



## Hague Domestic Violence Forum Expert Paper #2

### The 'grave risk' exception and domestic violence.

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#### Biographies

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## Introduction

The drafters of the Convention had the foresight in 1980 to predict that there may be situations that would preclude the return of children to their habitual residences and specifically laid out several exceptions or defences. Article 13(1)(b) of the Convention, the focus of the Forum, addresses dangerous situations and stipulates that:

'...the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that 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.'

The Convention makes no explicit reference to domestic violence. However, Article 13(1)(b) is 'particularly pertinent to abductions committed against the backdrop of domestic violence' (Weiner, 2000, p. 651; Trimmings & Momoh, 2021, p. 3) because extensive social and clinical science links domestic violence in the home to psychological and physical harm to children.<sup>1</sup> Although children have sometimes been referred to as the 'hidden victims' of domestic violence, this 'fails to capture the severity of the harm that children who experience domestic violence directly suffer' (Ho, 2022). Children are often caught in the middle of physical violence and become indirect or direct targets (see, Lisa Fischer-Wolovick, *Expert Paper #1 The definition, prevalence, and identifying features of domestic violence*). Children can also be harmed by coercive and controlling abuse perpetrated by a parent against another, and can suffer debilitating coercive control directly themselves (Katz, 2022; Callaghan et al., 2018; Katz, Nikupeteri and Laitinen, 2020; Stark, 2023). This harm to children living with domestic violence has been recognised in various jurisdictions' domestic legislation<sup>2</sup> Given gendered patterns of caregiving for children and for domestic abuse, it is typically mothers who raise the Article 13(1)(b) exception.

This briefing paper considers the history of Article 13(1)(b) and its current use in cases that raise allegations of domestic violence. It demonstrates that there has always been a stringent emphasis on return in these cases, even after considerable attention to the issue by the Permanent Bureau and State Parties. This orientation has been, and is, fuelled by an unfounded fear that otherwise the Convention will be undermined, and a belief that legal systems can protect survivors (Kaye, 1999, pp. 196–198). The paper asks the Forum to consider, inter alia, whether courts should find that, 'where serious spousal abuse has been shown, it should be presumed that the grave risk exception is established'. (Schuz, 2018, p. 323)

### The history of Article 13(1)(b)

The drafters of the Convention did not anticipate that the great majority (75%) of taking parents would now be mothers, almost all of whom (94%) are the primary or joint-primary carers of their children (Lowe and Stephens, 2023, [41–47]). We set out a lengthy extract from a recent interview with the special rapporteur of the Convention, Professor Elisa Perez-Vera - it illustrates how the drafters did not anticipate that these "abductors" might be fleeing for reasons of safety and her acknowledgement that the Convention fails to protect children when it does not take account of violence against mothers (Alvares, 2024).

*'... I believe that, almost 50 years later, we need to reinterpret the letter of the Convention in light of the new social realities in which it has to be applied. Because it is true indeed that the social reality to which we tried*

to respond was one of kidnappers, mostly fathers, who were not also holders of custody rights, and who took children away from their mothers. Now, on the contrary, several decades later, what we have is that most of the abductors are women who have the official rights of guardianship over their children but who are fleeing from an abuser.

*I believe that the fundamental element of change that was not taken into account was gender-based violence ... We had not been aware that it was a phenomenon that was going to have such an impact on the lives of women and minors. So I do believe this is a fact that should make those applying the Convention think about the need to reinterpret the essential idea that those who are best placed to decide who should have the custody and guardianship of the child are the judges of the habitual residence before the displacement, the abduction, takes place. The problem is: if those judges happen to be in the same place where the abuser is, is it reasonable to request that the authority of the country where the mother has taken refuge with the child return both mother and child to the place where the abuser is? Or, on the contrary, can it be understood that such a return would place the child in an intolerable situation within the meaning of the Convention's Article 13?'*

### Intolerable situation

Throughout State Parties and the Permanent Bureau's consideration of Article 13(1)(b), insufficient attention has been given to whether returning a child would place them in an 'intolerable situation.' These words were specifically added to the Convention to address the topic of domestic violence (Permanent Bureau, 2011 Reflection Paper, p. 12, citing Fourteenth Session of the Hague Conference on Private International Law (1980), *Actes et documents de la Quatorzième session*, Tome III, *Enlèvement d'enfants, Child abduction*, pp. 302). They enable courts to focus on the specific child's circumstances even when the child won't experience physical or psychological risk from return, thereby recognizing that return should not occur at any cost (consistent with Article 12's approach to the well-settled child and Article 13's approach to the mature child's views). As Baroness Hale (as then was) said: "Intolerable" is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate.'" (Re D (Abduction: Rights of Custody) [2007] 1 AC 619 [52]) This more flexible prong allows a court to reject an order for return in light of the hardship the child and the taking parent would face upon return, the likelihood the child would be separated from the taking parent in a custody proceeding because the taking parent is often seen as an 'abductor,' and the message conveyed to the child that the legal system sides with the batterer instead of the survivor.

