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Safety as the best interest of the child

Toolkit for victim-friendly judicial practice in
child custody, contact and visitation matters

SAFEGUARDING AND EMPOWERING CHILDREN PROJECT



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Preface

Women Against Violence Europe (WAVE) launched the Safeguarding and Empowering Children project in 2022 to improve safeguarding children and to strengthen international movement-building for more child-friendly custody proceedings. WAVE members involved in the project are the Autonomous Women's House Zagreb (AWHZ) from Croatia, NANE Women's Rights Association (Women For Women Together Against Violence) from Hungary, the Central Information Office of Autonomous Women's Shelters (ZIF) from Germany, and the Women's Rights Foundation (WRF) from Malta.

The creation of this toolkit has been an extensive process over the course of one year. We have all strived diligently to gather experience, consolidate expertise and develop recommendations with the utmost care.

This toolkit can be used interdisciplinarily and is intended for all those involved in the fields of women's and child protection. The aim is to address and ensure the linkage between protection against violence and decisions on child custody, contact, visitation and access, including the review and execution of these decisions. This toolkit applies to justice personnel – judges, court appointed experts, other professionals and practitioners who are involved in the proceedings, decision-making, review and execution of child custody, contact and visitation decisions. This includes the police, child and youth welfare office staff, guardianship authority, as well as those who work directly with mothers affected by violence and their children.

For those of us in the field, the topic of custody and access rights in the context of violence against women has been a long-standing concern that consistently challenges us and demands our tireless commitment to education, cooperation, and intervention. At the beginning of this guideline, it is important for us to emphasise that we have already made progress on various fronts: national and international networks have been founded, local guidelines have been developed, research has been expanded and legislative projects have been accompanied. With this guideline, we would like to support and complement your work on the ground for women and children affected by violence, aligning with WAVE's principle of empowerment through networking.

Authors

I. Introduction: issues and challenges of child-friendly custody proceedings and visitation rights

“The consequences of domestic violence and its effects on children are also misunderstood and underestimated by judges,¹ who tend to prioritise and grant contact with fathers. In doing so, judges fail in their duty to protect children from harm,² giving abusive fathers unsupervised access to their children, including in cases where judges have found that physical and/or sexual violence has occurred.³” *United Nations (UN) Special Rapporteur on violence against women and girls, Custody report, 2023, p. 4*

There is a growing international attention to and recognition of the problem of intimate partner violence, domestic violence and their effect on children, including custody, contact and visitation matters. Based on the international standards, ensuring the safety of women and children, adopting a victim-centred approach,⁴ and prioritising the best interests of the child shall always be the foremost considerations when determining custody and visitation arrangements, surpassing all other criteria.⁵ The Council of Europe’s Istanbul Convention on preventing and combating violence against women and domestic violence is legally binding in many countries and the European Union (EU) has now also ratified the Convention. However, for many years and decades, and still today, mothers affected by intimate partner violence and their children have been confronted with the fact that their experience of abuse is not recognised by the different authorities and institutions, including the courts. Throughout Europe, specialised support services for women affected by violence are drawing attention to this. The provisions of the Istanbul Convention, including the ones in relation to child custody and visitation are often not implemented in the member states. The independent expert body that monitors the Convention’s implementation, GREVIO,⁶ repeatedly points this out in its country monitoring reports.⁷ The UN Special Rapporteur on violence against women and girls also highlighted alarming problems regarding custody, violence against women and violence against children in her 2023 thematic report.⁸ At the same time, the growing right-wing movement in Europe, which often goes hand in hand with a conservative “men’s/father’s rights” movement, is also having an impact on jurisprudence across Europe.⁹

- 1 Donna Martinson and Margaret Jackson, “Family violence and evolving judicial roles: judges as equality guardians in family law cases”, *Canadian Journal of Family Law*, vol. 30, No. 1 (2017), p.11
- 2 Adrienne Barnett, “Contact at all costs? Domestic violence and children’s welfare”, *Child and Family Law Quarterly*, vol. 26 (2014), pp. 439–462; see also Birchall, J. and Choudhry, S. (2018) “What about my right not to be abused?” Domestic abuse, human rights and the family courts, Bristol: Women’s Aid
- 3 Yvonne Woodhead and others, “Family court judges’ decisions regarding post-separation care arrangements for young children”, *Psychiatry, Psychology, and Law*, vol. 22, No. 4 (2015), p. 52
- 4 For risk assessment and safety management see: PROTECTII – Capacity Building in Risk Assessment and Safety Management to Protect High Risk Victims – A Learning Resource. WAVE, 2012. http://files.wave-network.org/trainingmanuals/PROTECTII_Risk_Assessment_and_Safety_2012_English.pdf See also: A guide to risk assessment and risk management of intimate partner violence against women for police. European Institute for Gender Equality, 2019. Available at <https://eige.europa.eu/publications-resources/publications/guide-risk-assessment-and-risk-management-intimate-partner-violence-against-women-police>
- 5 See the related report on it: **A/HRC/53/36: Custody, violence against women and violence against children – Report of the Special Rapporteur on violence against women and girls, its causes and consequences**, Reem Alsalem | OHCHR
- 6 The Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence <https://www.coe.int/en/web/istanbul-convention/home>
- 7 <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>
- 8 A/HRC/36: Custody violence against women and violence against children, op. cit.
- 9 Tip of the Iceberg – Religious Extremist Funders against Human Rights for Sexuality and Reproductive Health in Europe 2009–2018, Brussels 2021 <https://www.epfweb.org/sites/default/files/2021-08/Tip%20of%20the%20Iceberg%20August%202021%20Final.pdf>

Marianne Hester¹⁰ described the so-called “Three Planet Model” in 2011 in order to illustrate the contradictions in approaches to women’s and children’s safety when they are affected by violence. Mothers are confronted with different interventions and messages from the authorities and different professional groups. On the “domestic violence” planet, victims should report the acts of violence and take legal action to protect themselves. On the “child protection planet”, mothers are expected to leave the violent partner to protect their children. On the “contact regulation planet”, mothers are told to allow the children to have contact with the violent father.

In many countries violent fathers are viewed as offenders under the laws on protection against domestic violence, and they are forbidden to have contact with their children. However, and paradoxically, in custody and visitation proceedings, the same men are often successfully granted visitation rights.

Protection against violence for women and their children can only be successful if there is interdisciplinary cooperation and an equal understanding of the situation by all those involved. In particular, child custody, contact, visitation and access proceedings must be conducted hand in hand with all relevant actors and in a coordinated manner. In addition to the same understanding of the problem, coordination and cooperation, it is crucial to have the same shared fundamental values and basic principles for action, where the victims’ rights and safety come first, including the protection and interest of children.

10 Hester, Marianne (2011) The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children’s Safety in Context of Domestic Violence, *British Journal of Social Work*, Bd.41, Nr. 5 pp. 837–853.

II. Terminology

Child

For the purposes of this document, a child is anyone under the age of 18 years.

Child-friendly justice

This term refers to legal systems that ensure the utmost respect for and effective enforcement of all the rights of children, while considering the child's level of maturity, comprehension, and the specifics of each case. This approach duly acknowledges the child's entitlements, including the right to a fair legal process, active involvement and preservation of personal integrity and dignity.¹¹

Legal proceedings

We are referring to all proceedings taken before courts, administrative authorities, and other legislative bodies who have responsibility in child custody or visitation procedures, including issuing, execution, and review of such decisions.

Mother and father

We use the term mother (survivor of violence) and father (perpetrator of violence) in this text when referring to survivors and perpetrators of intimate partner violence/domestic violence. This is due to the fact that most victims are female and most perpetrators are male.¹²

We are aware that people live fluid gender identities and do not clearly categorise themselves as female and male. Nevertheless, we have chosen to do so in order to highlight the still important socio-political dimension of the category of gender.

