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PROTECTIVE AND RETURN-SEEKING PARENTS

The Power of Language in Child Abduction Law

Johanna Niemi and Laura-Maria Poikela

1. INTRODUCTION

The main aim of the international regulation of situations in which a parent has taken their child and moved to another country before a looming divorce proceeding and custody trial has been to secure the child's quick return to the country of shared domicile. The main reasoning behind this approach is that a parent should not be able to manipulate the jurisdiction of the custody dispute to be more favourable to them, and should not be changing the child's environment to gain an advantage in

the custody dispute.[1] The primary purposes of the Hague Convention on Child Abduction ('the Convention' or 'HCCA'),[2] as the main instrument governing international child abductions, were, and still are, to preserve the status quo, to ensure the prompt return to the *status quo ante*,[3] and to deter parents from crossing international borders in search of a more sympathetic court. These kinds of motivations led to the adoption of the Convention in 1980, and the European Union (EU) essentially transferred the procedural regulations of the Convention into the Brussels IIa Regulation in 2003.[4] As a result of a complex process of negotiation, the Hague Convention was, ultimately, preserved for intra-member State abductions, but complemented by more stringent EU rules.[5]

Before the Hague Convention on Child Abduction, two other Hague Conventions addressed international family law and child law matters. Neither of these, the Hague Convention on the Guardianship of Infants (1902) or the Hague Convention on the Protection of Minors (1961), mention international child abductions. The need to agree on rules regarding international child abductions was recognised in the late 1970s, when the number of divorces began to increase. Both the Council of Europe and the Hague Conference on International Private Law started to work on a Convention in this area. During the preparations, the US-based lawyer Adair Dyer prepared a research report combining legal and sociological approaches to international child abductions.[6] For decades, researchers,

1 E. Pérez-Vera, *Explanatory Report on the HCCH Child Abduction Convention*, Acts and Documents of the XIVth Session, Hague Conference on Private International Law, The Hague 1981 <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 26.05.2021, e.g. para. 15.

2 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, referred to as 'the Convention'.

3 Restoring the circumstances before the abduction, by returning the child to the State of habitual residence.

4 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1. From 1 August 2022, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1, shall replace Reg. 2201/2003.

5 P. McEleavy, 'The European Court of Human Rights and the Hague Convention: Prioritising Return or Reflection?' (2015) 62 *Netherlands International Law Review* 365–405, 372.

6 A. Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, Preliminary Doc. 1, Actes et Documents of the XIVth Session, Hague Conference on Private International Law (1978).

professionals, officials and courts all over the world have relied on the Dyer Report and the Explanatory Report by Elisa Pérez-Vera in interpreting the Convention. The final draft for the Convention was presented to the Hague Conference in November 1979. The 23 countries participating in the process adopted the Hague Convention on Child Abduction in 1980.[7]

There are several reasons to ask whether the Convention is still adequate today, and its motivations still relevant, especially in Europe. The world is not the same as it was in 1980. First, the regulation of jurisdiction within the EU has evolved in child disputes since the enactment of the Brussels IIa Regulation, which includes rules on jurisdiction within EU countries over such matters. Secondly, and also related to the processing of international disputes, cooperation among the courts across borders has developed to include, for example, possibilities for the electronic presentation of evidence, either in the course of cooperation between the courts, or directly from a witness or a party to a court in another country, as well as efficient service of documents, and enforcement of judgments across borders.

A third development since the 1970s has been an increase in research on violence against women and children (VAW and VAC, respectively).[8] We know much more about these forms of violence today than we did in the 1970s. It has not been good news. There is a greater level of violence within families than was previously known, and such violence is more serious. Domestic violence has an effect on children, even when they are not the direct victims.[9] The European Parliament has commented that:

> violence against women goes hand in hand with violence against children and has an impact on children's psychological wellbeing and lives … violence against women as mothers directly and indirectly affects and has a long lasting

7 B. Bodenheimer, 'The Hague Draft Convention on International Child Abduction' (1980) 14 *Family Law Quarterly* 2. The Hague Conference on Private International Law (HCCH) currently has 89 Members (August 2021).