### Assessing risk: children and post-separation abuse

Assessing the risk to the child on return is key to the safe operation of Article 13(1)(b). This requires an understanding of the nature, prevalence, and impact of post-separation domestic violence. Until relatively recently, domestic violence was generally considered to encompass acts of physical violence. It is now recognised that the most prevalent and harmful form of domestic violence is coercive and controlling abuse, which can include physical violence as well as intimidation, isolation and control (Stark, 2007). The dangers of coercive control cannot be underestimated. Coercive control is one of the strongest indicators of female homicides (McLeod, 2018; Smith, 2018). Coercive controlling abuse has a more severe impact on victims compared with physical violence alone and can be experienced by women as more frightening and debilitating than physical violence (Nevala, 2017, a study across 28 EU member states). It is important, therefore, that those implementing the Convention appreciate the

well-founded fear that can be sustained by mothers who have suffered coercive controlling abuse and are expected to return to the jurisdiction of their abuser. Recent Convention jurisprudence in England and Wales has confirmed that our increasing awareness of coercive and controlling abuse 'should also inform the exercise under Article 13(b)' (*TKJ, Re (Abduction: Hague Convention (Italy))* [2024] EWHC 198 (Fam) [35], and that 'the court must be astute to recognise" conduct which forms part of a pattern of controlling or coercive behaviour' (*Re A-M (A Child: 1980 Hague Convention)* [2021] EWCA Civ 998 [49, 56]).

It is often assumed that domestic violence stops when the relationship ends. However, numerous statistics and studies across a broad range of methodologies and populations reveal that domestic violence can start, continue and increase in severity on and after separation (Brownridge, 2006; Edleson, 2023; Spearman et al., 2023). Coercive controlling behaviour by the perpetrator during the relationship is the main predictive factor for post-separation domestic violence (Brownridge, 2006; Macleod, 2018; Spearman et al., 2023). These findings demonstrate the importance of appreciating that many women who flee domestic violence across borders are already in a high-risk category, as are their children. Most of the 22 women interviewed by Edleson et al. (2010, p.181) 'reported new domestic violence committed against them by their abusive husbands once they returned to the other country' including severe physical and sexual assaults, and children were often physically assaulted or exposed to severe violence against their mothers.

Studies have attested to the profound combined effects of past and continuing abuse on mothers' parenting and mental health (Thiara and Humphreys, 2017; Holt, 2017). The most important factor for enabling mothers to rebuild their lives, recover their physical, emotional and mental health and parenting capacities, and support their children's recovery is freedom from further abuse (Holt et al., 2008; Katz, 2022). Ongoing abuse can substantially impede that recovery (Davies et al., 2009).

The court's risk assessment exercise under Article 13(1)(b) has to take into account the likelihood and impact of the perpetrator parent's involvement with the child and victim parent on return. Children returned under the Convention may be compelled to live with, or live in a shared care arrangement with, a perpetrator father (Edleson et al., 2010). This is concerning given the substantial research demonstrating that shared care/contact is the key site for the perpetration of continued, more serious, abuse (see, eg, Brownridge, 2006; Edleson et al., 2010; Holt, 2017; McLeod, 2018), and at worst, fathers' homicide of mothers and children (Brandon et al., 2009; Women's Aid, 2016). The effects on and outcomes for children are poorest when children have contact with a perpetrator parent post-separation (Cafcass and Women's Aid, 2017; Spearman et al., 2022). The problems of post-separation abuse are exacerbated for women and children returned in Convention proceedings, whose vulnerability may be increased through language difficulties, absence of a support network, poverty and homelessness (Masterton et al., 2022). On any level, the research discussed in this Briefing demonstrates that the child is likely to suffer a grave risk of harm and be placed in an intolerable situation in these circumstances. Children can recover from the impact of domestic violence when they are in a safer environment, but ongoing involvement with the abusive parent can create problems for children's ability to recover and sustain recovery (Humphreys, 2006; Katz, 2022).

### Approaches to Article 13(1)(b)

The courts of most contracting states have taken the approach that Article 13(1)(b) should be interpreted restrictively (HCCH, 2011 p.17; European Parliament, 2016). However, as the UK Supreme Court said, there is no need for Article 13(1)(b) to be narrowly construed because, by its terms, it is of restricted application.



The words of Article 13(1)(b) are plain and need no further elaboration or gloss (*Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 [31]).