11 Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), p. 17.

12 Across the EU, 31% of women reported having experienced physical violence since the age of 15, that's almost 58 million women affected. See the survey of FRA – European Union Agency for Fundamental Rights, 2014: http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf

III. International and European legal framework

The existing international human rights framework guarantees the rights of both women and children and their protection from violence. The key relevant norms (conventions) may be separate, but they shall be read, interpreted and applied together, in conjunction when both children and women are affected by violence, such as in case of intimate partner violence, or domestic violence. Linkage of the protection and support for women and children from violence, during the legal proceedings, including in custody and visitation matters is clearly provided by the Istanbul Convention; that shall be a guidance and standard for other norms in the field.

1. Basic human rights and general principles of protecting and safeguarding children in custody, visitation and contact proceedings and decisions¹³

1.1 The best interest of the child

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” *UN Convention on the Rights of the Child, Article 3 (1)*

The best interest of the child is and shall be a fundamental guiding principle in all cases and matters affecting children. It shall be a primary consideration in any action concerning them, whether this is done in a private or public social welfare institution, including courts, administrative authorities, or legislative bodies.¹⁴ Therefore, the best interest principle shall apply to all relevant legal proceedings and decisions, including child custody, visitation, and contact matters.

The best interest principle is a *substantive right of children*¹⁵ to have their best interests assessed and taken as a primary consideration when there are different interests, in making decisions concerning a child, a group of children, or children in general. Taking the best interest principle as a primary consideration is a state obligation that is directly applicable and can be invoked before a court.

The best interest concept is also a *fundamental, interpretative legal principle*. This means that if a legal provision has more interpretations, the one that most effectively serves the child's best interests should be chosen. Furthermore, the best interest is a rule of procedure, therefore, if a decision will affect a child or children, the decision-making process must include an evaluation of that decision's possible impact on the child/children. The justification of a decision must show that the right has been explicitly taken

13 For the international and EU framework and standards, see in more details: Logar, Rosa and Pap, Enikő: The protection of children from violence in the context of intimate partner violence/domestic violence and custody and visitation In light of the international normative framework, with special attention to the Council of Europe's Istanbul Convention. WAVE, 2022. Available at https://wave-network.org/wp-content/uploads/WAVE_Child-Custody-and-Visitation-rights.pdf

14 UN Convention on the Rights of the Child (CRC), Article 3 para. 1

15 See the threefold interpretation summarised in this paragraph in detail: UN Convention on the Rights of the Child - Committee on the Rights of the Children: General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1). CRC/C/GC/14, 29 May 2013. Available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEAXPu5AtSWvliDPBvwUDNUfn%2FyTqF7YxZy%2Bkauw11KCl-JiE%2Bul1sW0TSbyFK1MxqSP2oMIMyVrOBPKcB3YI%2FMB>

into account – it shall be explained how the right has been respected, what has been considered as the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations.

The child’s best interest principle shall be applied and taken into consideration in conjunction with all the child’s other rights, including matters of parental responsibilities and separation from parents. A related fundamental rule that provides guarantee is that “no right could be compromised by a negative interpretation of the child’s best interests.”¹⁶

The child’s best interests should be determined on an individual basis, according to the specific situation of the child/children, while taking into consideration their personal context and needs. Relevant decision-making has two main steps: the best-interest assessment and the best-interest determination. The “*best-interests assessment*” evaluates and balances all the elements necessary to make a decision. One of the elements to be assessed shall be the consideration of the child’s safety, the right to protection from all forms of violence, injury or abuse, sexual harassment, degrading treatment, and protection against sexual, economic and other exploitation.¹⁷ The assessment is carried out by decision-makers, possibly a multidisciplinary team, and requires the participation of the child. The “*best-interests determination*” is the formal process with strict procedural safeguards to determine the child’s best interests based on the best-interests assessment.¹⁸

1.2 The right of the child to be protected from violence, injury, neglect, maltreatment and/or exploitation

“ States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” *UN Convention on the Rights of the Child, Article 19 (1)*

Children shall be protected from all forms of violence, injury or abuse, neglect, maltreatment or exploitation.¹⁹ The state has a strict obligation to take all appropriate measures for this purpose.²⁰ Such protection measures should include effective procedures for prevention, identification, reporting, referral, investigation, treatment and follow-up of child maltreatment, and judicial involvement.²¹ “Child victims of violence should be treated in a child-friendly and sensitive manner throughout the justice process, taking into account their personal situation, needs, age, gender, disability and level of maturity and fully

16 See the threefold interpretation summarised in this paragraph in detail: UN Convention on the Rights of the Child - Committee on the Rights of the Children: General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1). CRC/C/GC/14, 29 May 2013. Available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEAXPu5AtSWvliDPBvwUDNUfn%2FyTqF7YxZy%2Bkauw11KCI-JiE%2Bul1sW0TSbyFK1MxqSP2oMIMyVrOBPKcB3YI%2FMB>

17 Ibid.

18 Ibid.

19 CRC, Article 19

20 See the UN Convention on the Rights of the Child – Committee on the Rights of the Child: General comment No. 13 (2011), The right of the child to freedom from all forms of violence, CRC/C/GC/13, para. 37. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F13&Lang=en

21 CRC, Article 19 para. 2

respecting their physical, mental and moral integrity”.²² Judicial involvement should be part of a coordinated and integrated approach across sectors, with other professionals working with children, caregivers, families, and communities, and facilitating access to all child caregiving and protection services available.²³ Judicial involvement may include criminal law procedures to abolish the practice of de jure/de facto impunity; proceedings against professionals for neglectful or inappropriate behaviour in dealing with suspected cases of child maltreatment; orders to ensure compensation and rehabilitation for children victims of violence.²⁴

Violence against children is a core element that has to be assessed when determining the child’s best interest.²⁵

1.3 The right of the child to be heard, and to have their views being taken into consideration

“ The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” *UN Convention on the Rights of the Child, Article 12 (2)*

The child who is capable of forming views has a right to express his or her views in all matters affecting him/her. The state has a clear legal obligation to recognise this right and ensure its implementation by listening to the views of the child and giving them due weight, in accordance with the age and maturity of the child.²⁶ Children must be “sufficiently involved in the decision-making related to his/her family and private life”.²⁷

Article 12 (2) of the UN Convention on the Rights of the Child shall be applied to all relevant judicial proceedings, without limitation, including, for example, separation of parents, custody, care, child victims of physical or psychological violence, sexual abuse or other crimes.²⁸

1.4 The right of the child to be informed about their rights in a child-friendly language

The state has an obligation to make children aware of their rights.²⁹ Children have the right to receive all the necessary information explaining how they can access justice and how they can be heard.

22 General comment No. 13., *ibid.*, para. 54 b)

23 *Ibid.*, para. 54 c)

24 *Ibid.*, paras. 55 c), d), e)

25 See 1.1 The best interest of the child

26 CRC Article 12 para. 1; UN Convention on the Rights of the Child – Committee on the Rights of the Child: General comment No. 12 (2009) The right of the child to be heard (CRC/C/GC/12), para. 32. Available at https://tbinternet.ohchr.org/_layouts/15/treaty-bodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F12&Lang=en

27 European Court of Human Rights: Key theme 1 Article 8 Right of the child to be heard in domestic proceedings on family matters (Last updated: 10/01/2022). Available at: <https://ks.echr.coe.int/documents/d/echr-ks/right-of-the-child-to-be-heard-in-domestic-proceedings-on-family-matters>

28 General comment No. 12, para. 32

29 CRC, Article 41

1.5 Separation from the parents, restrictions of parental rights for the best interest of the child. Guaranteeing rights and safety of victims in child custody and visitation.

