

# The Hague Abduction Convention

## What needs to change?



Hague Mothers is a voluntary, women-led, international initiative which aims to end the injustices caused by the Hague Abduction Convention, specifically for mothers fleeing abusive relationships. The project is supported by the feminist charity FiLiA ([FiLiA.org.uk](http://FiLiA.org.uk)).

This position paper is based on extensive academic research, legal expertise, professional understanding of the impact of domestic violence on mothers and their children, and the experience of protective mothers who are further abused by the Hague process. It is a wish list, but one based on the reality of the Hague Convention which, in over 75% of cases, directly and profoundly undermines the safety and wellbeing of mothers and children.

This cannot be allowed to stand.

*We are grateful to lead author Adrienne Barnett (Brunel University London), and to the other members of our international strategy group who provided advice and input: Nicole Fidler (Sanctuary for Families US), Miranda Kaye (UTS Australia), Cris McCurley (solicitor advocate UK) Jessica Raffal (ISS Australia), Sudha Shetty (University of Berkeley US), Merle Weiner (University of Oregon US). Thanks also to the wider Hague Mothers' team, and to the many mothers who have generously shared their experience-based expertise with us.*

When we were first discussing the injustices created and perpetuated by the Hague Abduction Convention, one of our steering group reminded us of the case of Cassie Hasanovic who fled from the UK to Australia with her two sons to escape her violent husband. In spite of the UK police deeming Cassie and her children at 'high risk', the Hague court ordered the return of the boys to England. Her mother said she was 'unravelling with fear' on her return – convinced that she would be killed. She was right to be fearful. She was murdered by her estranged husband as she and her sons were about to be driven to a women's refuge. The Hague Convention cost Cassie her life.

What follows is our view of key changes that might have prevented Cassie's death.

There are many - including many on the Hague Mothers' team - who argue that the Convention is beyond saving. That it is used by perpetrators, emboldened by judicial and state support, as a way to extend their control over their children and ex-partners. Evidence for this view is not hard to find, although the 25% of cases brought by mothers against abducting fathers do provide a counter-point: when it works as originally intended, the Hague Convention is highly effective in returning children to the safety of their primary carers – invariably mothers.

Either way, given that over 100 countries are signed up to the Hague, it is unlikely that it can simply be expunged. The paper begins, therefore, with a fractionally less impossible consideration of what needs to change within the Convention itself. In descending order of complexity, we then consider Convention protocols and changes to its implementation in contracting states. We also call for stronger guidance in relation to Article 13(1)(b); improved practice direction for Hague courts; and equality of arms through legal aid provision for taking mothers.

**Our focus throughout is on domestic violence victims – mothers and their children – and on ensuring that the Convention both acknowledges their particular vulnerability and prioritises their protection.**

## 1. Change the Hague Convention

- Include a defence against return in circumstances of domestic violence/abuse, and explicit acknowledgment of the impact of domestic violence/abuse on children.
- Include provision for a stay on return orders in domestic abuse cases and enable welfare hearings to be held remotely to permit the taking parent to litigate in a safe location.
- Restrict the circumstances in which it is appropriate to rely on 'protective measures' and in any event ensure that courts cannot accept undertakings as a means of defeating the Article 13(1)(b) defence in domestic violence/abuse cases.
- Ensure that children's wishes and feelings are explored in all cases involving domestic violence/abuse.

*However desirable, changing the Convention will be a lengthy and difficult task, and unlikely to be achieved. All signatory states would have to agree; the history of the Guide to Good Practice indicates the problems in achieving this. Nonetheless, if this is the only way to end the injustices caused by the Hague (the core aim of the Hague Mothers project) it will remain a key goal.*

## 2. Include a DV-aware Protocol to the Convention

- Include a defence against return in circumstances of domestic violence/abuse, and explicit acknowledgment of the impact of domestic violence/abuse on children.
- Include provision for a stay on return orders in domestic abuse cases and enable welfare hearings to be held remotely to permit the taking parent to litigate in a safe location.
- Restrict the circumstances in which it is appropriate to rely on 'protective measures' and in any event ensure that courts cannot accept undertakings as a means of defeating the Article 13(1)(b) defence in domestic violence/abuse cases.
- Ensure that children's wishes and feelings are explored in all cases involving domestic violence/abuse.