8 European Union Agency for Fundamental Rights, *Violence against Women: An EU-wide Survey*, FRA 2014 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf> accessed 29.09.2021; C. Hagemann-White, L. Kelly and R. Romkens, *Feasibility Study to Assess the Possibilities, Opportunities and Needs to Standardise National Legislation on Violence against Women, Violence against Children and Sexual Orientation Violence*, European Union 2011 <https://op.europa.eu/en/publication-detail/-/publication/cc805fb4-c139-4ac0-99b7-b0dad60179f7/language-en#> accessed 29.09.2021.

9 S. Wood and M. Sommers, 'Consequences of Intimate Partner Violence on Child Witnesses: A Systematic Review of the Literature' (2011) 24(4) *Journal of Child and Adolescent Psychiatric Nursing* 223.

> negative impact on their children's emotional and mental health, and can create a cycle of violence and abuse which is perpetuated through generations.[10]

The fourth development, relevant for cross-border relationships, is the change in the nature of violence and harassment. More and more harassment, threats and defamation take place in the electronic world, including through personal communications such as emails and text messages, and social media activities.[11]

The regulation of cross-border child removals (abductions) does not pay much attention to the reasons why the removal has taken place, but prioritises swift return of the child. There are reasons to reconsider how the courts handle cases in which a parent has removed the child from a violent home.

Furthermore, times have also changed regarding international and transnational families and their situations. An increasing number of families, especially within the EU, live either temporarily or permanently in a country in which only one, or neither, of the parents were born. This free movement, where people work and/or study in another Member State, or move within the EU after first settling there from a non-Member State, have contributed to families being more international and multicultural than before. When a parent moves with their child to another country, it is more likely to be to a country where the parent already has social contacts.[12] It is likely that the parents who move with their children to another country are a more diverse group than during the drafting of the Convention in the 1970s.

The purpose of this contribution is to ask how international communities, the EU, and EU States have responded to these changes to the nature of situations in which a child is moved from one country to another EU country. More specifically, we are interested in how the Convention and the Brussels IIa system of a swift return of the child to the country of habitual residence functions in circumstances where there are indications of domestic violence.

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10 European Parliament resolution 26 November 2009 on the elimination of violence against women (P7-TA (2009) 0098).

11 European Institute for Gender Equality, *Cyber violence against women and girls*, EIGE 2017 <https://eige.europa.eu/publications/cyber-violence-against-women-and-girls> accessed 29.09.2021.

12 Taylor and Freeman have identified the desire to move to a familiar environment with support of the extended family as the main reason for parents to move: N. Taylor and M. Freeman, 'International Research Evidence on Relocation: Past, Present, and Future' (2010) 44(3) *Family Law Quarterly* 3.

The growing body of international law on violence against women seeks to protect both women and children. In the European legal domain, the Istanbul Convention and the European instruments on cross-border enforcement of protection orders[13] strengthen the protection against violence, albeit in different ways. This body of law has evolved separately from the regulations on child abduction. The aim of this contribution is to bring together these two regulatory spheres: child abduction law and the law of protection against violence. Since the aims of these types of law are far apart – rapid return of the child versus protection against violence – it is not surprising that the language of their respective regulations and texts are quite different. Therefore, we start with an analysis of the two discourses: one of swift return, and the other of protection.

The theoretical and methodological basis of this contribution is social constructionism, according to which language not only reflects or corresponds to reality, but also constructs it. Thus, the words and concepts that we use shape social relations, social structures and, finally, concrete reality.[14] This kind of thinking is not unfamiliar to lawyers and legal researchers. Obviously, legislation and legal decisions have effects that change relations, and lead to changes in environments. Social constructionism goes further than this, because the power of language and discourses to construct reality are not limited to such intentional actions as enacting laws and giving legal decisions, but also encompass indirect and unintended effects. Thus, in the legal setting, the attention of the researcher turns to the broader use of language and concepts, and to how the discourses construct identities, actions and relations.[15] As per Carol Bacchi, we are particularly interested in how legal language constructs a certain social problem, such as the removal of a child.[16]

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13 Council of Europe Convention on the preventing and combating violence against women and domestic violence; referred to as the 'Istanbul Convention' [2011]; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (EPO) OJ L338/2.

14 P. Berger and T. Luckmann, *The Social Construction of Reality*, Penguin Books, London 1991.

15 K. Nieminen, 'The Law, the Subject and Disobedience: Inquiries into Legal Meaning Making', Dissertation, University of Helsinki 2017 <https://helda.helsinki.fi/handle/10138/195911> accessed 29.09.2021.