“ 1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account. 2 Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.” *Istanbul Convention, Article 31.*

Children shall not be separated from their parents against their will, except when the competent authorities determine that such separation is necessary for the best interests of the child. A separation may be necessary in case of abuse or neglect of the child by the parents.³⁰ The child who is separated from one or both parents has a right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.³¹ Application of the best interest principle shall include the assessment of violence, so as violence shall be a factor in the best-interest determination.³²

As the Istanbul Convention clearly sets: the states shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence against women or domestic violence are taken into account. They shall take such measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.³³ Parental rights of the perpetrators might be withdrawn if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way.³⁴

1.6 The right of the child to specific protection and support

Protective measures against violence and abuse of children should include effective procedures to provide the necessary support for the child and for those who are caring for the child, for prevention, identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment, as well as for judicial involvement.³⁵ The state shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment.³⁶

In case of violence against women and domestic violence, protection and support measures shall address the specific needs of child victims.³⁷ A due account is taken on the rights and needs of child witnesses of such violence; measures shall include age-appropriate psychosocial counselling for them.³⁸

30 CRC, Article 9 para. 1

31 CRC, Article 9 para. 2

32 See above

33 Istanbul Convention, Article 31

34 Istanbul Convention, Article 45 para. 2

35 CRC, Article 19

36 CRC, Article 39

37 Istanbul Convention, Article 18 para. 3

38 Istanbul Convention, Article 26

During investigations and judicial proceedings, child victims and child witnesses of violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.³⁹

For victims of crime, an assessment shall be conducted to identify⁴⁰ “victims with specific protection needs”, according to the EU’s Victim’s Rights Directive. “Child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation”, therefore they are entitled to specific protection measures.

1.7 Risk assessment and risk management

“ In particular in cases of domestic violence, issues regarding common children are often the only ties that remain between victim and perpetrator. For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face-to-face.” *Explanatory report of the Istanbul Convention, para. 176*

The rights and safety of the victims of violence against women and domestic violence, including children shall be at the centre of any related measures and interventions. All relevant authorities (not only the police) shall therefore carry out risk assessment, examining lethality risk, the seriousness of the situation and the risk of repeated violence, and related risk management to provide coordinated safety and support for the victims. Risk assessment⁴¹ and management is particularly important in the case of post-separation, where intimate/domestic violence is likely to continue, or even increase, with a risk of homicides. Therefore during child custody, contact, and visitation proceedings and decisions, as well as for executing the related decisions, adequate risk assessment, management and safety planning shall be carried out, or taken into due consideration.

1.8 Child friendly justice

When children are brought into contact with competent bodies and services involved in implementing criminal, civil or administrative law, child friendly justice shall be applied. Child-friendly justice has a relevance both before, during and after judicial proceedings. Its fundamental principles are: participation, best interests of the child, dignity, protection from discrimination, and the rule of law. The general elements of child friendly justice include information and advice, protection of private and family life, safety (special preventive measures), as well as related training of professionals and a multidisciplinary approach.⁴²

39 Istanbul Convention, Article 56, para. 2

40 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (The Victim’s Rights Directive). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>

41 Istanbul Convention, Article 51

42 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum. Council of Europe, October 2011. Available at <https://rm.coe.int/16804b2cf3>

“ It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.”
(Council of Europe, Committee of Ministers: Guidelines on child friendly justice, II. c)

2. Basic human rights and general principles of safeguarding mothers in child custody and visitation proceedings and decisions

2.1 Right to protection against all forms of violence against women and domestic violence

States shall take the necessary legislative and other measures to promote and protect the right of women to live in an environment free from violence in both the public and the private sphere.⁴³

2.2 Guaranteeing the rights and protection of victims in child custody, visitation and contact

The states shall ensure that, in the determination of custody and visitation rights of children, incidents of violence are taken into account, and that the exercise of visitation or custody rights does not jeopardise the rights and safety of the victim or children.⁴⁴ Authorities have to take into consideration the incidents of all forms of violence against women and domestic violence when they make decisions on custody and visitation rights. Not only incidents of violence against the child, but also “incidents of violence against the non-abusive carer” must be regarded “when decisions on custody and the extent of visitation rights or contact are taken”.⁴⁵

“The rights or claims of perpetrators or alleged perpetrators during and after judicial proceedings, including with respect to ... child custody, access, contact and visitation, should be determined in the light of women’s and children’s human rights to life and physical, sexual and psychological integrity and guided by the principle of the best interests of the child.”⁴⁶

2.3 Right to specific protection and support

In case of violence against children, protective measures shall be applied. Such protective measures should include effective procedures to provide necessary support not only for the child, but also for those “who have the care of the child”.⁴⁷ For domestic violence cases, including in relation to custody and visitation matters, therefore both the children and the non-abusive adult, who is usually the mother,

43 Istanbul Convention, Article 4 para. 1

44 Istanbul Convention, Article 31

45 Explanatory report of the Istanbul Convention, para. 175

46 UN CEDAW General Recommendation No. 35.

47 CRC, Article 19 para. 2

shall be protected and supported. Specialist women's support services shall be available to all women victims of violence and their children.⁴⁸

During the investigation and at all stages of judicial proceedings for victims, special protection measures shall be applied to protect the rights and interests of victims of violence against women and domestic violence, including their special needs as witnesses, such as:

- protecting the victims, their families and witnesses, from intimidation, retaliation and repeat victimisation;
- informing victims, in cases where they and their family might be in danger, when the perpetrator escapes or is released temporarily or definitively (from state custody);
- informing victims of the rights and the services available to them, the follow-up of their complaint, the charges, the progress of the investigation or proceedings, their role (in the proceedings), and the outcome of their case;
- enabling victims to be heard, to supply evidence on their presented views, needs and concerns presented, directly or through an intermediary;
- providing victims with appropriate support services so that their rights and interests are duly presented and taken into account; protecting the privacy and the image of the victim; ensuring that, where possible, contact between victims and perpetrators within court and law enforcement agency premises is avoided;
- providing victims with independent and competent interpreters;
- enabling victims to testify in the courtroom without being present or at least without the presence of the alleged perpetrator, through appropriate communication technologies, where available.⁴⁹

For crime victims, an assessment shall be conducted to identify “victims with specific protection needs”, according to the EU’s Victim’s Rights Directive. Victims of violence in close relationships, and gender-based violence, “tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation” and “there should be a strong presumption that those victims will benefit from special protection measures”.⁵⁰

2.4 Risk assessment and risk management

Risk assessment and risk management for all cases of violence against women and domestic violence shall be conducted by all relevant authorities. This obligation stands for all relevant actors, not only the police. Risk assessment, risk management and safety planning is especially important in post separation, including child custody, visitation and contact matters. Coordination among and cooperation of all relevant actors is crucial in general for violence cases, and also relevant for risk assessment and management.⁵¹

48 Istanbul Convention, Article 22

49 Istanbul Convention, Article 56

50 Victim’s Rights Directive, op. cit., rec. 57

51 See page 12

2.5 Prohibition of mandatory alternative dispute resolution

Alternative dispute resolution can have a negative effect in cases of violence against women and domestic violence, especially when it is ordered mandatorily.⁵² In intimate partner violence, domestic violence cases victims often face a pressure/obligation from the authorities to conciliate with the perpetrator, and come to an agreement - that includes custody and contact/visitation matters. In case of all forms of violence against women and domestic violence, states shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation.⁵³ This prohibition shall be applied for procedures of child custody, visitation, and contact.

3. International case law

The state and its authorities have a positive obligation to provide protection and safety of minors, and of adult victims of violence. Failure to do so can not only cause grave harm to them but could also lead to their death. The rights of child and adult victims of violence shall be guaranteed and protected in the context of custody and visitation matters as well. Some examples of related international case law are listed below.

In *D.M.D v. Romania* case⁵⁴, the European Court of Human Rights (ECtHR) noted that Member States should strive to protect children's dignity and that there shall be an adequate legal framework to protect children against domestic violence.

