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.25 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.29 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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The Conventions’ mission is to protect domestic violence victims and children, for to disregard it when it disadvantages survivors. The Guide itself
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 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.
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/0a0532b7-d580-4d53-8c25-7d6b2a294284.pdf.
9. Hale, supra note 2, at 11.
13. General Comments of the United States of America on the 13(b) Guide to Good Practice (undated, on file with author) (hereafter “U.S. General Comments”).

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Hague cases involving allegations of domestic violence. The guide titled, Representing Battered Respondents Under the Hague Convention on the Civil Aspects of International Child Abduction, was developed with the support of Hanson Bridgett, LLP and Robins, Kaplan, Miller & Ciresi LLP, and distributed with support from Thomson Reuters, Inc., Morrison & Foerster LLP, and the International Action Network for Gender Equity & Law. The 90-page guide takes attorneys and advocates through every step of a Hague case from preparing the case to the hearing. It offers suggestions on key elements and considerations for each stage of a case.

Online Clearinghouse

Because Hague cases often involve timelines that require quick access to information, we developed a project website (http://www.haguedv.org) that offers judges, clerks, attorneys, advocates, and others access to a wide array of information at any time of the day or night. The site includes specific information for mothers, advocates, attorneys, and judges as well as a variety of project reports and national and international online resources. The practitioner guide is available online by request, and state bench guides are distributed to judges only by judicial councils or court administrators.

Training for Judges, Attorneys and Advocates

Finally, much of our work has also focused on distributing information through live conference presentations and webinars. These are offered at state-level judicial conferences or through national organizations such as the National Council of Juvenile and Family Court Judges and the American Bar Association’s Commission on Domestic & Sexual Violence. In fact, the ABA’s Commission will be continuing the work of the HagueDV project into the future. The ABA will be conducting webinars in Spring 2020 that will address a) The Effect of Domestic Violence on Children and Parents and the Experience of Battered Mothers and Children in Hague Cases; b) The Respondent’s Defense: Exceptions to Return; and, c) Questioning the Prima Facie Case.

Conclusion

When we started this work almost two decades ago there was little attention to allegations of domestic violence in Hague Convention cases. Now multiple states have judicial bench guides focused on this issue and a model bench guide exists to help other states develop their own. Many attorneys have been trained on how to represent battered respondents, and they have an increasing network of experienced attorneys and a practice guide to support them. Finally, the project staff have disseminated their experience widely across the globe through participation in expert meetings called by the Hague Secretariat in the Netherlands and individual consultations with foreign attorneys and governmental representatives. Despite our limited resources, we have increased the capacity of others to respond sensitively to battered respondents in these cases.

Yet, despite all this work, we continually hear from mothers fleeing harm and desperately seeking help to defend against petitions for the return of their children by abusive partners. Our work is hardy done, but the way forward is clearer than it was 20 years ago.

End Notes