16 C. Bacchi, *Analysing policy: What's the problem represented to be?*, Pearson Education, London 2009.

Social constructionism is the theory behind several methodological approaches, in particular discourse analysis[17] and narrative analysis.[18] In this contribution, the concept analysis is informed by discourse analysis: in particular, how the key concepts of child abduction and protection against violence depict the *actions* and the *parent*, and what kind of effects these conceptualisations have on the lives of the parents.

Section 2 of this contribution analyses the language of relevant international law. First, in section 2.1, it looks at the language of the central legal instruments – the Convention and the Brussels IIa Regulation – focusing on what is generally referred to as child abduction. The language in these instruments is gender- neutral. Thereafter, section 2.2 comments on the different approach chosen by the recent EU-funded project 'Protection of Abducting Mothers in Return Proceedings' (POAM),[19] which uses gendered language.

Next, section 3 explores the language of international law on violence against women, in which VAW is, today, seen as a violation of human rights. In this context, protection against violence has become a key concept, as is exemplified by the EU documents regulating cross-border enforcement of protection orders. Finally, section 4 brings these two discussions together, and refers to the case law of the European Court of Human Rights (ECtHR), which has in several cases tried to consolidate the requirements of the Convention, on the one hand, and the protection of private and family life according to the European Convention of Human Rights (ECHR), on the other.

2. THE LANGUAGE OF THE REMOVAL OF A CHILD

2.1. THE CONVENTION AND BRUSSELS IIA: WRONGFUL REMOVAL

The private international law term for circumstances in which a parent moves to another country with their child, without permission from

17 J. Niemi-Kiesiläinen, P. Honkatukia and M. Ruuskanen, 'Legal Texts as Discourses' in E.M. Svensson, Å. Gunnarsson and M. Davies (eds), *Exploiting the Limits of Law*, Routledge, Ashgate 2007, 69–88.

18 R. Wharton and D. Miller, 'New Directions in Law and Narrative' (2016) *Law, Culture and the Humanities* 1.

19 Best Practice Guide – Protection of Abducting Mothers in Return Proceedings (hereafter 'POAM Best Practice Guide'), reprinted in this volume.

the other parent who has custody (usually shared) of the child, is child abduction. It is clear even to a non-native speaker of English that the term 'abduction' denotes a serious wrongdoing. The *Cambridge Dictionary* defines abduction as 'the *act* of making a *person* go *somewhere* with you, *especially* using *threats* or *violence*'.[20]

In the Hague Convention on Child Abduction, this terminology is present only in the title. The Convention text itself does not use the word 'abduction'. The State Parties decided to avoid using the word 'abduction' in the Convention text because of the stigmatising connotation of the word. The original Convention countries were of the opinion that the Convention text should not include any criminal connotations.[21] Thus, especially when it seems that domestic violence might be a crucial factor behind the parent's decision to move or even flee with the child, or there is at least evidence or a reasonable suspicion that this is the case, terminology such as 'abduction' and 'abductor' places the situation in a more criminal setting than originally intended by the Convention Member States.

Nevertheless, the catchily worded concept 'child abduction' has conquered the world. Even translations of the word replicate the terms 'abduction' or 'child kidnapping'. The word abduction is part of the legal language in international civil law, as well as national criminal law, and is widely used by authorities, researchers and professionals.

The EU has incorporated the Hague Convention rules on child abduction into EU law with the Brussels IIa Regulation on jurisdiction and recognition of judgments in matrimonial matters and parental responsibility.[22] This Regulation mentions the word 'abduction' in the title of the key article, Article 10: 'Jurisdiction in cases of child abduction'.

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20 <https://dictionary.cambridge.org/dictionary/english/abduction> accessed 29.09.2021 (emphasis added).

21 A. Passanante, 'International Parental Kidnapping: The Call for an Increased Federal Response' (1996) 34 *Columbia Journal of Transnational Law* 677, 690; D. Leslie, 'A Difficult Situation Made Harder: A Parent's Choice between Civil Remedies and Criminal Charges in International Child Abduction' (2008) 36(2) *Georgia Journal of International and Comparative Law* 381, 383–412 <https://digitalcommons.law.uga.edu/gjicl/vol36/iss2/4> accessed 29.09.2021; B. Bodenheimer, 'The Hague Draft Convention on International Child Abduction' (1980) 14 *Family Law Quarterly* 2: 'The word abduction appears only in the [HCCA] title and is there qualified by the word's civil aspects. It was felt that abduction standing by itself may have a criminal law connotation.'

