

Hague Domestic Violence Forum
Expert Paper #5

**Protective Measures and
their inability to protect
against domestic violence**

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Biographies

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Jeffrey L Edleson, PhD, is a Distinguished Professor of the Graduate School, University of California, Berkeley. A leading expert in domestic violence, Dr Edleson's current research examines the impact of adult violence on children and how social systems respond to these children. His work also focuses on international parental abduction in cases of domestic violence and the evaluation of interventions and policies on family violence. His body of publications comprises more than 130 articles and 12 books.

Protective Measures cannot adequately protect against domestic violence and should not be relied upon to order returns where the finding of grave risk of harm is based on domestic violence

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the 'Convention') starts out by stating that 'the interests of children are of paramount importance.'¹ Thus, the Convention expressly allows a court of a country to which a child is wrongfully removed (or retained) to refuse the return if it would expose the child to a 'grave risk of physical or psychological harm.'² Neither the Convention, the Explanatory Report of Perez-Vera, nor the implementing legislation of any signatory country contains any additional requirements for the application of the 'grave risk of harm' defense.

Nevertheless, the courts of many member states, including the United States and the United Kingdom, following the finding of a 'grave risk of harm', rather than simply denying the return, have required that the party asserting the 'grave risk of harm' defense also prove that no protective measures³ could be put into place to ensure adequate protection of the child in his or her state of habitual residence. The Permanent Bureau's Guide to Good Practice on Article 13(1)(b) also strongly recommends protective measures when considering returning children to their habitual residence.⁴

Reliance on abusers' compliance with the orders perversely places the effectiveness of the measures on the very person whose conduct necessitated the protection in the first place.

It is now well-established that the great majority (75%) of taking parents are mothers, most of whom are the primary carer or joint-primary carers of their children (80%).⁵ Seventy-eight percent of these mothers raise allegations of domestic violence by the left-behind father.⁶

Research shows that abusers are highly prone to recidivism and are likely to ignore or defy interventions (such as court orders) intended to mitigate the recurrence of abuse.⁷ Many domestic violence offenders revert to their abusive behavior within months or years following law enforcement or social service interventions.⁸ Thus, reliance on protective measures in cases involving domestic violence to facilitate return despite a finding of grave risk reflects a fundamental lack of understanding of the complexity of domestic violence and the needs of its victims -- the children and their caretaker parents -- leading courts to put children in real danger.

Given the reality of domestic violence, the imposition of protective measures will never protect a child as effectively as declining to return the child due to a grave risk of exposure to harm.

As a recent brief to the United States Supreme Court correctly summarized, relying on protective measures in domestic violence cases fails to account for: the dangerousness, unpredictability, and complexity of domestic violence; the propensity for abusers to continue their violence; the inability of courts ordering the return to reliably assess the efficacy of measures in a foreign country (especially in an expedited jurisdictional proceeding); and the high probability that the protective measures ordered will be useless due to non-compliance by abusers and unenforceability in the country of habitual residence.

Three studies of the effectiveness of protective measures provide ample concern to be hesitant to ever rely on such measures. For instance, the Reunite International Child Abduction Centre's study of cases in the U.K. revealed that two-thirds (67%) of the undertakings issued – including all of those focused on a child's safety upon return – were not implemented in the country of habitual residence. Even when

judges issued mirror orders, only one in five of those mirror orders was implemented as planned.⁹ Research of U.S. incoming cases has also revealed that both judges and attorneys were skeptical of the enforcement of these orders by another country's courts and that mothers who returned with their children to the country of habitual residence would frequently face violations of previously agreed undertakings by their abusive ex-husbands or mirror orders that were seldom enforced.¹⁰ Finally, in the recent online survey conducted by two U.K. charities, mothers from a number of countries reported that protective measures, even those in which mirror orders were obtained, were not enforced or very difficult to enforce.¹¹

Given the many reasons why protective measures are not capable of protecting children or their caregiving parents, there should be a recognition that such orders are never appropriate when the grave risk determination arises from something as complex and dangerous as domestic violence, and that a return order in reliance on such measures is flatly inconsistent with ensuring the safety of the children, which is the ultimate goal of the Convention.

Decades of well-established research clearly link a child's exposure to domestic violence, including adult-to-adult domestic violence, with significant negative physical and psychological outcomes.

Such outcomes include depression, anxiety, sleep disturbances, lower social and emotional competence, fewer empathetic skills than non-exposed children, poorer academic performance, higher tolerance and endorsement of aggression and violence, and decreased ability to regulate their physiological responses to stressful events.¹² This list is by no means exhaustive. In addition, the few research studies published to date on the aftermath of Convention cases reveal a heightened risk of continuing harm to children who return to their country of habitual residence, and often into the custody of their abusive father.¹³

The legal community, however, has been slow to recognize the harm caused to children by the exposure to domestic violence, especially adult-to-adult domestic violence, where the children are exposed to the violence rather than direct targets of the violence. Indeed, the *Guide to Good Practice*, while acknowledging that Article 13(1)(b) does not require that the child be 'the direct or primary victim of physical harm,' notes that 'harm to a parent, whether physical or psychological' can create a grave risk to a child only 'in some exceptional circumstances.'¹⁴ Perhaps it is this lack of recognition of the harm caused by domestic violence that explains the misguided reliance on protective orders to attempt to mitigate the harm.

Domestic violence is inherently complex as compared to other forms of violence. Not only are its victims often reluctant to report their abusers, but the cultural norms and societal attitudes play a crucial role in what counts as impermissible violence between family members in the first place, and how a country responds to it. While any modern society considers certain acts, such as corporal punishment of women or children, or forced sex, criminal in other contexts, it may deem them acceptable if they happen at home, between members of a family.

