

Mr Christophe Bernasconi

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Open letter to the Hague Permanent Bureau

Dear Secretary General Bernasconi

We write as members and supporters of Hague Mothers, in anticipation of the Eighth Special Session to Review Operation of the Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Abduction Convention'). Our group includes mothers and children who have been adversely impacted by the Hague Abduction Convention, academics who study the Hague Abduction Convention, lawyers who represent parties in these cases, and experts who support mothers facing a Hague Abduction Convention petition, and dealing with the often traumatic aftermath.

It is imperative that state parties end the continued injustice and harm to children and survivors of domestic violence that are the unintended consequences of the current administration of the Hague Abduction Convention.

In this regard, we respectfully request:

- **the dissemination of this letter to all state parties and NGOs in attendance at the Eighth Special Session, hopefully in advance of their arrival**
- **the sharing of this letter with the Council on General Affairs and Policy**
- **inclusion of the specific topic of domestic violence and abuse (to include coercive control) on the Special Session's agenda.**

We would also appreciate an invitation to attend the Eighth Special Session as an NGO (our host organisation, FiLiA, is a UK charity with international reach and remit).

The context that prompts our letter is well known and well-evidenced. Research by Professor Nigel Lowe, presented to state parties at previous Special Sessions, demonstrates that the vast majority of respondents in Hague Convention cases are mothers who are the primary carers of their children.



Answers by state parties to Permanent Bureau questionnaires, as well as our own international experience, confirm that many of these respondents are fleeing abusive situations to protect their children.

Yet the Hague Convention itself does not acknowledge this population's vulnerability, or prioritise their protection. The Article 13(1)(b) Guide to Good Practice acknowledges their existence, but falls far short of adequately addressing their plight.

Consequently, we strongly recommend the following preliminary but essential steps be taken by state parties at the Eighth Special Session:

- 1. A recognition, reflected in the summary and conclusions of the Special Session, that improvement is needed in the implementation of the Hague Abduction Convention for survivors of domestic abuse who flee for safety with their children. A commitment by the Permanent Bureau and State Parties to improve matters in this regard.**
- 2. An agreement, reflected in the summary and conclusions of the Special Session, to assemble a new working group with the specific purpose of advancing improvements to the application of the Hague Abduction Convention for this population.**

The group to be comprised of experts in areas of domestic abuse, child abuse, and trauma, as well as legal scholars, lawyers, and jurists, who are genuinely committed to finding a solution that ensures the safety and wellbeing of mothers and children who are fleeing domestic abuse. Their experiences should be used to directly inform the group's discussions and conclusions.

We recognize that there exist various ways that the Hague Abduction Convention could be made a just instrument that respects the human rights of domestic violence survivors and their children.

These include: making changes to the Convention itself, or promulgating an appropriate protocol; producing a soft-law instrument to encourage state parties to change implementation at a domestic level; strengthening the Guide to Good Practice on Article 13(1)(b); producing a Practice Direction or similar guide to improve approaches by the courts in contracting states.

Each potential solution has its own advantages and disadvantages. The suggestions below are not comprehensive nor mutually exclusive. Rather, they are intended to convey some of the existing opportunities. They also highlight the need for a special working group to consider and recommend solutions that will solve the problem once and for all.

1. Amend the Convention or promulgate an appropriate Protocol

- a. Include a provision for a stay of return in cases with domestic abuse. Enable welfare/custody hearings to be held remotely to permit the taking parent to litigate in a safe location.

- b. Include a defence against return in circumstances of domestic abuse, and include explicit language that acknowledges the impact of domestic abuse on children.
- c. Restrict the circumstances in which it is appropriate to rely on ‘protective measures’ in cases of domestic abuse, and ensure that undertakings are never allowed to defeat the Article 13(1)(b) defence in domestic abuse cases.
- d. Ensure that children’s wishes and feelings are explored in all cases involving domestic abuse.
- e. Require that legal aid be made available to all taking parents alleging domestic abuse.

2. Develop a soft-law instrument that encourages state parties to change domestic laws implementing the Hague Abduction Convention to Include provisions such as:

In addition to the matters set out above:

- a. Explicitly state that the ‘grave risk of harm’ and ‘intolerable situation’ defences in Article 13(1)(b) can arise from circumstances of domestic abuse.
- b. State that removal is not ‘wrongful’ when the taking parent is fleeing domestic abuse.
- c. Define ‘intolerable situation’ to include situations when the following criteria are met:
 - 1) placement with the applicant is manifestly not in the best interest of the child;
 - 2) the abducting parent cannot care for the child in the child’s habitual residence, or cannot reasonably be required to do so;
 - 3) placement in foster care is manifestly not in the best interest of the child.
- d. Include a rebuttable presumption of no return in domestic abuse cases.
- e. Require courts to undertake a proper risk assessment of the fleeing parent’s and child’s safety.
- f. Require that domestic legislation to implement the Hague Abduction Convention is consistent with other domestic legislation addressing domestic violence/abuse cases (for example, that it defines domestic abuse as including coercive control and that it recognizes that children living with domestic abuse are victims in their own right).

3. Strengthen the Guide to Good Practice on Article 13(1)(b)

In addition to the matters set out above:

- a. Prohibit use of undertakings as a means to defeat the Article 13(1)(b) defence in domestic violence/abuse cases.
- b. Disallow perpetrators/alleged perpetrators of domestic violence/abuse from counter-claiming so-called parental alienation¹.

4. **Produce a Practice Direction, or a similar guidance document, to improve approaches by the courts in contracting states.**

This would include items from 1-3 above, and, in addition:

- a. 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.
- b. Require Cafcass (Children and Family Court Advisory and Support Service) or a similar body in other states, to undertake safeguarding enquiries (as is now required for private law family court proceedings in England and Wales).
- c. Explicitly acknowledge the impact of domestic violence/abuse on children.
- d. Make provision for risk assessment including exploring the views, wishes and feelings of the child.

We believe that the Hague Abduction Convention is an important international instrument, but, as currently applied, its terms and implementation can be harmful and unjust. The Permanent Bureau must assume a leadership role at the Special Commission meeting to help solve this problem. Survivors of domestic abuse and their children who would otherwise be harmed by this Convention deserve to have this problem fixed by those with the power to do so.

We are hopeful that, with your assistance, there will be real progress on the issues we've raised above and would welcome the opportunity to contribute to a meaningful solution. We will also continue to direct our efforts to human rights bodies, state parties, regional organisations, and others with the power to affect positive change.

We would appreciate an early response acknowledging receipt of this letter, informing us whether we will be able to attend the Eighth Special Session as observers, and whether you will meet the requests set out in paragraph two i.e.

- **the dissemination of this letter to all state parties and NGOs in attendance at the Eighth Special Session, hopefully in advance of their arrival**
- **the sharing of this letter with the Council on General Affairs and Policy**
- **inclusion of the specific topic of domestic violence and abuse (to include coercive control) on the Special Session's agenda.**

¹ For further information on harmful pseudo-scientific concept of 'parental alienation', please see the report by UN Special Rapporteur on Violence against Women and Girls: 'Custody, violence against women and violence against children' <https://www.ohchr.org/en/documents/thematic-reports/ahrc5336-custody-violence-against-women-and-violence-against-children>

Yours sincerely

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