22 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 [2003] OJ L338/1.

The Brussels IIb Regulation repeats the same language in its title and chapter title.[23] Otherwise, both the Convention and the Brussels IIa Regulation use the terminology 'wrongful removal or retention' of the child, emphasising that the removal has been in contravention of the right of the child's (other) custodian.[24]

The Hague Convention identifies the child as the main victim of the removal. The purpose of the Convention is 'to protect children internationally from the harmful effects of their wrongful removal or retention'.[25] The Convention does not state who the abductors would be. However, since the Convention is connected to custody disputes, and is intended to deter abductions that are presumed to have occurred for the purposes of forum shopping, and therefore regulates international jurisdiction, it is clear that the main actors will be the parents of the child. The Convention does not even mention the word 'parent', let alone 'mothers' or 'fathers'. Likewise, the Brussels IIa Regulation, notwithstanding its core concept of parental responsibility, defines the party whose rights have been violated, in sterile terminology, as 'a person, an institution or any other body'.[26]

Indeed, even if the aim of these instruments is to protect children, both instruments state that the violation is 'in breach of rights of custody', attributed to a person, an institution or any other body.[27] Neither the Convention nor the Brussels IIa Regulation mentions the possibility that the person moving with the child may have, and often has, custody rights (joint or sole) over the child. Having custody rights includes, in many jurisdictions, the right to decide where the child lives.

Even though the language of the Convention and the Brussels IIa Regulation is gender-neutral, and devoid of the nature of the parental relationship, the *Explanatory Report to the Convention* describes the child's relationship to the person, institution or any other body that has the custody rights in the following terms:

> the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent

23 The term 'child abduction' is in the title of the recast Regulation 2019/1111, and Chapter III is titled 'International Child Abductions'.

24 HCCA, Art. 3; Reg. 2201/2003, Art. 2.11; Brussels IIb Regulation 2019/1111 (hereafter 'Brussels IIb Reg.'), Ch. III.

25 HCCA Preamble.

26 Reg. 2201/2003, Art. 10(a); Brussels IIb Reg., Ch. III, Art. 22; also, HCCA, Art. 3.1.

27 Reg. 2201/2003, Art. 3.1; HCCA, Art. 3.1.

> who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.[28]

The language used by the *Explanatory Report* is such as is typically connected to the mother/child relationship: for example, according to the attachment theory, 'traumatic loss' and 'parent in charge of his upbringing'. In gender-neutral terms, this language assumes that the violated custodian has been in charge of the psychological needs and everyday care of the child.

In addition, the original Convention scenario describes the country to which the child is wrongfully removed as totally strange and unfamiliar to the child. While some child abductions correspond to this description, there are reasons to doubt whether these are typical circumstances in Europe, where people can easily keep contact with their former home countries during holidays, and via various media, such as phones, mail, electronic channels and social media.

During the 1970s, the presumption of the Convention Member States was that the abductor would not hold custody of their abducted child or, at least, was not their primary carer. Thus, the removal or retention would often lead to the breach of the custody rights of the 'left-behind' parent. Only later, through research, and with case law, has it become clearer that the 'abductor' is just as likely to be a parent with sole or joint custody of the child, or the primary carer. In recent times, and with the increasing amount of ECtHR case law on child abduction, the original idea of the abductor not having custody rights over the child, and abducting the child in order to acquire custody rights in a different jurisdiction, has changed significantly.

In addition, a notable share of the parents who move with their children are mothers. Beaumont, Walker and Holliday[29] conclude that, in

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28 E. Pérez-Vera, *Explanatory Report on the HCCH Child Abduction Convention*, Acts and Documents of the XIVth Session, Hague Conference on Private International Law, The Hague 1981 <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 26.05.2021, para. 24, quoting A. Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, Preliminary Doc. 1, Actes et Documents of the XIVth Session, Hague Conference on Private International Law (1978).