Thus, for a country to provide effective protection to victims of domestic violence, there must be a proper recognition of the problem not only at the national level, leading to the adoption of laws specifically tailored to address it, but also an implementation and proper enforcement of such laws at the local level, through the court system, state enforcement and social services agencies. Officers of these systems must all be trained to recognize and understand the problems and complexities of domestic violence, and be willing and equipped to help its victims.

In light of this inherent complexity of domestic violence, and of the crucial role played by the societal attitudes, the system for addressing it will necessarily vary from country to country, often dramatically so. Not only does the court issuing the protective measures lack the necessary understanding of the legal system in the state of habitual residence, but it also lacks the power to enforce these measures once the parties leave its jurisdiction, thus rendering them entirely meaningless.

The recent decision of the United States Supreme Court in the matter of *Golan v. Saada* provides important guidance going forward.

In *Golan*, the U.S. Supreme Court, recognizing the complexity of domestic violence and the limitation of the U.S. courts to issue orders that would protect victims of domestic violence overseas, rejected the appropriateness of protective measures in cases involving domestic violence:

'A court may [] decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one example of an intolerable situation. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed.'¹⁵

The U.S. Supreme Court also explicitly held that 'the Convention sets as a primary goal the safety of the child.' After all, as the United Kingdom's Supreme Court previously stated, 'the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise.'¹⁶

Thus, the only effective way to protect a child in cases where domestic violence has been established is for the court to deny the return.

References

1. Convention, Preamble.
2. Convention, Article 13(1)(b).
3. 'Protective measures,' also frequently referred to as 'ameliorative measures' in court decisions and scholarly articles, are usually in the form of voluntary undertakings by a left-behind parent and/or orders issued by the courts deciding the return petition, with mirror orders in the country of habitual residence.
4. HCCH Guide to Good Practice, Part VI Article 13(1)(b), 43, p. 34.
5. N Lowe and V Stephens, *Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention*. (HCCH, The Hague, Prel. Doc. No. 19A of September 2023).
6. Merle Weiner notes that, in two samples of US Hague Convention appellate cases in 2000–2001 and 2017–2018, allegations involving domestic violence were present in 78 per cent of the cases: MH Weiner, 'You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence' *UCLA Women's Law Journal* 28(1), 223–332 (2021). See also HCCH, *Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (HCCH, The Hague, May 2011).
7. See Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995–2005: Career Criminals*, 14 *Violence Against Women* 136, 144 (2008); see also Julian Farzan-Kashani et al., *Anger Problems Predict Long-Term Criminal Recidivism in Partner Violent Men*, 32 *J. Interpersonal Violence* 3541, 3551 (2015).
8. See EW Gondolf, *Evaluating Batterer Counseling Programs: A Difficult Task Showing Some Effects and Implications*. *Aggression and Violent Behavior*, 9, 605–631 (2004), EW Gondolf, *The Future of Batterer Programs*:

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9. See studies by reunite Research Unit, *The Outcomes for Children Returned Following an Abduction* (reunite International Child Abduction Centre, UK, 2003).
 10. T Lindhorst and JL Edleson, *Battered Women, Their Children and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press, 2012).
 11. GlobalARRK and Hague Mothers, *The Effectiveness of Court-Ordered Protective Measures in the Aftermath of Hague Convention Decisions: An International Survey* (Expert Paper presented at the HCCH Forum on Domestic Violence and the Operation of Article 31(1)(b) of the 1980 Child Abduction Convention, June 2024).
 12. AE Bender, SJ McKinney, MM Schmidt-Sane, J Cage, MR Holmes, KA Berg, J Salley, M Bodell, EK Miller, and LA Voith, 'Childhood Exposure to Intimate Partner Violence and Effects on Social-emotional Competency: A Systematic Review' *Journal of Family Violence*, 37, 1263-1281 (2022); KE Evans, MM Schmidt-Sane, AE Bender, KA Berg, MR Holmes, 'Children's Exposure to Intimate Partner Violence and Acceptance or Appraisals of IPV: A Systematic Review' *Journal of Family Violence*, 37, 1301-1319 (2022); SE Evans, C Davies and D Dillillo, 'Exposure to Domestic Violence: A Meta-analysis of Child and Adolescent Outcomes' *Aggression and Violent Behavior* 13, 131-40 (2008); DA Wolfe, CV Crooks, V Lee, A McIntyre-Smith and PG Jaffe, 'The Effects of Children's Exposure to Domestic Violence: A Meta-analysis and Critique' *Clinical Child and Family Psychology Review* 6, 171-87 (2003); KM Kitzmann, NK Gaylord, AR Holt and ED Kenny, 'Child Witnesses to Domestic Violence: A Meta-analytic Review' *Journal of Consulting and Clinical Psychology* 71, 339-52 (2003); L Kiesel, K Piescher and JL Edleson, 'The Relationship Between Child Maltreatment, Intimate Partner Violence Exposure, and Academic Performance' *Journal of Public Child Welfare* 10, 434-546 (2016).
 13. T. Lindhorst and J.L. Edleson, *Battered Women, Their Children and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press 2012); GlobalARRK and Hague Mothers, *The Effectiveness of Court-Ordered Protective Measures in the Aftermath of Hague Convention Decisions: An International Survey* (Expert Paper presented at the HCCH Forum on Domestic Violence and the Operation of Article 31(1)(b) of the 1980 Child Abduction Convention, June 2024).
 14. HCCH Guide to Good Practice, Part VI Article 13(1)(b), 33, p.26
 15. *Golan v. Saada*, 142 S. Ct. 1880, 1894 (2022) (emphasis added) (internal citations omitted).
 16. *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 [2012] 1 AC 144, per Lady Hale and Lord Wilson.

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.