In *M. and M. v. Croatia* case⁵⁵, the ECtHR found that there had been a breach of Article 3 of the European Convention on Human Rights when the Croatian courts failed to remove the children from their father who had been abusive towards them and thus exposing them to further abuse. The Court noted that delays within the judicial system led to further trauma for the child who not only had greater mental suffering but also started self-harming. It further found that there was a breach of Article 8, due to the delay in the judicial process and the lack of the child's involvement in the custody decision-making process.

In the *Bevacqua and S. v. Bulgaria* case⁵⁶ the applicants were a mother and her son (the first and second applicant, respectively). The mother claimed she was regularly battered by her husband (Mr. N.), and that her requests for interim custody measures were not treated as priority. The ECtHR in its final judgement established a violation of Article 8 of the Convention, and the state's positive obligation, given "the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which adversely affected the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants".⁵⁷

52 Explanatory report of the Istanbul Convention, para. 252

53 Istanbul Convention, Article 48

54 Application No. 23022/13; see the final judgement at: <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2223022%2F13%22%2C%22itemid%22%3A%22001-177226%22%7D>

55 Application No. 10161/13, see the final judgment at <https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22%3A%22ENG%22%2C%22appno%22%3A%2210161%2F13%22%2C%22documentcollectionid%22%3A%22CHAMBER%22%2C%22itemid%22%3A%22001-156522%22%7D>

56 Application No. 71127/01; see the final Judgment at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-86875%22%7D>

57 Ibid.

In *Talpis v. Italy* case,⁵⁸ the delay in the judicial process led to the attempted killing of the mother and the killing of the child. In this case, the mother filed several complaints to the national authorities about recurrent acts of violence. The court concluded that the manner in which the authorities had conducted the criminal proceedings constituted a breach of Article 3 due to the judicial passivity. It further found that the mother had been the victim of discrimination as a woman on account of the inaction of the authorities.

In the *Angela González Carreño v. Spain* case under the jurisdiction of The Committee on the Elimination of Discrimination against Women (CEDAW), an abusive father, during an unsupervised visit, murdered his daughter and then took his own life. The CEDAW Committee found that, by ruling to allow unsupervised visits without giving sufficient consideration to the background of domestic violence, the Spanish authorities had failed to fulfil their due diligence obligations under the Convention (para. 9.7).⁵⁹

58 Application No. 41237/14, see the final judgment here: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2241237/14%22%5D,%22itemid%22:%5B%22001-171994%22%5D%7D>

59 Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-eighth session) Communication No. 47/2012* *González Carreño v. Spain*. CEDAW/C/58/D/47/2012. Available at <https://juris.ohchr.org/casedetails/1878/en-US>

IV. Mapping harmful practises in custody and visitation procedures

Child custody and visitation proceedings in the context of violence against women and domestic violence are complex and emotionally charged. Courts and legal systems in regular divorce proceedings are generally tasked with making decisions that balance the rights and needs of both parents while ensuring the safety and well-being of the children involved. Unfortunately, in cases of intimate partner violence where children are involved, some custody and visitation methods and practices can exacerbate the trauma experienced by children and mothers, perpetuating the cycles of abuse. Experiences of women's civil society organisations and research has shown the existence of a variety of harmful child custody practices that often prevail in domestic violence cases.

Based on the Istanbul Convention, violence shall be taken into consideration when determining custody and visitation rights, and states have to adopt measures to ensure the safety of survivors of violence and their children when exercising visitation rights. Not only violence against the non-abusive parent shall be taken into consideration, but also any direct harm inflicted on the child.⁶⁰

When assessing visitation rights, paramount importance is placed on shielding women survivors of violence and their children from any potential harm. This becomes especially critical given that, in cases of intimate partner violence, children often become the sole point of contact between the survivor and the perpetrator following separation. This situation places the victim at risk and regrettably exposes the children to the possibility of further harm, at times even fatal harm, if contact orders are granted.⁶¹

Article 18 of the Istanbul Convention outlines the duty to prevent secondary victimisation. Nevertheless, women who have survived violence, particularly intimate partner violence face significant discrimination and are often subjected to re-victimisation within the system, especially in cases concerning custody and visitation rights. One comprehensive assessment on the harmful practices related to child custody proceedings has revealed extensive detrimental practices targeting women during these legal proceedings.⁶² For example, it has shown that women survivors of violence often receive unfavourable treatment in custody proceedings in 27 out of 31 countries (87%). In numerous countries, while incidents of violence are theoretically considered in child custody cases, they are often disregarded in reality. A prevailing belief exists within both social services and the courts, that a husband with a history of violence can still be a competent father. The priority is often given to the father's visitation rights, even at the potential expense of the safety of the women and children involved. In some cases, mothers are even held accountable if they cannot protect the child from the father's aggression towards either of them.

The monitoring expert group of the Istanbul Convention, GREVIO has noted deficiencies in both the legal framework and its application across all parties to the Convention concerning the duty to guarantee the safety of victims and their children in decisions regarding custody and visitation rights. In numerous parties, GREVIO discovered that there was no specific mention of domestic violence as a legal criterion to be considered when determining custody and/or visitation rights.⁶³

60 See Article 175 of the Explanatory Report to the Istanbul Convention, op. cit.

61 Article 176 of the Explanatory Report, op. cit.

62 European Women's Lobby 'Towards a Europe Free from Male Violence Against Women and Girls' Recommendations from the European Women's Lobby to end violence against women and girls in Europe once and for all', 2020.

63 In its baseline evaluation report concerning Malta, GREVIO observed that while incidents of domestic violence were clearly outlined as grounds for losing custody rights, they were not explicitly cited as reasons for forfeiting visitation rights upon separation. In its baseline assessment report regarding Serbia, GREVIO observed that the legislation did not recognise the detrimental impact that witnessing violence between one parent and the other has on children. Ibid., para. 327

In multiple baseline evaluation reports, GREVIO observed that parties often prioritise the assumed best interests of the child, emphasising the importance of maintaining contact with both parents at any expense, even when children have been exposed to violence. In certain countries, GREVIO noted that the shared exercise of parental authority was typically upheld, even in cases where a parent had received a definitive criminal conviction for committing violence against the other parent or when a protection order was in place.⁶⁴

Another troubling pattern is the display of prejudice against women who bring up concerns of domestic violence during custody and visitation proceedings. These victims are often stigmatised as uncooperative parents and paradoxically deemed “unfit for parenting”.⁶⁵

It is imperative for legal systems to evolve and adapt to better serve the needs of victims and their children, ultimately breaking the cycle of domestic violence. Child custody practices in cases of domestic violence require careful consideration to avoid causing harm to children and mothers. Not linking the rights and safety of the children and mothers, forced visitation, re-victimisation during visitation, mediation, and other dispute resolution methods, reference to Parental Alienation (PA) or Parental Alienation Syndrome (PAS) can perpetuate cycles of abuse and trauma, as described below.

Lack of linkage in children’s rights and women’s rights

Custody cases involving domestic violence present a multifaceted challenge to legal systems across Europe and worldwide. Central to these cases are the rights of two vulnerable groups: children and women. The lack of linkage between children’s rights and women’s rights in custody cases involving domestic violence is a deeply concerning issue that perpetuates cycles of violence and injustice. The best interests of the child - as laid down by the Convention of the Rights of the Child (CRC) - have long been a foundational principle in family law and custody decisions. However, this principle often becomes muddled when domestic violence is present. While courts are tasked with considering the child’s physical and emotional well-being, the assessment frequently ignores the effects of witnessing domestic violence, which can have profound and lasting impacts. The violence survived by the mother influences her children regardless of whether they have witnessed or have been direct victims of violence themselves. In cases of divorce involving intimate partner violence, children are often used as a means to control the woman survivor and continue the abuse.

