

**Mandates of the Special Rapporteur on violence against women and girls, its causes and consequences; Special Rapporteur on the sale, sexual exploitation and sexual abuse of children and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

19 September 2023

Secretary General Bernasconi,

We have the honour to address you in our capacities as Special Rapporteur on violence against women and girls, its causes, and consequences; Special Rapporteur on the sale, sexual exploitation and sexual abuse of children and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 50/7, 52/26 and 52/7.

In this connection, we would also like to draw your attention to the thematic report of the Special Rapporteur on violence against women and girls on custody, violence against women, violence against children presented to the fifty-third session of the United Nations Human Rights Council in June 2023 ([A/HRC/53/36](#)). In the said report, the Special Rapporteur called on the international community to acknowledge the egregious miscarriages of justice that regularly occur in both family courts and courts that adjudicate Hague abduction cases internationally. This is a global human rights issue which must be urgently addressed in order to safeguard mothers and their children.

We would also like to draw your attention to section VI.c) of the above report, which is dedicated to the gendered application of the Hague Abduction Convention. As the Special Rapporteur mentions in the report, “around three-quarters of all cases filed under the Hague Convention are against mothers”. In the report, the Special Rapporteur on violence against women and girls also recommended that the Hague Abduction Convention be revised to better protect abused women and their children by allowing a clear defence against return in cases where there is family violence or coercive control. Courts must recognise that a child’s return order frequently compels an abuse survivor to return to life-threatening violence and harm or to be separated from her child. Neither option is acceptable. It is essential that the injustices wrought - albeit unintentionally - by the current implementation of the Hague Abduction Convention are recognised and acted upon. We believe that the upcoming session of the Special Commission offers an opportunity to do so.

Mr. Christophe Bernasconi  
Secretary General  
Hague Conference on Private International Law

Published research indicates that most respondents in the Hague cases concern mothers who are primary carers of their children (for example, recent polls suggest that this is true for over 90 per cent of cases in Japan, and over 80 per cent in Ireland). Reports from States to the Permanent Bureau of the Hague Conference on Private International Law (HCCH) and information received by the concerned Special Procedures mandates from affected parents, mostly mothers and their children as well as their representing organizations, suggest that domestic abuse has occurred in a significant number of these cases. The safeguarding of this abused and highly vulnerable group - mothers and their children - must become a priority. It is entirely unacceptable that the children are returned despite risks to the safety and wellbeing of the mother and the child, when alternatively, custody litigation could occur where the mother and the child are safe, including the places and the countries to which they flee.

To that end, we would like to recommend that the States Parties take the following first steps at the eighth Special Session:

1. A clear acknowledgement of the need to improve the implementation of the Hague Abduction Convention to safeguard survivors of domestic abuse and their children.
2. A commitment to take action and to create a new working group, whose overarching aim is to ensure the safety and wellbeing of mothers and children fleeing domestic abuse. The working group must include experts in the areas of domestic abuse and child abuse, as well as academics and lawyers. It would be imperative that a gender lens is applied to the proceedings to account for the social, economic, cultural, structural and systemic inequalities faced by mothers. The working group should also ensure that women representatives from marginalized groups and affected by the patriarchy in the societies they live in are meaningfully involved in achieving its mandate.

We would also like to recommend revising the Convention itself or through a protocol. Alternatively, changes could be made at a domestic level, through implementing legislation or court decisions, with guidance from the Permanent Bureau. The Guide to Good Practice to Article 13(b) also needs strengthening. The recent report of the Special Rapporteur on violence against women and girls referenced above considered both the operation of family courts and courts that adjudicate Hague Convention cases. Many of the recommendations are applicable in both contexts, including:

1. Introducing changes to the Hague Convention directly or through a Protocol to the Convention to provide for:
  - a. an acknowledgement of the impact of domestic abuse on children, as is well-recognised internationally. There are countries whose legislation explicitly recognizes that exposure to domestic abuse can amount to significant harm to children; a new defence against return in circumstances of domestic abuse;