*Achieving a Protocol would not be easy, but is arguably not quite as difficult as amending the Convention.*

## 3. Change domestic laws that implement the Convention in its contracting states

Domestic enabling legislation must make it explicitly clear that 'grave risk of harm' and 'intolerable situation' arise from circumstances of domestic violence/abuse. And that:

- removal is not 'wrongful' when the taking parent is fleeing domestic violence/abuse
- the definition of 'intolerable situation' should be along the lines of the Swiss model
- there should be a rebuttable presumption of no return in domestic abuse cases
- there can be a stay on return orders in domestic abuse cases (as above)
- circumstances in which it is appropriate to rely on 'protective measures' must be restricted and, in any event, states must ensure that courts cannot accept undertakings as a means of defeating the Article 13(1)(b) defence in domestic violence/abuse cases

- courts must undertake a proper risk assessment, including exploring the views, wishes and feelings of the child
- perpetrators/alleged perpetrators of domestic violence/abuse must be disallowed from counter-claiming so-called parental alienation
- In the UK: ensure that the Child Abduction and Custody Act 1985 is compatible with the Domestic Abuse Act 2021 (including the definition of domestic abuse and the recognition that children living with DA are victims in their own right).

*Although a country-by-country approach to change would necessarily result in unequal treatment of mothers and children depending on the jurisdiction, individual countries could provide examples of good practice in relation to safeguarding victims of domestic violence and abuse, and potentially inspire change in others.*

#### **4. Strengthen the Guide to Good Practice re Article 13(1)(b)**

The Guide must make it explicitly clear that ‘grave risk of harm’ and ‘intolerable situation’ arise from circumstances of domestic violence/abuse. And that:

- removal is not ‘wrongful’ when the taking parent is fleeing domestic violence/abuse
- the definition of ‘intolerable situation’ should be along the lines of the Swiss model
- there should be a rebuttable presumption of no return in domestic abuse cases
- there can be a stay on return orders in domestic abuse cases (as above)
- circumstances in which it is appropriate to rely on ‘protective measures’ must be restricted and, in any event, states must ensure that courts cannot accept undertakings as a means of defeating the Article 13(1)(b) defence in domestic violence/abuse cases
- courts must undertake a proper risk assessment, including exploring the views, wishes and feelings of the child.

*Guidance in relation to the Convention has tended to avoid the issue of domestic violence and focus instead on streamlining and aligning the process. The Guide also places over-reliance on sa-called ‘protective measures’ – ones which were in place when Cassie Hasanovic was murdered.*

*Nonetheless, as Merle Weiner pointed out in her 2021 paper<sup>1</sup>, judges can apply the Convention in ways that protect victims of domestic violence. Clear guidance would ensure that, even where the legislation is problematic, the default is to prioritise the safety and wellbeing of children and of mothers.*

---

<sup>1</sup> Weiner, M. (2021). You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence. *UCLA Journal of Gender and Law*, 28(1).

## 5. Improve approaches by the courts in contracting states

This could be achieved by a Practice Direction (modelled on PD12J which applies in England and Wales) or similar guidance-type document which would (not an exhaustive list):

- require Hague judges to investigate the context from which a victim of domestic abuse fled and the circumstances she is likely to encounter on return
- require Cafcass. or a similar body in other states, to undertake safeguarding enquiries (as is now required for private law family court proceedings)
- explicitly acknowledge the impact of domestic violence/abuse on children
- recognise that 'grave risk of harm' and 'intolerable situation' arise from circumstances of domestic violence/abuse
- make provision for risk assessment including exploring the views, wishes and feelings of the child
- restrict the circumstances in which it is appropriate to rely on 'protective measures' and, in any event, ensure that courts cannot accept undertakings as a means of defeating the Article 13(1)(b) defence in domestic violence/abuse cases.

## 6. Change legal aid provision

Automatic legal aid must be made available to taking parents - currently only left behind parents get automatic legal aid in many jurisdictions. Both parties need expert legal representation so that the facts and the law can be properly presented to the court. Equality of arms is a necessity if taking mothers – already labelled as abductors - are to have any possibility of equal access to justice.

Some of our members have also recommended that legal aid should be refused in cases where the petitioner has a history of domestic violence/abuse. Although this is desirable in principle, it could result in a further increase in counter claims of domestic abuse made against protective mothers.

*In future papers we will consider exemplar countries where progress has been made in relation to the changes outlined above.*

Adrienne Barnett | **Hague Mothers** | 27 February 2023



Hague Mothers is a voluntary international initiative which aims to end the injustices caused by the Hague Abduction Convention, specifically for mothers fleeing domestic abuse and coercive control. It is a FiLiA Legacy Project: [FiLiA.org.uk](http://FiLiA.org.uk).