk
  - **Risks associated with the State** of habitual residence

# *Domestic violence towards an abducting parent*

- **Croatian experience in the last 4 years:**
  - the claims regarding the domestic violence towards the abducting parent were most often raised in terms of Article 13 (1)(b) – **5 cases involving domestic violence out of 13 cases in total**
- **Questions to answer:**
- **1. Can violence towards the abducting parent constitute the grave risk exception regarding the child?**
  - Social science research supports the conclusion that violence against a parent can also have a traumatic effect on children who witness it.
  - There cannot be an automatic presumption - the specific evidence has to be produced on a case-by-case basis

## 2. To what extent the facts of domestic violence have to be proven in the court of the State of refuge?

- the burden of proof lies on the abducting parent
- without carrying out a full-scale inquiry
- **Croatian experience:** violence against the abducting parent was proven in only 1 case, but it was asserted in **4 cases out of 8** in which the grave risk exception was raised

## *Domestic violence towards an abducting parent*

- The “nature” of the domestic violence
- Mental health or substance abuse concerns related to the perpetrator?
- Likelihood of recurrence
- The effect of violence on the victim(s) – direct and indirect
- Can this situation be equalled with a “grave risk of harm”?
- What measures are available to protect the victim and children in the State of habitual residence?
- How compliant is the perpetrator with court orders?

# *How to determine whether the child faces a grave risk of harm?*

■ The questions that may be asked:

1. Is the left-behind/abducting parent **capable of independently supporting and caring** for the child upon return, or through social/public assistance or aid?
2. Does the age, nature, physical or psychological health, or any other relevant circumstances of the child mean that **separation** from the abducting parent is likely to exacerbate the risk of physical or psychological harm to the child?

3. Is any **potential risk of harm** mitigated by the care that can be provided by the **left-behind parent**?
4. Is the abducting parent **unable to return, or merely unwilling to return**?
5. If the parent is **unable to return**, have all potential measures that would permit return been exhausted?
6. If the abducting parent is **unwilling to return**, what are the reasons for the fear of return?
7. If the return of the child is ordered, what is the likelihood of the **abducting parent nevertheless returning to the State of habitual residence**?

## *Possible approaches*

- **First:** The judge *assumes* that the assertions under the exception may be proven and immediately verifies whether effective protective measures are available in the State of habitual residence...

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- **Second:** The judge immediately *evaluates* the facts, information and evidence, assessing whether they include sufficient detail and substance **which amounts to a grave risk**. If so, the judge has to verify whether effective protective measures are available in the State of habitual residence...

# *The Draft Guide – importance for Croatia*

## ■ The “Four track” mechanism:

- **The first track** is the *Brussels IIbis regime*, currently applicable between Croatia and 26 EU States (Danmark is not applying; UK is applying - Brexit implications?)
- **The second track** concerns *the cases involving States outside of the EU who are Parties to the 1980 Convention and the 1996 Convention*; currently applicable between Croatia and 16 States (out of 47 State Parties: third States + Danmark; Cuba is a State Party only to the 1996 Convention; Croatian acceptance of accession to the 1980 Convention is lacking for Dominican Republic, Ukraine and Lesotho)

- **The third track** pertains to the **States bound only by the 1980 Convention**; currently applicable between Croatia and 40 States (out of 98 State Parties; acceptance is lacking for Paraguay, San Marino, Gabon, Guinea, Iraq, Zambia, Philippines, Bolivia, Pakistan, Jamaica, Tunisia as State Parties only to the 1980 Convention)
- **Fourth track - only the 1996 Convention is applicable, currently applicable between Croatia and 4 States**: Cuba (the 1996 Convention), Dominican Republic, Ukraine, Lesotho (Parties to both conventions, Croatian acceptance of accession to the 1980 Convention is lacking)

# *What we can do together?*

## *Academic cooperation?*

- Draft encourages the **concentration of jurisdiction**
- **In the meanwhile?**
  - Translations of the existing Guides to Good Practice (CA practice; Implementing Measures; Preventive Measures; Enforcement; Mediation)
  - Translation of the 2017 Draft Guide
  - A training programme (2nd, 3rd and 4th track)
  - INCADAT – serious language barrier...

*THANK YOU!*