29 P. Beaumont, L. Walker and J. Holliday, 'Conflicts of EU Courts on Child Abduction: the reality of Article 11(6–8) Brussels IIa proceedings across the EU' (2016) 12(2) *Journal of Private International Law* 211–60. The article contains the final findings from a research project that sought to collect data on non-return orders

the majority of cases in which a court has based their refusal of return on Article 13 of the Convention, the majority of the parents moving with the child (84%) have been mothers.[30] Furthermore, the abducting parent was usually returning, with the child, to the State of the parent's nationality. A key finding of the study was that, in just under half of the cases (31 out of 63), the non-return had been ordered on the basis of the Article 13(1)(b) 'grave risk of harm' provision. In 29 of these cases, the parent moving with the child was the mother.[31] The gender-neutral language hides a gendered but varying reality.

2.2. THE POAM PROJECT: ABDUCTIVE MOTHERS AND LEFT-BEHIND FATHERS

The EU-funded POAM project on the protection of mothers who have fled an abusive partner uses different terminology from the Convention and the Brussels IIa Regulation.[32] Unlike these instruments, POAM uses gendered terminology: it speaks about 'abducting mothers' and 'left-behind fathers'.

As already mentioned, research has shown that the majority of 'abducting parents', at least in the EU, are mothers.[33] Studies on abducting mothers indicate that many of them are victims of some degree of abuse, and some even of violence.[34] Against this background, there is reason to ask how appropriate the term 'abduction' actually is, in such cases.

The process of return without delay (without even an investigation into the child's best interest)[35] relies on the original idea that abductions happen

made between 1 March 2005 and 28 February 2014, where there were Brussels IIa, Art. 11(6–8) proceedings arising from HCCA, Art. 13. The study identified 63 such cases, but did not look at non-returns based on the HCCA, Art. 13 across the EU. The study covered only non-returns that resulted in Art. 11(6–8) proceedings.

30 The authors of the article use the term 'abducting parent'.

31 There were a further seven cases where the non-return was ordered on the basis of grave risk combined with the child's objections, and two cases where it was combined with one of the provisions in Art. 13(1)(a).

32 POAM, 'Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction' <https://research.abdn.ac.uk/poam/> accessed 29.09.2021.

33 K. Trimmings, *Child Abduction Within the European Union*, Hart Publishing, Oxford 2013, p. 78.

34 M. Freeman, *Parental Child Abduction: The Long-Term Effects*, International Centre for Family Law, Policy, and Practice, 2014, p. 20 <http://www.famlawandpractice.com/researchers/longtermeffects.pdf> accessed 29.09.2021.

35 The Convention does not mention the best interest of the child. The Explanatory Report includes a discussion of the best interest of the child, concluding: 'Now, the

in connection with, or at the time of, the custody and contact rights being under dispute, or such a dispute being pending, in a national court of the State of habitual residence. In reality, the reasons for such a move could be, for example, the proximity to the parents' own parents, loneliness in the country of the spouse,[36] access to better healthcare and social security, or a new partner or job in the parent's original home country. To lump all of these, and other possible legitimate reasons, under the derogatory term 'abduction' is rather arbitrary, to say the least.

It is suggested that the term 'left-behind fathers', used in recent literature, including that published by the Hague Conference and, indeed, the POAM, is no less problematic in its connotations. It implies pity for the father: a mother who leaves is still a stigmatising label in all cultures. It implies victimhood, and brings to mind popular movies, such as *Three Men and a Baby* or *Kramer vs. Kramer*, which depict the burden of the father left behind with his child, with either humour or compassion. While a parent certainly has a right to seek the return and the custody of their child, generalising assumptions about why parents do so can be dangerous. The reasons may vary from a genuine concern about the well-being of the child, or about being prejudiced in a custody dispute, to a wish to control the protection-seeking parent, or to get an abused spouse to return. The term 'left behind' implies wrongdoing on the part of the other parent, towards the parent without whose consent the removal of the child has happened. Further, 'left behind' is, in our opinion, especially poorly suited to cases where domestic violence has been the reason for fleeing or moving with the child.

Overall, the majority of parents who move to another country, or plead for the return of their child, have a reason to do so. Broad assumptions and moral statements about their reasons are likely to be unjustified in a large number of cases. We suggest that a more neutral terminology would be appropriate, in relation to both the sex of the parent and the reason behind the move. Regarding cases involving abuse and/or domestic violence, a more proper and adequate explanatory term would be 'protecting parent'

right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.': E. Pérez-Vera, *Explanatory Report on the HCCH Child Abduction Convention*, Acts and Documents of the XIVth Session, Hague Conference on Private International Law, The Hague 1981 <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 26.05.2021, para. 24.