- b. a stay of return in cases with domestic abuse to enable the taking parent to litigate in a safe location while the court in the child's habitual residence determines the welfare issues;
  - c. for 'protective measures' only to be used exceptionally and in circumstances where the taking parent considers they will alleviate the risk of harm, and prohibit the use of undertakings as 'protective measures' considering their proven inefficacy;
  - d. insurance that risks to the child and taking parent are properly assessed and that children's wishes and feelings are heard and taken into account in all cases involving domestic abuse, in line with the States Parties' obligations under the United Nations Convention on the Rights of the Child.
2. Encourage States to make more use of Article 20 of the Convention and which has historically been underutilized. Article 20 of the Hague Convention provides that a court may refuse to return a child if the return "would not be permitted by the fundamental principles of the requested State, relating to the protection of human rights and fundamental freedoms". Invoking Article 20 where relevant, would also serve to protect victims of domestic violence, including the taking parent, and who may flee transnationally with their children as part of their effort to escape domestic or intimate partner violence. Sending the child of the domestic violence victim back to the location where the taking partner, usually the mother, is unsafe, puts the taking parent in front of the impossible choice of choosing between their own safety or that of their children. States have a duty to prevent violence against women and children under international human rights law, and it would reaffirm their recognition of this obligation with regards to victims of domestic violence and intimate partner violence. It would also provide a more operational avenue to women that currently lack other viable defences.
3. Strengthen the Guide to Good Practice to Article 13(1)(b) by incorporating the above changes and by:
- a. acknowledging the broad nature of domestic abuse, including coercive and controlling behaviour, which also recognises children as victims in their own right; prohibiting perpetrators and alleged perpetrators from counter-claiming the so-called parental alienation, as observed in the above-mentioned report of the mandate, which assesses the extent to which accusations of parental alienation are deployed in family courts internationally as a strategy to negate and deflect attention from domestic abuse;
  - b. acknowledging the links between Article 13(1)(b) and Article 20, specifically, because States have an obligation, pursuant to public international law and consistent with Article 20, to exercise due diligence to punish past incidents of domestic violence, prevent future incidents of domestic violence, and rehabilitate victims including against the taking parent;

- c. acknowledging the links between Article 13(1)(b) and Article 20 of the Hague Convention and Article 3 of the Convention Against Torture. Article 3 prohibits torture, inhuman and degrading treatment and constitutes customary law. The provision is mirrored in other international and regional treaties. The risk of torture does not need to be highly probable but must be personal and present. As such, the Guide should recognize that the exceptions found in Article 13(1)(b) and Article 20 are appropriate to uphold the principle of *non-refoulement* in any case where there is a real risk of reaching the threshold of article 3;
  - d. recognizing the links between Article 13 (1)(b), Article 20, and the customary law principle of *non-refoulement* which is contained in the 1951 Refugee Convention and its 1967 Protocol. Both prohibit the return of a person to a country or territory where their life may be in danger or where they may be exposed to torture. In this case, it would be important to evaluate the consequences of forced return for both the child and the taking parent (if the latter is ordered to return for the sake of the child or compelled to return by circumstance), as well as the legality and harm of returning the child without the taking parent, who may also be the child's primary caretaker.
4. Encourage States to make changes to their domestic law in line with the changes recommended above and by:
  - a. explicitly recognizing that domestic abuse can give rise to a 'grave risk of harm' and 'intolerable situation' in accordance with Article 13(1)(b) and that removal is not 'wrongful' when the taking parent is fleeing domestic abuse;
  - b. requiring courts to consider domestic abuse when interpreting and applying the provisions of the Hague Abduction Convention;
  - c. ensuring that the views of the child are sufficiently and independently represented in proceedings and, where possible, that children can participate in such proceedings, according to their age, maturity and understanding, applying all safeguards and obligations contained in the Convention on the Rights of the Child;
  - d. ensuring the availability of any child-sensitive complaints, reporting and referral mechanisms that allows victims to report abuses without fear and stigma, with provisions of shelters and rehabilitative support such as comprehensive healthcare and services for the victims of abuse;
  - e. including a rebuttable presumption of no return in cases involving domestic abuse;
  - f. ensure mandatory training of the judiciary and other justice system professionals on gender bias, the dynamics of domestic abuse, the way in which litigation can be used as a strategy of abuse, and the relationship between allegations of domestic abuse and of so-called parental alienation and related pseudo-concepts;
  - g. issuing and implementing specific guidance to the judiciary on the need to examine each case based on facts and ensure proper and appropriate risk assessment;
  - h. ensuring equality of arms by making legal aid available to all taking parents alleging domestic abuse as well as access to lawyers who are fully cognizant of

the impact of domestic abuse, including coercively controlling behaviour, and of gender bias, which continues to be a barrier to justice for mothers in these circumstances, as documented in the above referenced report on the particular difficulties for victims of domestic abuse who are unrepresented in family court proceedings;

- i. instituting publicly funded systems of experts to provide information to courts on risks to children and ensure that such experts be regularly trained on the dynamics of domestic abuse and its effect on victims, including on children.

We would welcome the opportunity to contribute to the discussions on these issues, or in relation to the evidence to inform these discussions, in the lead up to the Eight Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention.

Finally, we take this opportunity to request that this letter be shared with all States Parties to the Hague Convention. We also wish to inform you of our intention to publish this letter, given the mandates' priority on child custody issues and their relation to violence against women. We would like to reiterate that child custody is a universal human rights issue, which cannot and must not be ignored by those who have the power to make a difference.

Please accept the assurances of our highest consideration.

*Reem Alsalem*

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