

The Guide to Good Practice on Article 13(1)(b): Domestic Abuse Perspective

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Introduction

Article 13(1)(b) of the [Hague Convention on the Civil Aspects of International Child Abduction](#) provides an exception to return where there is a “grave risk” that a return would expose the child to physical or psychological harm or place them in an intolerable situation. The ‘[Guide to Good Practice on Article 13\(1\)\(b\)](#)’ (2020) aims to clarify how this exception should be applied.

First and foremost, we are grateful to the drafters of the Guide and we wish to acknowledge the challenges inherent in both preventing harmful abductions and safeguarding victims in protective abductions. We welcome many of the excellent points and directions in the Guide, which is directed at the overall conception, drafting and use of the Article 13(1)(b) exception to the return of the child under the Convention.

This briefing will focus on the specific circumstances where a parent subjected to domestic abuse¹ has removed their child across an international border. The Guide refers to this situation but, as a general Guide to the use of Article 13(1)(b), is not specific in its discussion of the nature and impacts of domestic abuse on children and their carers.

In this briefing, we aim to offer constructive suggestions that place the safety of victim-survivors of domestic abuse (both the parent and children) at the center of the Guide, incorporating recent developments, especially insights from the HCCH Forum on Domestic Violence and Art.13(1)(b) held in 2024.

We highlight good practice in domestic violence cases, and, importantly, bring in the unique, real-world expertise of frontline domestic abuse advocates and victim-survivors themselves to inform global best policy and practice. Victim-survivor quotes are in blue throughout this paper.

¹ We prefer the term ‘domestic abuse’ as it better captures the multiple types of abuse, physical and non-physical, that can be perpetrated. However, the Guide refers to ‘domestic violence’ and therefore, when we are referring specifically to the wording used in Guide, we will follow the drafters’ preferred terminology.

Domestic Violence is a Grave Risk

The Guide claims that evidence of domestic violence, “in and of itself,” is not sufficient to establish grave risk of harm to a child. Indeed, it states that harm would constitute a grave risk only in ‘exceptional’ circumstances:

“harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” [33]

Why have they even put ‘exceptional’? What... why does it have to be exceptional? Why is it just not in some circumstances?’ - Parent feedback

High threshold of Article 13(1)(b)

The Guide further introduces a requirement for a ‘high threshold’ based on factors such as “the nature, frequency and intensity of the violence, as well as the circumstances in which it is likely to be exhibited” [72].

This formulation directly contradicts both current understandings of the dynamics of domestic abuse and the protective purpose of Article 13(1)(b). By suggesting that only extreme or repeated violence meets the threshold, the Guide risks minimising the very real and well-documented harm that different types and frequencies of abuse inflict on the child directly, and on the abused parent with responsibility to care for the child. It also overlooks the cumulative psychological impact of coercive control, intimidation, and threats, which may not present as “intense” but nonetheless create an intolerable situation affecting the child’s welfare.

We would suggest that, in practice, where there is credible evidence of domestic abuse, this should ordinarily be sufficient to establish the grave risk defence.

Restrictive interpretation of the exceptions

‘The underlying message that I was getting from the Guide was that it wasn’t assisting in interpreting it or operating it correctly. To me, it felt more like ‘Don’t use it, and here’s why you don’t use it’ It is how it’s almost been set up.’ - Parent feedback

Paragraph 25 asserts that a restrictive interpretation is necessary, as to do any less “would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration”.

Underlying this is a presumption that situations leading to the successful engagement of the exceptions will be rare. Specifically, that domestic abuse is a rare occurrence. This is not the case. Domestic abuse is widespread, often serious, and

typically escalates in seriousness over time; the fact that it is widespread does not mean that it is any less serious.

The exceptions to return should be engaged when the circumstances demand it. This would not undermine the 1980 Convention, rather, together with adjustments to the threshold requirements, it would help fulfil the Convention's aim of protecting children.

Impact on the Child

The Guide does not acknowledge what we now know: that where there is domestic abuse, the child is also a victim. Indeed, it states:

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. [73]

However, many legal frameworks both recognise and embody that this is not so, and that domestic abuse within a household will invariably impact a child. The Preamble to the [Istanbul Convention](#)² clearly states:

'Recognising that children are victims of domestic violence, including as witnesses of violence in the family...'