In the context of parental responsibilities, including custody and visitation rights, the UNCRC upholds both the child’s entitlement to maintain relationships with both parents and the right to be protected from all forms of violence. Striking a balance between these two competing rights afforded to the child is imperative with the ultimate aim of serving the child’s best interests. However, in practice the best interest of the child is often interpreted as the right to have contact with both parents, with such a right superseding the right of both mother and child to a safe environment free of violence. The rights of parents to maintain familial connections with their child are also recognised as human rights, articulated as the right to family life, occasionally encompassed within the concept of the right to private life and privacy. Consequently, a parent retains custody or visitation rights over the child, even in cases of shared custody or when the other parent has been awarded sole custody.

64 Ibid., para. 329

65 In its baseline evaluation reports for Denmark and Italy, GREVIO expressed deep concern over victims who cite domestic violence as a justification for not participating in meetings with the perpetrators or refusing to consent to custody or visitation. Ibid., para. 331

Gender bias remains a prevalent issue within the legal system, impacting custody decisions disproportionately. Women, who are victims of intimate partner violence, may be unfairly labelled as unfit mothers due to societal expectations and stereotypes. This bias can lead to the removal of children from their mothers, further victimising both. Granting joint custody and visitation rights to the abusive parent can compel the victim to continue residing in close proximity to the perpetrator and maintain contact with them. In such scenarios, the failure to limit custody or unsupervised visitation rights can potentially lead to tragic consequences, not only for the woman but also for the children.

Forced visitation

Forced visitation, also known as court-ordered visitation, occurs when a court (or other authority in charge) mandates visitation between a child and an abusive parent against the wishes and safety concerns of the custodial parent. While proponents argue that forced visitation ensures the child's right to access both parents, it can be extremely harmful and dangerous in cases of domestic violence.

a. Psychological impact on children

Children forced into visitation with an abusive parent often experience anxiety, depression, and fear. Witnessing the abusive parent's behaviour during visitation can lead to long-term emotional trauma. In a study by Johnston (2005), children who were forced into visitation with abusive parents showed increased psychological distress and trauma symptoms.⁶⁶ Forced visitation can erode the child's trust in the legal system and lead to feelings of helplessness. Forcing children to have contact with an abusive parent can expose them to ongoing emotional and physical harm as witnessing or experiencing abuse can lead to long-lasting psychological trauma, anxiety, and depression. When abusive parents are granted visitation rights without adequate safeguards, it sends the message that abusive behaviour is tolerated or even condoned.

b. Safety risks for mothers

Mothers who get primary custody over children are put in a challenging position when forced to send their child to an abusive ex-partner. Mothers may face legal consequences if they refuse to comply with court-ordered visitation, leaving them vulnerable to legal sanctions. In some cases, mothers may be accused of parental alienation if they express concerns about visitation, leading to further legal challenges.

Re-victimisation during visitation

In many domestic violence cases, the abusive parent uses visitation as an opportunity to continue their abusive behaviour. This re-victimisation during visitation has severe consequences for both children and mothers. Some of the possible consequences are:

a. Physical abuse

Abusive parents may physically harm the child or use visitation as an opportunity to assault the custodial parent. Children may witness or experience violence during visitation, leading to lasting trauma.

b. Emotional abuse

Verbal abuse, threats, and intimidation can be ongoing during visitation, causing severe emotional distress to children and mothers. The fear of retribution for reporting abuse can prevent children from disclosing their experiences.

⁶⁶ Johnston, J. R. (2005). Children of divorce who refuse visitation. In J. R. Johnston & L. E. Benett (Eds.), *Children of divorce: Psychological, developmental, and clinical perspectives* (pp. 221–238). Guilford Press.

c. Legal barriers

Reporting abuse during visitation can be challenging due to the lack of evidence and the legal presumption of the best interests of the child. Mothers may be hesitant to report abuse due to fear of losing custody or facing retaliation.

Some common factors contributing to re-victimisation include:

a. Lack of supervision

Insufficient supervision during visitation can put children at risk of further abuse. Abusive parents may use these visits as opportunities to manipulate or threaten both the child and the mother.

b. Psychological manipulation

Abusive parents may employ various forms of psychological manipulation, such as gaslighting or guilt-tripping, to maintain control and intimidate the child during visits.

c. Coercion and fear

Children may feel coerced or fearful during visitation, making it difficult for them to express their feelings or concerns. This fear can result in long-term emotional trauma.

Mediation and other dispute resolution processes

Mediation and alternative dispute resolution (ADR) processes are often utilised to resolve child custody disputes, but they can be highly problematic in cases involving domestic violence. In a case study published by Sullivan (2013), mothers who were victims of domestic violence reported feeling re-traumatised during mediation sessions where they were forced to negotiate with their abusive ex-partners. This further perpetuated the power dynamic and undermined the safety of both mothers and children.⁶⁷ Concerning civil ADR procedures, GREVIO has raised concerns regarding the compulsory requirement of family mediation in certain countries, along with the absence of a definitive prohibition of mandatory ADR processes in cases involving violence against women. GREVIO has pointed out that this situation creates legal ambiguity and a lack of clear guidance for family courts and mediation units in handling such cases.⁶⁸

In numerous baseline evaluation reports, including assessments of Italy, Montenegro, and Turkey, GREVIO also discovered that despite an official prohibition of ADR processes in cases of violence against women, it continued to be frequently employed in practice. In countries like Andorra and Portugal, where compulsory mediation is forbidden in cases of violence against women, GREVIO emphasised the potential danger of mediation being suggested or continued if a woman had not previously disclosed her experience of intimate partner violence.⁶⁹

67 Sullivan, C. M. (2013). Mediation and advocacy with women survivors of domestic violence. In L. E. Walker, C. M. Renzetti, & J. L. Edleson (Eds.), *The Encyclopedia of Domestic Violence* (pp. 382-390). Routledge.

68 GREVIO Horizontal Review Report, para. 410

69 Ibid, para. 412

The key points of concern regarding mediation and ADR are the following.

a. Power imbalances

Mediation and ADR may not adequately address the power imbalances present in cases of domestic violence. Abusers may use mediation as an opportunity to manipulate or intimidate the victim.

b. Lack of safety measures

Mediation settings may not prioritise the safety of victims, allowing for potentially dangerous situations. Mediators and facilitators may lack training in identifying and addressing domestic violence.

c. Harmful/unfair mediation outcomes

In some cases, mediation may lead to agreements that do not adequately protect the child or the victim. Victims may feel coerced into accepting unfair custody arrangements to avoid further conflict.

Recognition of/Reference to Parental Alienation (PA) or Parental Alienation Syndrome (PAS)

Parental alienation (PA) or Parental alienation syndrome (PAS) are not scientifically and empirically recognised concepts, with no accepted definition. Its basis is the claim that one parent alienates the child from the other. PA/PAS are often used against mothers, when they are victims of domestic violence and oppose the perpetrator's contact with the child.

PAS is a controversial notion, introduced in 1985 by child psychiatrist Richard Gardner. His theory posited that children could be manipulated by one parent to reject the other parent, leading to the child's supposed pathological alienation. Gardner argued that this alienation was especially prevalent in high-conflict divorce cases and often went unrecognised by courts and mental health professionals. It was argued that the more the children distanced themselves from their fathers, the stronger the evidence of the alienating syndrome became. Gardner recommended severe measures to address this syndrome, including complete separation from the mother to "deprogram" the child.⁷⁰

Actually, reference to PAS may result in sidelining or delegitimising the history of domestic violence by the authorities.⁷¹ It's important to note that the scientific community does not endorse the use of the term – parental alienation for example was omitted from the Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association, rendering it as an invalid concept. Parental alienation was also deleted from the WHO's International Classification of Diseases (ICD-11).