## The Guide to Good Practice to Article 13(1)(b)

Over the last twenty-five years or so, the response by the Permanent Bureau and State Parties to this reality has always been to emphasize return with an effort to mitigate the risks involved from return. For example, when Special Commissions started addressing the topic, State Parties emphasized returning the child with protection for the child which 'also sometimes require steps to be taken to protect an accompanying parent.' (HCCH, 2001 Conclusions and Recommendations, §5.1.1; Special Commission, 2002, ¶. 76; Conclusions and Recommendations, 2006, §1.1.12). The Permanent Bureau's 2011 Reflection Paper on the topic noted the wide variety of State practices and suggested that a future Guide might increase uniformity and might 'balance' the Convention's objectives (including 'to reinforce the legitimate and appropriate custody and access rights of parents across jurisdictions') with 'the strong censure of family violence and intimate partner abuse found in current international and regional law.' (148-151). A Working Group, established in 2012 to develop a *Guide to Good Practice* on the interpretation and application of Article 13(1)(b), produced a *Guide* in 2020 with this same emphasis (Permanent Bureau, 2020).

In a major step forward, that *Guide* did recognize that domestic violence against a parent can give rise to the Article 13(1)(b) exception, despite Article 13(1)(b)'s focus being on grave risk of exposure to the child, not the parent [57]. The *Guide* does not require that the child be the direct or primary victim of 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 [33]. The *Guide* also recognizes that the primary carer's circumstances are highly relevant to the child's situation, and that some taking parents may be so debilitated by return that the child would suffer too [26].

## Protective measures

Nonetheless, the *Guide*, consistent with the historic approach to the topic, suggests return is often appropriate because the risks of return can be mitigated (even where a grave risk would otherwise be evident). Most notably, it admonishes courts to examine protective measures to mitigate risks and facilitate return. This approach — absent from the Convention itself — continues to prioritize return over safety for children and their taking parents. The inadvisability of the 'protective measures' approach is discussed by Professor Merle Weiner in Expert Paper #6, *Briefing on Protective Measures*, and in Expert Paper #5 *Protective Measures and their inability to protect against domestic violence* by Professor Jeffrey Edleson and attorney Valentina Shaknes.

## The way forward

State Parties to the Convention are at an important juncture. They can continue to promote return with protective measures, despite the fact that this approach minimizes the risks from domestic violence, treats domestic violence victims and their children unjustly by requiring additional components to an Article 13(1)(b) defence, and serves as a tool for domestic violence perpetrators. Or they can apply the Convention's Article 13(1)(b) faithfully, acknowledging that return is inappropriate and dangerous in cases of domestic violence.

There have been cases in civil countries that have indicated that this latter approach is appropriate. For example, *H 28 (1827) (Germany – Spain)*<sup>3</sup> in which the Spanish court noted that the court must be sure that the return will be safe and protections are 'real and effective,' noting that 'generic protection or existing legal coverage is not enough, even if it's abundant on paper' (Soto Moya, 2021). In the Inner House Scottish case of *AD v SD [2023] CSIH 17*, the court concluded that the severity of the risk to the children should have been considered before considering the adequacy of protective measures. The father had repeatedly breached the Illinois court orders and he would not agree to further measures beyond 30 days. The Scottish court refused to order the return. Courts in common law countries, these authors' homes, have also recently made decisions that appear to align with the *Guide to Good Practice's* advice to focus on 'the effect of domestic violence on the child upon his or her return' (HCCH 2020, [58]). The following cases are selected as examples:

**United States:** in holding that consideration of protective measures in cases of domestic violence was discretionary, not mandatory, the U.S. Supreme Court, in *Golan v. Saada* 142 S. Ct. 1880, 1893-94 (2022), emphasized that a court 'must prioritize the child's physical and psychological safety.' The Court specifically mentioned protective measures would not be appropriate in some cases 'where it is clear they would not work because the risk is so grave,' including cases of prior sexual abuse, 'physical or psychological abuse, serious neglect, and domestic violence,' as well if a court 'reasonably expects they will not be followed.' The Court also noted that a hearing on ameliorative measures should not usurp the role of a judge in the custody trial or impede the expeditious nature of the return proceedings.

**Australia:** the appeal court in *Walpole v Secretary, Department of Communities & Justice* (2020) 60 Fam LR 409 found that no protective measures would be effective at ameliorating the grave risk of harm posed by the history of domestic violence despite New Zealand having 'sophisticated systems in place to protect victims of family violence', in this case, a return order was refused based on the grave risk of the children's exposure to an 'intolerable situation' arising from the risks of the children's exposure to violence, the well-founded fears of the mother and consequent impact on the children, and their precarious living circumstances, exacerbated by the effect of poverty.