The [Explanatory Report](#) to the Istanbul Convention³ provides valuable commentary on the Convention. Referring to the Preamble, at paragraph 27, the Report explains that:

'Where children are concerned, it is acknowledged that they do not need to be directly affected by the violence to be considered victims but that witnessing domestic violence is also traumatising and therefore sufficient to victimise them.'

In agreement with this, many countries, including in the UK, have laws which reflect a clear understanding that domestic abuse impacts the whole family unit, and that exposure to such harm is itself abusive. Children who see, hear, or experience the effects of domestic abuse are explicitly recognised as victims of domestic abuse in their own right (for example, see s.1(3), Domestic Abuse Act 2021 (UK)⁴. **By failing to recognise this, the Guide falls behind modern legal and psychological understandings, and risks diminishing the protection owed to children under Article 13(b).**

² Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence* (Istanbul, 11 May 2011), CETS No. 210. (Istanbul Convention)
Available: <https://rm.coe.int/168008482e>

³ Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (Istanbul, 11 May 2011) CETS No 210
Available: <https://rm.coe.int/1680a48903>

⁴ <https://www.legislation.gov.uk/ukpga/2021/17/contents>

Coercive and controlling behaviour

‘The definitions of domestic abuse, which would be one of the main areas that we would use grave risk, is outdated, and it is massively omitting the entire psychological spectrum of abuse. If you don’t have a black eye, it does not count, and that is what this Guide falls down on’ - Parent feedback

Mention of coercive and controlling behaviour is conspicuously absent from the Guide, despite recognition as a profound form of psychological violence or harm, often characteristic of domestic abuse, and criminal in nature (see, e.g. s.76, Serious Crime Act 2015 (UK)). Parts of Australia, the US and Canada have also criminalized coercive control. In the United States, ten states have enacted legislation which addressed coercive control in the context of criminal and / or family law. Such legislation defines coercive control as a ‘pattern of threatening or intimidating behavior that interferes with the free will of another person.’ Most of these states include coercive control as a form of domestic violence or abuse.

Furthermore, Art. 33 of the Istanbul Convention specifically criminalises psychological violence. The terms ‘coercive and controlling behaviour’ or ‘coercive control’ are not used in the Convention, however, psychological violence is understood to capture coercive and controlling behaviour,⁵ and note that GREVIO (the Convention’s monitoring and implementation body) considers coercive control to fall under the scope of Art.33.⁶

Under the Istanbul Convention psychological violence is encompassed in the definition of domestic abuse, but it is also separately addressed per Art.33. **State parties to the Istanbul Convention, which includes all EU member states as well as the EU itself, are bound by the Convention to implement legal measures to prevent and combat psychological violence as a form of violence against women.**

Financial Abuse

The significance and impact of financial abuse in creating poverty and risk for children are underplayed: the Guide asserts that:

‘If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, e.g., because his / her living standard would be lower, he / she is unable to find

⁵ European Parliament, *Violence against Women: Psychological violence and coercive control* (Study, Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 650.336, April 2020) [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/650336/IPOL_STU\(2020\)650336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/650336/IPOL_STU(2020)650336_EN.pdf) at p.17

⁶ GREVIO, Baseline Evaluation Report: Slovenia (2021), para.245; GREVIO, Baseline Evaluation Report: Estonia (2022), para.163; and GREVIO, Baseline Evaluation Report: Finland (2019), para.157. See also GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports (2022), para.347.

employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order.[83]'

It is vital to recognise that without financial means to survive, the taking parent and child are left extremely vulnerable if returned. **Destitution, poverty and inability to access financial support on return constitute a grave risk to the child's welfare**, putting at risk their physical and psychological health and development, potential to access education and other forms of social activity once returned.

'As I say to my solicitor, I have to survive this whilst waiting over a year for the court. I have to live day by day trying to survive this, and going, where's the money coming in from? How am I putting food on the table? But my threat, if I become homeless, is that my daughter could be removed from her primary carer, which is a grave harm to her.' - Parent feedback

Separation from the Primary Carer is a Grave Risk

The Guide states that, where return would result in separation between a child and their primary carer, courts would "rarely" uphold Article 13(1)(b) as the separation should not be deemed a 'grave risk' of harm to the child.