36 In HCCA terminology, the child's habitual residence before the abduction.

or 'protection-seeking parent'. More generally, we could speak about 'parents who move with their children'. To take a step further again, evaluating and recognising all the circumstances of each particular case, and depending on the relevant facts, even 'fleeing parent' might be a more suitable term than 'abducting parent'. As a neutral term for the parent who stays in the country from which the other parent has moved, we suggest 'return-applying parent' or 'parent seeking the return' of the child. In all cases, parents have a right to expect that we use respectful language about their choices.

3. THE LANGUAGE OF PROTECTION AGAINST VIOLENCE

3.1. VIOLENCE AGAINST WOMEN IN INTERNATIONAL LAW

In international law, there has been a thorough paradigmatic change in relation to violence against women and children. Traditionally seen as matters for national law, there are now several international instruments addressing these issues as violations of international law. The CEDAW Committee has even argued that the prohibition of domestic violence is part of customary international law,[37] and thus valid even without an explicit contractual commitment.

Besides the UN instruments, such as the Declaration on the Elimination of Violence against Women[38] and the CEDAW Convention,[39] with the Recommendations and Communications of the CEDAW Committee, the most important European Conventions are the European Human Rights Convention, complemented by the case law of ECtHR, and the Istanbul Convention.[40] According to these instruments, violence against women is a human rights violation, and a form of gender-based discrimination

37 Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation (GR) No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2017.

38 Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

39 UN Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

40 Council of Europe Convention on the preventing and combating violence against women and domestic violence; referred to as the 'Istanbul Convention' [2011].

against women.[41] In the human rights treaties, the States have committed to respecting and ensuring these rights.[42] Regarding violence against women, the ECtHR has specified that States should have adequate legislation and administrative procedures in place, and an obligation for their representatives to act when they are aware of an immediate risk of violence.[43]

While the human rights treaties generally leave the concrete means and ways of fulfilling these commitments to the discretion of the States, a standard of due diligence has evolved for the assessment of such fulfilment.[44] The recommendations on the international law on VAW specify the obligations of the States under such concepts as prevention, protection, prosecution, punishment and redress.[45] The most recent and detailed international instruments – the Istanbul Convention and CEDAW General Recommendation No. 35 – include a long list of measures that a State should implement. Even if the required measures are many, they are not always specific. For example, the Istanbul Convention states that the sanctions for criminal offences of VAW should be punishable by effective, proportionate and dissuasive sanctions (Article 45.1),[46] but does not specify what kind of sanctions qualify as such. Among the measures, the commitment to provide judicial orders for the protection of the victims are most concrete ones. The protection orders may prohibit contact, or order the eviction of the abuser from the shared home.[47] The Istanbul

41 E.g. Istanbul Convention, Art. 3. See also Declaration on Violence against Women, 1994, Preamble.

42 E.g. International Covenant on Civil and Political Rights [1966], Art. 1.1; CEDAW GR No. 35 p. 11: respect, protect and fulfil.

43 E.g. *Opuz v. Turkey*, no. 33401/02, ECHR 2009; *Kontrova v. Slovakia*, no. 7510/04, ECHR 2007; *Branko Tomašić v. Croatia*, no. 46598/06, ECHR 2009; *ES. and Others v. Slovakia*, no. 8227/04 ECHR 2009; *Civek v. Turkey*, no. 55354/11, ECHR 2015; *Tërshana v. Albania*, no. 48756/14, ECHR 2020. See also CEDAW, GR No. 35 on gender-based violence against women, updating general recommendation (CEDAW GR No. 35) No. 19, para. 26.

44 E.g. Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993, Article 4(c); Istanbul Convention, Article 5(2).

45 CEDAW GR No. 35, para. 28; Istanbul Convention, Art. 5(2).

46 In the Istanbul Convention, the monitoring Committee, GREVIO, has a central role in specifying whether the States have concretely fulfilled their duties of due diligence in implementing the Convention.

47 CEDAW, GR No. 35 on gender-based violence against women, updating general recommendation (CEDAW GR No. 35) No. 19, para. 40(b).

Convention is the first binding international instrument that includes a commitment to provide legislation on protection orders: both emergency barring orders and longer protection orders (Articles 52 and 53).