According to the report of the UN Special Rapporteur on violence against women and girls, in divorce cases involving intimate partner violence, perpetrators often misuse the provisions of the family law to continue to abuse the victims. Accusations of domestic violence often undergo inadequate examination within the legal system, leading to problematic assumptions. These assumptions may include the belief that such violence inflicts minimal harm on both the mother and child, and that it automatically ceases upon separation. Furthermore, judges frequently misunderstand and underestimate the repercussions

70 Richard A. Gardner, *The Parental Alienation Syndrome and the Differentiation between Fabricated and Genuine Sexual Abuse (Creative Therapeutics, Cresskill, New Jersey, 1987)*, pp. 225–230. and pp. 240–242.

71 The downplaying of gender based violence in family court proceedings is closely connected to the increasing use of the concept of "parental alienation", which attempts to undermine the credibility of the child's fears of contact with the violent parent. PAS proponents demand as a solution family court interventions such as accompanied contact, change of contact arrangement, change of residence of the child or withdrawal of the custody of the parent in charge. See more details about the parental alienation concept and the harmful effects of its use in the report of the UN Special Rapporteur on violence against women about custody and violence, op. cit.

of domestic violence, particularly its effects on children, while showing a tendency to prioritise and grant contact with fathers.

Abusive fathers, when facing allegations of violence, often turn to PAS as a defence strategy. By framing themselves as victims of alienation, they attempt to divert attention from their abusive behaviour, creating a false equivalency between their actions and the actions of the woman survivor of violence.

This misuse of PAS can have severe consequences for the survivors of domestic violence. It places the burden of proof on the victim to demonstrate her innocence and often leads to protracted legal battles, further traumatising the children involved. In some cases, it even results in the abusive parent gaining custody or visitation rights, putting the children's safety at risk.

According to several studies, in recent years, from 75% up to 100% of cases of intimate partner violence during divorce proceedings involved claims of PAS by the alleged perpetrator. Accusations of the mother alienating the child are frequently used as evidence to argue that granting custody to her may not be in the child's best interest, as she may not facilitate communication with the father. Mothers seeking protection find themselves in a difficult position, where providing proof of domestic violence or child abuse could be interpreted as trying to estrange the children from the other parent. This could potentially lead to losing primary care or contact with their children.⁷²

Alleged international parental abduction

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty,⁷³ with the aim to “secure the prompt return of children wrongfully removed to, or retained in, any contracting state and to ensure that rights of custody are protected.”⁷⁴ The Convention refers to “the interests of children” as of paramount importance in relating to their custody. There is also an exception to the prompt return of children: the state authorities are “not bound to order the return of the child if... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”.⁷⁵

According to the Explanatory Report,⁷⁶ the Convention was drafted to solve the problem of an abductor, usually a parent, removing a child from their country of habitual residence and gaining artificially created legal custody rights, and jurisdictional links to the child in the country to where he had fled. This could essentially override custody orders made in the courts of the child's habitual residence, with the return of the child dependent on unilateral agreements made by each individual State.⁷⁷ It has been called a “remedy of hot pursuit”. The aim is that a child shall be returned to their jurisdiction of habitual residence within six weeks of an application being filed,⁷⁸ regardless of any court order that had been made in the country to which they had fled. What the Hague Abduction Convention fails to consider is the impact the remedy of immediate return has on mothers who flee to another jurisdiction with their children to escape domestic abuse.

72 See the UN Special Rapporteur's report on Custody, violence against women and violence against children, op. cit.

73 As of October 2023

74 The Hague Convention on the Civil Aspects of International Child Abduction 1980, Article 1. Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

75 The Hague Convention, Article 13 b)

76 See Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 1980. Available at <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>

77 Ibid, p. 429.

78 The Hague Convention, Article 11

The drafters of the Convention had envisaged that a 'typical' abduction would arise if the non-custodial parent, usually the father, kidnapped the child from the custodial parent and disappeared with the child abroad.⁷⁹ However, data reveals that in 2021, 88% of 'abductions' took place by custodial parents, 94% of whom were mothers,⁸⁰ a far cry from what was envisioned when the Hague Abduction Convention was drafted.

This has resulted in countless numbers of women and children being trapped in abusive relationships, unable to return to their home country;⁸¹ a mother who flees domestic abuse may find herself party to the Hague Abduction Convention proceedings for having abducted her child, in many cases inadvertently,⁸² and then forced to return.⁸³

If a mother finds herself in this situation, there are several points to consider in determining whether the Hague Abduction Convention applies and could be invoked should the mother remove her children from the jurisdiction. More information is available in Annex II.

Map of harmful practices – Don'ts

- Separating children's and mothers' rights and safety
- Ignoring/degrading when children witness violence and its effects
- Ordering contact and visitation at all costs – forced visitation
- Applying mediation and similar dispute resolution methods or processes
- Using or referencing parental alienation/parental alienation syndrome
- Ignoring/not duly taking into account the history of violence in alleged international child abduction case

79 See Hale J in Re S (Abduction: Access Rights) (1977) 1 FLR 971 at 977

80 Nigel Lowe and Victoria Stephens, Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention (HCCH 2023), available at: <https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf>

81 Merle H Weiner, Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad, (2002–2003), Issue 2, 11 AM. U.J. Gender Soc. Pol'y & L. 749, p. 769

82 Eran Sthoeger, International Child Abduction and Children's Rights: Two Means to the Same End, 32 *Michigan Journal of International Law*. 511 (2011). p. 513 Available at: <https://repository.law.umich.edu/mjil/vol32/iss3/3>

83 The Hague Convention, Article 1

V. Central factors for child-friendly custody and visitation proceedings and decisions⁸⁴

Children who witness or/and survive domestic violence are always severely burdened and their well-being is often endangered. The dangers and stresses can be exacerbated by parental separation. In any case, the potential consequences for the children are so severe that the priority must be to clarify the protection of the children. In many cases, the violence does not end with separation, the structures of control, fear, oppression, and humiliation continue to persist. Stalking, threats, physical and/or sexual violence also occur after spatial separation. Because of the serious consequences potentially impacting the child's development and the impact on relationships in the family system, the court must consider whether it is necessary to restrict or exclude access. It may also be appropriate to dissolve joint parental custody and grant it to the mother. In court proceedings following domestic violence, the best interest of the child must be the main concern. The protection of the parent affected by violence from further violence is equally legally protected by fundamental and human rights. It must not be lost from sight either in forming proceedings or in the judicial decisions on parental custody or visitation rights.

It is therefore important that the court is not only alert to indications of domestic violence, but also that those involved in the family court proceedings, as well as the counselling and support systems, ensure that the necessary information reaches the family court. Professionals in women's shelters, women's counselling centres, intervention centre or women's emergency centre can advise mothers affected by violence on the importance for the family court to be well informed about the incidents of violence. A written report by the counsellors in support of the mother will make an important contribution to clarifying the facts.

It is important to acknowledge that mothers often encounter difficulties to speak about violence shortly after separation from the perpetrator, as their willingness may be undermined by several setbacks:

- feeling shame for staying in an abusive relationship, and/or not being able to protect their children better
- feeling guilt, as they believe they are the cause of the failed family relationship
- feeling intimidated due to different threats of further violence made by the perpetrator (including child abduction)
- being afraid that they may lose their children in custody battle

In child custody cases after separation and divorce, the usual procedures of family court proceedings must be adapted in cases where domestic violence is involved.

A procedure which prioritises that the clarification of the facts and the risks for the child and the parent affected by violence are taken seriously and assessed is required. The focus is on the following questions:⁸⁵

- is the child protected from threats to their welfare?
- is the mother affected by violence protected from dangers to her welfare?

⁸⁴ This section is an abstract of Meysen, Thomas (Hrsg.) (2021): Kindschaftssachen und häusliche Gewalt. Umgang, elterliche Sorge, Kindeswohlgefährdung, Familienverfahrensrecht. Heidelberg/ Germany: SOCLES.