In relation to criminalisation it says: *'The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception.'*

It is widely accepted that separation from the primary carer will usually be intolerable for a child. **If a parent faces incarceration or immigration barriers upon return due to the act of fleeing from abuse, this should ordinarily satisfy the grave risk exception.**

Summary return

The Guide introduces the concept of Summary Return, which is not in the text of the Convention. The Convention instead advocates for the use of 'the most expeditious procedures available'. There is an important difference between the two - summary proceedings generally take place in simple disputes where there is no need to examine evidence. In other types of cases, a summary judgment may be granted if the court decides a party has no real prospect of success and there's no other compelling reason for a trial. **Complex cases where a primary caregiver has fled domestic abuse should not be decided in a summary manner.**

'It can be physical or psychological, and this is why you shouldn't have a summary hearing. You should have a proper hearing of fact-finding to determine what the circumstances are that create a physical and psychological harm, or grave risk to harm to the parent and how that affects the child. You obviously can't have a summary hearing to decide that.' - Parent Feedback

Risk Assessment

The Guide states that: *‘The duty to act expeditiously does not mean that the court should neglect the proper evaluation of the issues, including where the grave risk exception is asserted’* [22].

This statement is obviously correct and essential in cases where there is a grave risk of harm to the child to ensure that the application of the Convention is in compliance with human rights obligations towards the child and the survivor.

While expedition of hearing has a legitimate purpose, in domestic abuse cases it is dangerous to prioritise speed over safety. In addition, it can put survivors at a legal disadvantage - they may lack time to gather evidence of abuse, obtain legal support, or secure protective arrangements. Safety must always be prioritised over speed.

In practice, we often see that a proper evaluation of the issues is not taking place. The emphasis on the rapid conclusion of proceedings means that limited evidence will be sought of allegations associated with a grave risk, particularly domestic abuse, and investigations and consultation with the child is truncated. This causes a lack of understanding of the real levels of risk and can leave any next steps to mitigate the risk ineffective.

We would suggest that a full trauma-informed risk assessment should be conducted when domestic abuse is raised to ascertain the actual level of risk if their children are returned to the country of habitual residence.

Access to Justice and Relocation Systems

The Guide does not recognise the severe impact of not being able to afford legal representation:

The mere fact that the parent may be unable to afford legal representation has been found to be insufficient to establish lack of effective access to justice.[60]

For countries party to the European Convention on Human Rights, this risks being a breach of the right to a fair trial under Article 6 ECHR, which requires access to a court. Victim-survivors facing return proceedings may need support from a lawyer through legal aid, given the complexity of the issues in a case under the 1980 Convention, the importance of what is at stake, and the difficulties of a parent in representing themselves in court ([App.No.6289/73 Airey v Ireland](#)).

It is notable that the child must be at grave risk of harm but has no legal status in the proceedings and there is no obligation under the 1980 Convention for their views to be consulted (though this may form the basis of an exception to return under Article 13(2), 1980 Convention).

A lack of access to justice means that victims are often put at further risk of significant harm, to them or their child, with no consequences for the perpetrator and

a poor chance of escape with children via relocation proceedings due to the fact that relocation proceedings are usually unobtainable due to lengthy court proceedings, unaffordable legal cost and low probability of getting permission to relocate, especially since they are a victim of domestic abuse, see our report on relocation.⁷ The Guide further suggests that courts are reluctant to consider grave risk if the parent can return to the country of habitual residence for even a short period to attend court proceedings:

Even where this is not possible, courts are usually reluctant to consider the assertions of grave risk to the child resulting from a possible separation if the parent is able to return to the requesting State for at least a short period necessary to attend custody proceedings, or where the entry of the taking parent in the State of habitual residence is subject to certain conditions [63].

This is problematic in practice. Both custody and relocation proceedings routinely outlast the time limits on temporary visas, meaning that separation between child and primary caregiver is inevitable. **Where a primary carer parent cannot legally live and work or obtain a visa long enough to conclude relocation proceedings, independently of the other parent, the starting point should be that the grave risk exception is met.**

Status quo ante

'Homelessness, lack of money. You're not in the same situation, are you? You've now stood up to them, which they do not like.' – Parent feedback

The Guide asserts that the child and taking parent would return to the 'status quo ante'. However, in cases where there has been abuse, it is not safe to return to live in the same home as the perpetrator. The Guide promotes an idealized version of a return under the Convention, which is rarely true, or possible. The Guide states that:

The return of the wrongfully removed or retained child to his or her State of habitual residence not only restores the status quo ante, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State' [15].