Further, protection is a concept that binds together the general obligation to respect, protect and fulfil human rights, the overall approach of VAW instruments to prevent and protect, and the concrete content of Articles 52 and 53 of the Istanbul Convention. The duty to protect has a specific role and meaning in the European context. Unlike the Anglo-Saxon countries, in which generic temporary protection measures in civil and criminal procedure laws evolved into practical tools for cases of domestic violence during the 1980s and 1990s, the European countries have enacted specific laws for protection against domestic violence. In particular, the Austrian model of a barring order imposed by the police, after which the victim may file for a civil protection order, has been influential in Europe. When the European countries enacted protection order laws in the 1990s and 2000s, they responded to the demands of politicians, and experts on domestic violence. Consequently, the protection order laws do not neatly fall into the division between civil and criminal procedure. Many countries categorise them as administrative, yet the police have a role at the initial stage of the process.[48]

3.2. EUROPEAN UNION AND CROSS-BORDER PROTECTION

The EU is in a unique situation regarding violence against women. Since matters of criminal law generally belong to the competence of the Member States, the role of the EU has been to commission and fund research,[49] as

[48] S. Van der Aa et al., *Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States*, Wolf Legal Publishers, AH Oisterwijk 2015 <http://poems-project.com/> accessed 29.09.2021; T. Freixes and L. Román, *Protection of Gender-based Violence Victims in the European Union: Preliminary Study of the Directive 2011/99/EU on the European Protection Order,* Universitat de Rovia et Virgili/Universitat Autonoma de Barcelona, Tarragona and Barcelona 2014.

[49] E.g. European Union Agency for Fundamental Rights, *Violence against Women: An EU-wide Survey*, FRA 2014 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf> accessed 29.09.2021; The European Institute for Gender Equality has also carried out studies on the costs of violence, cyber violence and female genital mutilation: <https://eige.europa.eu/gender-based-violence> accessed 29.09.2021.

well as projects and campaigns.[50] In addition, the European Parliament has adopted resolutions on violence against women.[51] The EU recognises VAW within its gender equality framework,[52] which is significant since gender equality has been part of the regulation of the internal market from the beginning of the European Community.[53] Since the Lisbon Treaty of 2009, the EU has committed to combatting discrimination based on sex, among other grounds.[54]

Yet, legal action against VAW at the EU level has been difficult. The EU signed the Istanbul Convention in 2017,[55] but has not ratified it. However, several criminal law and procedural instruments that the EU has adopted, within its wider competences according to Articles 82 and 83 of the Treaty on the Functioning of the European Union (TFEU), are relevant in cases of VAW. In particular, the cross-border recognition of protection orders was a logical step in the EU's work to enhance cross-border cooperation in criminal and civil matters.[56] The adoption of Regulation 606/2013 on Protection Measures and Directive 2011/99/EU on Protection Orders means that the EU has confirmed the protection of victims of violence as a central concept in this judicial cross-border cooperation.

The Regulation and the Directive are generic; that is, they are not gender-specific, nor are they related to violence against women in general, or domestic violence. While the Directive is silent on the specific needs of

50 The Daphne Programme has, since 1997, had a significant effect, bringing together research, expert knowledge and stakeholders in VAW and VAC. For a brief history, see <https://ec.europa.eu/justice/grants/results/daphne-toolkit/daphne-toolkit-%E2%80%93-active-resource-daphne-programme_en> accessed 29.09.2021.

51 European Parliament resolution 26 November 2009 on the elimination of violence against women (P7-TA (2009) 0098).

52 <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence_en> accessed 29.09.2021.

53 Consolidated Version of the Treaty on European Union, since Lisbon 2009, Art. 3.3(3).

54 Consolidated Version of the Treaty on the Functioning of the European Union 2009, Art. 19.1, Charter of Fundamental Rights of the European Union (2000/C 364/01) OJ C 364/1.

55 Istanbul Convention, Art. 72.1; The Council Decision (EC) 2017/865, 11 May 2017, on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, <https://ec.europa.eu/justice/grants1/programmes-2007-2013/daphne/index_en.htm> accessed 29.09.2021. About the difficulties in the EU decision-making, see: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-accession-to-the-istanbul-convention> accessed 04.02.2022.