⁸⁵ Ibid.

Children have the right to be heard by the court independently of their parents. Criteria for hearing children⁸⁶

a. Time window for the hearing

A basic requirement is that the court allows sufficient time for the child to be heard. At least one hour should be planned for this.

b. Location of the hearing

It is recommended that the court clarifies in advance where the child should be heard. In critical cases, such as in contexts of violence and threats to the child's welfare, consideration should always be given to hearing children at their place of residence. As a rule, the accustomed environment gives children safety in the stressful situation of the hearing.

c. Timing of the hearing

The timing of the hearing is also of significant importance and not arbitrary. Children who have witnessed domestic violence should not be heard on the same day as their parents. The tense and anxiety filled atmosphere can be spared by careful planning.

If time allows, it is advisable to schedule children's hearing a few days before the parents are heard. Thereby, the court is faced with the fresh impression of the dismay and stress that the parental, violent conflict emanates from the children. Thus the court can appear before the parents with much greater certainty in relation to safeguarding the best interests of the child.

d. Video-recording of hearings

The risk of secondary traumatising of children may be reduced by video-recording hearings and ensuring that recordings are acceptable evidence, in order to prevent needless repetition.⁸⁷

Risk and hazard assessment⁸⁸

The court has to regularly conduct its own risk assessment and also carry out risk assessments of other actors (e.g., youth welfare office, police) in order to reach preliminary decisions and/or regulations. When protecting survivors, it must be ensured that the no-contact order and proximity prohibitions under the Protection Against Violence Act⁸⁹ are not undermined by the order for contact. Additionally, it must be ensured that protection can exist during handover scenarios even if there is no current police presence or family court prohibition on contact and closeness. As an example of the risk assessment, see the Special Guide to Munich's Model Questionnaire added in Annex.

Review criteria for the court in decisions on custody and visitation procedures after domestic violence⁹⁰

Before a decision is made on custody or visitations, there must be sufficient certainty in the assessment of the risk situation for the child and/or the parent affected by violence. The following questions should be carefully considered:

⁸⁶ Ibid.

⁸⁷ FRA Child-friendly justice Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States, 2017, p. 12

⁸⁸ Ibid.

⁸⁹ In Germany, the so-called Protection against Violence Act (for civil law protection against acts of violence and stalking) has been in force since 2002. This gives the victim the possibility to apply to the court for the perpetrator to be expelled from the shared home or to be forbidden to have any contact with the mother. See <https://www.gesetze-im-internet.de/gewschg/BJNR351310001.html>

⁹⁰ Ibid.

- are the incidents of violence, the continuing presence of danger and protection needs of the child and the parent affected by violence sufficiently clarified? And, if applicable, is their probability sufficiently clarified?

- has the child's process of witnessing domestic violence been sufficiently clarified?

- can the risk of acts of violence of the perpetrating parent be assessed with sufficient certainty? Has the perpetrating parent taken responsibility for the acts of violence?

- what type of support and help is there for the child?

- what type of support is established for the perpetrating parent?

- what type of support and help is there for the parent affected by violence?

- is there a risk of further violence, for example when the secret residence of the child and the parent affected by violence becomes known?

- is there a risk of further stress or even re-traumatisation of the child or the parent affected by violence during contacts in the course of reaching an engagement on issues of parental care?

- does the (previous) violent structures and dynamics continue (control, fear, oppression, belittlement)?

- is there a sufficient reduction in the level of conflict in a reasonable amount of time (for example violent parents' sight and responsibility, heavy burden or breach of trust due to violence)?

Visitations procedures⁹¹

The ordering (accompanied) contact can be considered if sufficient reliable answers to the following questions about the behaviour of the violent parent can be given. If these questions cannot be answered, (accompanied) contact should not take place:

- has the demonstrably violent parent not only admitted their actions, but taken responsibility for them in a viable manner? (e.g. expressing regret for the burdens inflicted)

- has the violent parent worked out ways to express regret to the child for the stress inflicted and to behave adequately in dealing with the child? (e.g. not exert pressure and accept the restraint of the child)

- is there sufficient certainty that the violent parent can adequately control their impulses even in stressful situations? Important information on this point can be provided if the violent parent has already taken up advantage of educational counselling or participated in domestic violence perpetrator programmes and has been able to work out changes.

- does the child have fears/anxiety that stand in the way of visitation procedures, or are they firmly opposing to contact?

- is the safety of the parent affected by violence guaranteed, especially in case of contact with the child?

91 Ibid.

Sole or joint custody?⁹²

Domestic violence is a strong indication that (partial) annulment of joint custody is in the best interests of the child. In deciding whether to (partially) transfer sole parental custody to the mother, the following must be taken into account:

- with which parent is there a positive and stable bond?

- with which parent is the continuity of a reliable, positive relationship guaranteed/ensured?

- which parent is most likely to maintain a stable, positive living situation for the child, if necessary with the use of counselling and support?

92 Ibid.

VI. Promising practices for safeguarding children affected by domestic violence in judicial proceedings across Europe

Promising practice examples are emerging across Europe, demonstrating innovative approaches to address various challenges and issues related to women's and children's rights in custody proceedings. Some of these examples are presented below, to offer valuable insights into effective strategies that are paving the way for more victim-friendly custody proceedings.

Women's Aid in Ireland is working on a comprehensive, evidence-based study examining the effectiveness of Custody and Access proceedings within the Irish Family Law system. This research will assess how these proceedings, both independently and in conjunction with other factors, address the safety and well-being needs of domestic abuse victims and survivors, including children. The work should be completed in late 2024.⁹³

Regarding parental alienation, Spain has banned the use of PAS and corresponding theoretical concepts by law in 2021,⁹⁴ and in Italy the highest court also prohibited the application of the PAS theory.⁹⁵

In the case of Spain, GREVIO noted that despite the challenges in executing this modification effectively, perpetrators can no longer obstruct their children from accessing essential counseling sessions, as the provision determining the necessity for consent from both parents to access this service has been removed.⁹⁶

The Mid-term Horizontal Review report published by GREVIO offers a comprehensive overview of challenges and positive practices in relation to each article of the Istanbul Convention. Some of the promising initiatives for protecting children victims and/or witnesses of domestic violence regarding on custody proceedings are:

Article 31 – Custody, visitation, and safety

GREVIO commended several countries for good practices related to implementation of Article 31. In Austria, a strong legal foundation for preventing abusive parents from gaining custody has been set. Although GREVIO observed that this provision may not yet be widely recognised among the judiciary, it highlighted that the civil code incorporates the concept of "mitigating the risk of a child experiencing or witnessing violence against close individuals" when determining the child's best interests. Additionally, Austria established "family court assistance" in 2013, involving professionals (social workers, psychologists and child pedagogues) to support family judges in making informed and satisfactory decisions. In relation to Article 31, France introduced the accompaniment under protection measure, allowing children to have a non-family adult present during visitation rights.⁹⁷

93 Research projects - Women's Aid ([womensaid.ie](https://www.womensaid.ie))

94 See the respective law at <https://www.boe.es/buscar/act.php?id=BOE-A-2021-9347>

95 See: https://www.dire.it/wp-content/uploads/2021/05/Ordinanza-Cassazione-13217_2021.pdf

96 3rd General Report on GREVIO'S Activities. GREVIO Group of Experts on Action against Violence against Women and Domestic Violence, para. 87

97 Mid-term Horizontal Review of GREVIO baseline evaluation reports. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). Council of Europe, February 2022., para. 325 <https://rm.coe.int/prems-010522-gbr-grevio-mid-term-horizontal-review-rev-february-2022/1680a58499>