In reality: *He comes around (to my home) and harasses me to ensure that I'm kicked out, so that, which has happened twice already, I've already been asked to leave from two places because he kept sending the police around, and he kept turning up at the house. You know, it's those tactics that nobody's aware of. – Parent Feedback*

Upon return, the conditions are significantly worse for the returning parent and their child: they can be homeless, have less income, face criminal charges, and experience post-separation abuse, which carries risks of attempted homicide and abuse-induced suicide. After returning under the Hague, many parents face

⁷ <https://www.globalarrk.org/research/>

discrimination in the local family court and some lose custody of their child. They may also be criminalized. **Victims of domestic abuse cannot return to the status quo ante, nor is it appropriate.**

Protective Measures

'I just think if you have to be looking at putting in protective measures to return a child, then the child's in grave risk, and should not be returned.' - Parent Feedback

A central weakness of the Guide is its introduction and use of 'protective measures':

'...the court must still determine whether protective measures could address the risk and, if so, the court would then be bound to order the return of the child [89].

Most concerning is the Guide's instruction that courts must examine the availability of 'protective measures' even once grave risk *has been established*. This reverses the protective purpose of Article 13(1)(b). Where grave risk is proven, the starting point must be non-return. In some states, the parent using Article 13(1)(b) then faces two hurdles: first to establish the exception, and then to establish why protective measures would not be suitable to protect against what is acknowledged as a 'grave risk'.

It is notable that the Convention itself makes no mention of 'protective measures' in the text and they are not part of the original scheme of the Convention. Once grave risk has been found, the Convention leaves it to the courts to decline the return without further assessment of protective measures.

Despite the lack of framework for 'protective measures' within the 1980 Convention, national courts are encouraged by the Guide to weigh the existence of grave risk against possible 'protective measures', even where these are short-term, non-binding, or theoretical.

There are three main types of return:

1. A return without protection orders
2. A return with unenforceable protection orders like undertakings
3. A return with mirrored orders.

The Guide cautions against options one and two for obvious reasons:

'unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence.' [47]

In addition, the court issuing protective measures lacks the ability to enforce them once the litigants and the child(ren) have left such court's jurisdiction. While it is not uncommon to seek "mirror" orders in the state of habitual residence, such orders are

often unavailable and cannot be obtained. They also are known to be ineffective on the ground.

Why Mirrored Orders don't work:

Even where Mirror Orders are made, they are not reliably keeping victims safe for a number of reasons:

- Perpetrators frequently breach court orders
- The Hague Convention only provides for short-term protective orders, creating dangerous gaps.
- Support – legal and social - that may exist on paper rarely matches the actuality in the other jurisdiction, long delays in support and enforcement are commonplace.
- Victims face major challenges navigating foreign legal and support systems, often without language, cultural, or legal assistance.
- The key protective factors that truly keep victims safe are outside the remit of a court order: e.g. family and friends, financial resources, long-term rights to live and work, having a command of the language to communicate/ get assistance, support with child care, therapy, access to healthcare systems, and appropriate education provision.

'Protective measures, who's enforcing that? Who's making sure it's happened? How can one country say this needs to happen in another country? Massive failings around that whole protective measures, and I've yet to see it work for anyone I've spoken to.' - Parent feedback

As a sidenote, it should be noted that due to concerns about safety of victims, some courts are expressly disposing with consideration of protective measures. For example, in the United States, where until recently, many federal courts had required such consideration, the United States Supreme Court held that the Convention “does not impose a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists.” *Golan v. Saada*, 596 U.S. 666 (2022). Specifically, the Supreme Court held that “[u]nder the Convention and ICARA, district court’s discretion to determine whether to return a child where doing so would pose a grave risk to the child includes the discretion whether to consider ameliorative measures that could ensure the child’s safe return.” *Id.* at 678. The court further expressly recognized that domestic violence – whether physical, sexual or psychological – presents a particular kind of risk to children that, the court held, “cannot be readily ameliorated.” *Id.* at 680.

