A few thoughts on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part II)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED (forthcoming)

As indicated in a previous post, the comments on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention (subsequently, Guide to Good Practice or Guide) will be divided into two posts. In a previous post, I analysed the Guide exclusively through the lens of human rights. In the present post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law.

Please refer to Part I. All the caveats mentioned in that post also apply here.

The Guide to Good Practice is available here.

I would like to touch upon three topics in this post: 1) the examples of assertions that can be raised under Article 13(1)(b) and their categorisation; 2) measures of protection and 3) domestic violence.

1) One of the great accomplishments of the Guide to Good Practice is the categorisation of the ***examples of assertions that can be raised under Article 13(1)(b) of the Child Abduction Convention***. While at first sight the categorisation may appear to be too simplistic, it is very well thought through and encompasses a wide range of scenarios.

I include below the assertions as stated in the Guide:

Examples of assertions that can be raised under Article 13(1)(b)
a. Domestic violence against the child and / or the taking parent
b. Economic or developmental disadvantages to the child upon return
c. Risks associated with circumstances in the State of habitual residence
d. Risks associated with the child's health
e. The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child
i. Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention
ii. Immigration issues faced by the taking parent
iii. Lack of effective access to justice in the State of habitual residence
iv. Medical or family reasons concerning the taking parent
v. Unequivocal refusal to return
f. Separation from the child's sibling(s)

Nevertheless, while this categorisation is very comprehensive, there are a few matters that are mentioned only very briefly in the Guide and could have benefited from a more in-depth discussion. One of them is the extensive case law on what constitutes "***zone of war***" ***or a place where there is conflict***. See footnotes 88 and 89 of the Guide under the heading *c. Risks associated with circumstances in the State of habitual residence*.

Perhaps due to political sensitivities, it would be hard to pinpoint in the Guide jurisdictions that have been discussed by the courts as possibly being a "zone of war". Among these are Israel (most of the case law), Monterrey (Mexico – during the war on drugs) and Venezuela. See for example: Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) [INCADAT reference: HC/E/USf 530] (United States); Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81 [INCADAT reference: HC/E/AU 995] (Australia) and other references in footnotes 88 and 89 of the Guide.

Some of course may argue that "zone of war" is a gloss on the Convention and that as such it should not be analysed. However, one may also describe such situations without labelling them as "zone of war", such as a State where there is conflict, be it military, social, political, etc. Perhaps this could have been expanded under the heading *c. Risks associated with circumstances in the State of habitual residence* of the Guide referred to above.

While the “zone of war” exception has hardly been successful, it would have been beneficial to discuss some of the arguments set forth by the parties such as: the fluctuation of violence throughout the years, terrorist attacks, a negative travel advice by a government concerning the State of habitual residence of the child, the specific place where the family lives and the risks of terrorism, the violence of drug cartels, and the fact of being a political refugee in the State where the child was abducted. The negative travel advice is particularly apposite to our times of Covid-19 as that would have given some guidance to the courts.

Another assertion made under Article 13(1)(b) of the Child Abduction Convention that could have been analysed in more depth by the Guide – perhaps under *a. Domestic violence against the child and/or the taking parent* – is the ***sexual abuse of children***. The Guide includes very brief references to sexual abuse in the glossary, paragraphs 38 and 57, and footnote 76.

Undoubtedly, sexual abuse is a terrible and unbearable experience for children but it is still a taboo to single out this topic, let alone explain the current trends existing in the case law when this issue has been raised. Nevertheless, from my research there seems to be a very clear distinction in the case law: when the sexual abuse has been raised in the State of habitual residence and no action or insufficient action was taken by such authorities, and there is evidence of sexual abuse, the State where the child has been abducted tends to reject the return of the child to his or her State of habitual residence. In cases where this is not the case, the child is ordered back to the State of habitual residence, often with measures of protection. See for example: the multiple-layered decisions in the case of *Danaipour v. McLarey*, see for example the decision Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004) [INCADAT reference: HC/E/USf 597] (United States). This brings us to:

2) The second topic of this post: ***measures of protection*** (also referred to as protective measures). The paragraphs dedicated to this topic in the Guide are 43-48. The Guide is absolutely at the forefront of the latest developments and social research on the effectiveness of measures of protection. It has answered the call of many professors/scholars and practitioners, who have cautioned about the indiscriminate use of measures of protection, in particular of undertakings, when the person causing the violence is known to infringe orders and not to heed the warnings of the courts. The Guide is to be commended for this great step forward.

The Guide defines undertakings as follows: "an undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned." Because undertakings are a voluntary promise, their enforcement is fraught with problems, especially if the left-behind parent refuses to comply once the child has been returned. Where the primary carer (usually the mother) returns with the child to a "domestic violence" situation and it is not possible to enforce undertakings, both the mother and the child may be subject to a grave risk of harm. For more information, see Taryn Lindhorst, Jeffrey L. Edleson. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Boston: Northeastern University Press, 2012). This leads us to:

3) The third topic of this post: ***domestic violence***. Many claim that domestic violence is a human rights violation. In a wider context, there is indeed a correlation between domestic violence and human rights and this has been recognised by resolutions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and the judgment of the European Court of Human Rights. See for example *AT (Ms) v. Hungary, (Decision) CEDAW Committee* and *Opuz v. Turkey (Application No. 33401/02)*, respectively.

While the issue of domestic violence in the context of Article 13(1)(b) of the Child Abduction Convention was the one topic that sparked concern among the Contracting States to the Child Abduction Convention, as well as judges and the legal profession alike, the Guide only dedicates a few paragraphs to it. See paragraphs 57-59 of the Guide. It also arrives at a conclusion, which raises some doubts.

In particular, the Guide states that "***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***." There are a few problems with such a statement. Domestic violence comes in different shapes and sizes and the level of violence can be high or low. This statement is a "one-size-fits-all" and thus is necessarily flawed. In addition, it does not say what it means by "in and of

itself", does it mean *prima facie*? Also, it does not elaborate on what is necessary to invoke and substantiate domestic violence in order for this assertion to be considered sufficient. It also appears to set a standard of proof when it says that it "is not sufficient", which might perhaps not be appropriate for a soft law instrument, such as a Guide to Good Practice, to do.

Some scholars have analysed and criticised this statement of the Guide. In particular, Rhona Schuz and Merle H. Weiner in the following article "A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice" (Family Law LexisNexis©, January 2020) I refer to their arguments and prefer not to replicate them in this post.

Despite the weakness mentioned above and in Part I of this post, I believe that this Guide would be of great benefit to the legal profession.

Having all the above in mind, I would like to conclude with some words of the renowned American judge Richard Posner: "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations." (Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) [INCADAT reference: HC/E/USf 812] (United States)).