Article 50 – Immediate response, prevention and protection

In Spain, with the goal to deliver a comprehensive legal response to domestic violence, these cases are handled by specialised units within the Prosecutor's Office, and brought before dedicated courts. These courts have dual authority, covering both criminal and civil matters, such as protection order, custody dispute and divorce. All legal professionals involved in the process receive special training.⁹⁸

Article 55 – Ex parte and ex officio proceedings

In Denmark, victim support lawyers are available to assist as soon as a crime is reported, even before the victim provides their initial statement. These professionals also help victims pursue compensation from the perpetrators. GREVIO stressed the need for sustained victim support when civil proceedings arise from criminal acts, such as claims for damages and domestic violence-related divorce and custody cases. This level of support is similar to the psycho-social assistance offered in Austria (mentioned above).⁹⁹

Additionally, promising practices for protecting and supporting children and women affected by domestic violence in general, including in all judicial proceedings also highlighted by GREVIO:

Article 9 – Non-governmental organisations and civil society

In Austria, under the Security Police Act, law enforcement agencies notify the Violence Protection Centre whenever an emergency barring order is issued, allowing the centers to contact the affected women and children.¹⁰⁰

Article 11 – Data collection and research

In Portugal, a data collection tool is used to provide a comprehensive overview of the criminal proceedings related to domestic violence cases. Domestic violence incidents are documented in a form that captures crucial information such as victim's and offender's age and sex, the nature of their relationship (including economic dependency), the presence of children witnessing violence, weapon usage, any addictive behaviour exhibited by the perpetrator, as well as victim's medical treatment and risk assessment.¹⁰¹

Article 18 – General obligations

In Albania, referral mechanisms have been developed at the municipal level aiming to establish multi-agency co-operation among representatives from various sectors, including municipalities, legal bodies, police, health, employment and educational offices, including NGOs specialised in combating violence against women. The referral mechanisms consist of three primary components: steering committee in charge of the strategic course, a multi-disciplinary technical team handling case-management and a local co-ordinator overseeing the team's activities. The process begins when the victim reaches out to any member of the mechanism, who subsequently directs them further.¹⁰²

Article 19 – Information

In Sweden, municipal social services and medical care professionals are crucial in referring individuals to specialised support services. Additionally, within the education sector, there are dedicated school support personnel who can be approached for guidance and assistance as many of them receive specialised training to identify and manage cases involving children affected by domestic violence.¹⁰³

98 Ibid. para. 433

99 Ibid. para. 482

100 Ibid. para. 75

101 Ibid. para. 104

102 Ibid. para. 223

103 Ibid. para. 236

Article 26 – Protection and support for child witnesses

Numerous states mandate reporting incidents or any suspicion of children witnessing or being a victim of domestic violence to the appropriate authorities, such as local municipalities or child protection services. In various states, including Montenegro and Italy, perpetrating violence when children are present leads to more severe legal penalties, or is considered as child abuse (in Italy and Netherlands). In Andorra, Montenegro, and Turkey, the legislation mandates identical protection and support for both victims and witnesses, as witnessing such violence is regarded as equivalent to being directly exposed to it. Andorran legal framework designates minor children as “victims” along with their mothers in cases of domestic violence. This designation entitles them to receive essential support encompassing social, psychological, and medical assistance. Similarly, in Spain, the comprehensive support and safeguarding is offered to minor children or children under the guardianship or custody of women facing intimate partner violence

Article 28 – Reporting by professionals

In Finland, after legislative changes in 2015, professionals are not bound anymore by confidentiality regulations when they suspect there are potential threats to the lives of women or children in situations of domestic violence. Instead, they are enabled to report the risk to the relevant statutory authorities.¹⁰⁴

Article 29 – Civil lawsuits and remedies

In Spain, the Spanish Ombudsperson initiates investigations in all cases related to the killing of women or their children to address inadequacies in the response of the criminal justice system.¹⁰⁵

Article 30 – Compensation

In Sweden, children who witness domestic violence can receive compensation for criminal injuries, if the incident has caused damage to the child’s confidence and trust in someone with whom they share a close bond.¹⁰⁶

Article 56 – Measures of protection during investigations and judicial proceedings

In Denmark, “Children’s Houses” provide professional support and psychological counselling services for child victims of sexual abuse. These child-friendly spaces are also utilised for interviewing child witnesses of domestic violence. Similarly, in line with the 2017–2020 National Strategy on the Rights of Children, Portugal has established dedicated children interview rooms.¹⁰⁷

104 Ibid. para. 300

105 Ibid. para. 306

106 Ibid. para. 316

107 Ibid. para. 491

VII. Conclusions and recommendations

To mitigate the (potential) harm caused by custody and visitation decisions and practices, and to strengthen the rights, safety and protection of victims in cases of domestic violence, we recommend the following reforms, measures and practices as essential:

- 1.** The effect of intimate partner violence on children shall be recognised by law and practice. **Children witnessing domestic violence**/gender based violence **shall also be considered as victims** of violence, both in the legislation and in practice.

- 2.** Decisions regarding child custody and visitation shall always **prioritise the child's** best interests, their **rights, safety** and well-being as paramount. They should also take into account the **rights and safety of the protecting parents**, the mothers. This shall be guaranteed by the law and practice. The rights and safety considerations shall be monitored through the review of custody and visitation decisions, and in relation to the exercise of visitation as well.

- 3.** Courts shall conduct ex officio thorough **screening processes to identify domestic violence cases** and assess the safety of custody and visitation arrangements. **Standardised risk assessment** tools shall be used in custody, visitation disputes and related proceedings to evaluate the potential for harm to children and mothers. Adequate **risk management and protection measures** shall be applied.

- 4.** **Joint parental custody shall not be granted** in cases of violence, especially when (previously) violent structures and dynamics (control, threats, fear, oppression, belittlement) persist; stress continues to affect the child and the non-abusive parent (e.g. fear, traumatisation, stress symptoms before, during or after contact); or a sufficient conflict reduction is not reasonable with a treatment, or its success is not foreseen within a reasonable period of time. In case of violence, for the sake of rights and safety of victims, **visitation and contact** with the perpetrating parent shall usually be either **excluded, restricted, or suspended**. As long as there is a risk of violence against the mother and/or the child or the risk of renewed severe psychological stress, no (even supervised) contact shall take place. A declaration of refraining from violence and participation in a specialised counselling service and/or a social training course by the perpetrating parent shall be at minimum prerequisites for contact, in case no further risk of violence and harm has been identified.

- 5.** Legal professionals, judges, mediators, court appointed experts and other relevant professionals shall receive **qualitatively and quantitatively adequate basic and further training** on domestic violence dynamics, trauma-informed approaches, and on the impact of violence on children, including harmful custody and visitation practices. Related qualification and specialisation in the field is recommended.

- 6.** A holistic, integrated approach shall be provided in the justice system: related **proceedings** in criminal law and for the protection against violence **have to be synchronised** with child custody and visitation proceedings. Both in substantive and procedural laws, minimum **standards and procedures (protocols)** in cases of suspected violence shall be established. These shall comply with both the UN Convention on the Rights of the Child and the Istanbul Convention.

- 7.** **Hearing** of adult and child victims shall be provided in a way **to prevent secondary victimisation**. Multiple hearings of the children must be avoided.

- 8.** Victims should have **access to legal representation** to ensure their rights are protected and their voices are heard during custody and visitation proceedings.
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- 9.** Both children and mothers should have **access to adequate support services**, including counseling, legal assistance, and financial aid, to help them navigate the challenges of custody disputes.
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- 10.** In cases of violence **mediation**, conciliation, or similar dispute resolution methods and processes to require the parents to reach an agreement in custody and visitation matters shall be prohibited by the law and **shall not be applied** in practice.
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- 11.** **Not scientifically proven theories** such as the parental alienation syndrome (PAS), **shall not be used** as a basis for decisions on custody and visitation matters.
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