**New Zealand:** *LRR v COL* (2020) NZCA 209, the Court of Appeal investigated the true impacts of returning the child. The judges asked questions about the mother's access to support, mental health and parenting capacity if she returned to Australia and how those factors would affect her child (Henaghan et al., 2023). The father's previous breaches of Australian family violence orders and bail conditions led the court to state that, '[t]he unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim.' [135]

**England and Wales:** *In B (A Child Abduction Article 13(B))* [2020] EWCA Civ 1057, the father had been violent and controlling of the mother and a restraining order had been made against him by a Bosnian court. The Court of Appeal set aside the return order made by the trial judge and criticised her disregard of the father's breaches of undertakings made against him. The trial judge had also not conducted an assessment based on all the material for the purpose of deciding whether the exception under Article 13(1)(b) was established. In the recent case of *TKJ, Re (Abduction: Hague Convention (Italy))* [2024] EWHC 198 (Fam) the judge found a grave risk of harm due to the mother being a victim of domestic abuse comprising violent, coercive and controlling behaviour by the father and that her flight to the UK was 'in order to escape that abuse' [47]. The judge also found that the child would be placed in an intolerable situation if returned due to the risk that the mother's parenting ability would deteriorate if returned to

Italy due to the impacts of the abuse. The court found that the risks could not be mitigated by protective measures, despite the Italian legal system having similar protective powers to those of the UK. This was because the father had shown he was willing to continue his abusive behaviour even when orders were in force and also that even if objectively adequate protective measures were put in place, the mother's subjective fear that the father would harm her or the child meant the grave risk could not be mitigated.

## Conclusion

While neither this paper nor the Forum have focused on the Convention's Article 20 exception, the *right* of individuals to have States protect them from violence is relevant to the interpretation of Article 13(1)(b). The Guide to Good Practice itself recognized this fact by including Annex II, which mentioned that international law gives individuals the right to be safe from gender-based violence. Additionally, the European Court of Human Rights (ECtHR) in *X v Latvia (No. 27853/09)* emphasised that the assessment is in relation to the individual child rather than the interests of children generally. The Grand Chamber also implied that the European Convention on Human Rights takes precedence over the Hague Convention for those states that are parties to the ECHR. Consideration should therefore be given to the engagement of the rights of victims of domestic violence under Article 3 ECHR, an absolute right. In *Opuz v Turkey (2010) 50 EHRR 28*, *Affaire Buturuga v Romania (App No. 56867/15)* and *Volodina v Russia (App No. 41261/17)*, the ECtHR confirmed that domestic violence could amount to degrading and inhumane treatment within the meaning of Article 3 ECHR. In *TKJ, Re (Abduction: Hague Convention (Italy)) [2024] EWHC 198 (Fam)* the court confirmed that the risk of a breach of Article 3 should be determined indirectly through the operation of Article 13(1)(b). Therefore, the approach to Article 13(1)(b) should be the one that best protects children and their caregivers in cases of domestic abuse without unnecessary and unrealistic obstacles and in conformity with states' international obligations. This aligns with best practice in holding perpetrators accountable for the abuse rather than placing the onus on the victim to keep herself and the child/children safe.

Finally, while removing obstacles to the availability of the exception is the most necessary reform to make the Convention just and safe for survivors and their children, it is not the only reform required. Effective use of the exception requires that survivors of domestic violence have counsel. It requires that decision makers reject myths about domestic violence when adjudicating these cases. It requires Central Authorities' sensitivity to safety issues throughout the proceedings, including at the front end.

1. Edleson et al. (2023) describe a systematic review of 26 studies demonstrating that children exposed to domestic violence show lower social and emotional competence and fewer empathetic skills than non-exposed children (Bender *et al.*, 2022). It is well-documented that children who experience domestic violence have a higher risk of living with mental health difficulties (Peltonen et al., 2010), physical health impediments (Bair-Merritt et al., 2012) and educational challenges (Byrne and Taylor, 2007). A review of 23 studies found that exposure to domestic violence was associated with a variety of negative physiological impacts (Berg *et al.*, 2022).
2. Section 3, *Domestic Abuse Act 2021* (England & Wales) includes children as victims in their own right. See also s4AB Australian *Family Law Act 1975* (Cth); s11(2) *Family Violence Act 2018* (NZ).
3. See further: [https://www5.poderjudicial.es/CVsm/Ponencia\\_6\\_EN.pdf](https://www5.poderjudicial.es/CVsm/Ponencia_6_EN.pdf).

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## FILiA Hague Mothers

[FiLiA Hague Mothers](#) is a MVAWG project. Our overarching aim is to end the injustices created by The Hague Convention on the Civil Aspects of International Child Abduction, specifically for mothers and children who are victims of domestic abuse.