At the center of this is the U.S. Supreme Court’s recognition that “the Convention sets as a primary goal the safety of the child.” *Id.* at 684. By its persistent

recommendation of protective measures, the Guide to Good Practice is undermining this primary goal which is at the heart of the Convention.

Return even when there is Grave Risk and no protection available.

The Guide states that even when there is a grave risk established, and ‘protective measures’ are not going to mitigate the risk, that a judge may still return the child, into a situation acknowledged to pose a grave risk of harm to the child. The Guide needs to be clear that this would not normally be considered good practice.

‘Where the court is satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child, which means that it is within the court’s discretion to order return of the child nonetheless. [42]

Gendered nature of Domestic Abuse and Human Rights

‘And that is such a massive intrusion of the state, you know, into your most fundamental right, which is to protect your own life and the lives and safety of your children.’ - Parent feedback

The Guide offers limited guidance on how the 1980 Convention is to be interpreted in light of human rights obligations set out in a number of key international instruments, in particular, the UN Convention on the Elimination of all forms of Discrimination Against Women, the UN Convention on the Rights of the Child, the European Convention on Human Rights (and related jurisprudence of the Court), the Council of Europe Convention Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).⁸ Many states are party to both the 1980 Convention, and one or more of the aforementioned instruments. These instruments collectively underscore and mandate the global need for due attention to the safety and protection of women and children - a remit that coalesces with that of the 1980 Convention.

It is imperative that the 1980 Convention is interpreted and implemented in a manner cognizant of the social context in which it operates, and in concert with international human rights. Domestic abuse is known to be a gendered issue, disproportionately affecting women. Furthermore, childcare remains a gendered matter: more often than not, mothers are primary carers, linking the well-being of a child to their primary carer (mother) in real terms. When domestic abuse occurs in an international family context, it can lead to protective removals/retentions. We strongly urge that these gendered matters are acknowledged in the Guide and duly considered in the guidance on how the 1980 Convention is interpreted and implemented. Extrapolating

⁸ Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534 (1994) (Convention of Belém do Pará).
Available: <https://www.oas.org/en/mesecvi/convention.asp>

from the European Court of Human Rights' judgment in *X v Latvia* ([App.No. 27853/09](#)), in which the court directed a harmonious application of the ECHR and 1980 Convention, we encourage a harmonious and combined application of the network of existing international human rights law and the 1980 Convention.

Victim safety needs to be front and center

As with all policies addressing domestic abuse, the safety of both primary and secondary victims' safety should be at the center of the consideration of domestic abuse, in accordance with Article 18 of the [Istanbul Convention](#), which states that measures should: *'focus on the human rights and safety of the victim; and be based on an integrated approach which takes into account the relationship between victims, perpetrators and children.'*

The Guide emphasises the importance of mutual confidence between states in applying the Convention, and the focus of the exceptions is described as being *'derived from a consideration of the interests of the child'*, without carrying out an examination of the child's best interests, [25]-[26] but *'the Convention does not contemplate an automatic return mechanism'* [27]. The balance of ensuring that there is proper consideration of the exceptions to return to prevent automatic return is essential, and has been emphasised by the European Court of Human Rights ([App.No. 27853/09 X v Latvia](#)).

Conclusion

The *Guide to Good Practice on 13(1)(b)* of the Hague Abduction Convention was developed to clarify the scope of the "grave risk" exception and promote consistency in its application worldwide. However, the most prominent and prevalent grave risk - that of domestic abuse - needs further development especially in the light of new insights and findings from the HCCH Forum on Domestic Violence and Art.13b held in 2024.

Above all, a revised Guide must explicitly acknowledge that the safety of children lies at the heart of the Convention. We now know that domestic abuse presents a clear and significant risk to children, and this reality must be reflected more centrally in both the tone and substance of the text. To ensure this, the drafting process should include domestic violence advocates who work on the frontline, alongside meaningful consultation with individuals who have lived experience of these cases.

Authors

Members of the GlobalARRK Lived Experience Policy Group

Dr. Nishat Hyder-Rahman is a Postdoctoral Research Fellow based at the Department of Private & Economic Law, Vrije Universiteit Brussel, Belgium

Valentina Shakner is a US attorney specialising in International Family Law

Roz Osborne is the CEO of GlobalARRK