56 European Parliament resolution of 10 February 2010 on equality between women and men in the European Union (2009/2101(INI)) endorsed the proposal to introduce the European protection order for victims.

protection in relation to domestic or gender-based violence, the preamble to the Regulation states that the protection applies when:

> there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion.[57]

As important as protection is, these instruments are not without complications. They are not frequently applied. A report identified only seven EPOs up until September 2017, compared to the estimated number of 100,000 national protection orders.[58]

Unlike the national European protection measures, the EU Regulation and Directive distinguish between protection in criminal and civil procedures, which is the standard distinction in procedural laws and doctrines. The drafters of the EU instruments have been aware of the varying nature of national protection laws.[59] Thus, the State in which the recognition and execution of the order takes place would recognise the order, notwithstanding its classification in the State that issued the order in the first place:

> Since, in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under this Directive.[60]

However, the executing State should not execute an order issued by the police as a civil protection measure, according to the preamble of the Regulation.[61] Moreover, the Regulation emphasises the autonomous

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57 Preamble (6).

58 Committee on Civil Liberties, Justice and Home Affairs; Committee on Women's Rights and Gender Equality, *Report on the implementation of Directive 2011/99 on the European Protection Order* (2016/2329(INI)), 18 March 2018.

59 E.g. Reg. 606/2013, Preamble 15. The 2018 report (ibid.) mentioned that the Directive had not led to notable convergence between the national laws.

60 Dir. 2011/99 Preamble (20).

61 Preamble 13. The articles of the Regulation do not repeat this limitation. On the contrary, Art. 2, defines the 'issuing authority' as any judicial authority, or any other authority designated by a Member State as having competence in the matters falling within the scope of this Regulation.

interpretation of the scope of civil matters in EU law.[62] Consequently, the issuing State and the executing State may classify the order differently. For a recognition process with a purpose of simple and rapid[63] execution of a protection measure, the need for an interpretation of the original order unavoidably causes bureaucratic friction and delay.

As scholars of international private law have pointed out, the Regulation and Directive do not include any rules on international jurisdiction to issue a protection order.[64] The drafters of national and EU protection order laws have not found jurisdiction to be problematic, or in need of regulation, because, in a typical case, a threatened person files for protection in the country where they live or stay, and feel threatened. A standard case includes physical harassment, and the emphasis of the order is on restrictions on physical contact and approach.[65] Even though the orders usually include a prohibition on contacting the threatened party, the focus has been on situations in which both parties reside or stay in the same country. In such situations, both criminal and civil jurisdiction is within that country. The anticipated need for executing the order in another country arises when the protected person moves.[66]

The international jurisdiction becomes more complicated if the parties are in different countries. Such cases are not far-fetched, since electronic threats have become common. For example, in a small sample of interviews with protected persons, all of them had experienced various forms of serious harassment and threats via social media and other electronic media.[67] This should not be an obstacle to cross-border execution of protection, since the EU rules on jurisdiction in civil matters acknowledge jurisdiction in the country where a person has suffered the consequences and harm of an action taken in another EU country.[68] Likewise, national laws regulate international criminal law jurisdiction within the State, and such laws usually acknowledge the damage caused by a crime as a basis for jurisdiction.

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62 Reg. 606/2013, Preamble 13.

63 Ibid., Art. 1.

64 A. Dutta, 'Cross-Border Protection Measures in the European Union' (2016) 12 *Journal of Private International Law* 169, 171.

65 Reg. 606/2013, Art. 2(1); Dir. 2011/99/EU, Art. 5.

66 Dir. 2011/99/EU, Preamble (24).

67 J. Niemi and S. Majlander, '"Ja … Minä Jäin Henkiin" Lähestymiskielto ja suojelutarkoitus' [2017] *Lakimies* 747 et seq.

68 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 012, Art. 7.

Thus, the drafters of the EU Regulation and Directive may well have thought that jurisdiction in these matters would not constitute a problem. Private international law scholars, such as Anatol Dutta, are right, however, when they remind us of the EU law principle that recognition of judgments should require clear rules on jurisdiction, particularly if recognition does not require an exequatur.[69] The principles of EU law have evolved, after the Lisbon Treaty. TFEU Articles 81 and 82, which regulate the competence of the EU on recognition of judgments and decisions, do not require EU rules on jurisdiction as a basis of recognition. Furthermore, it is reasonable to think that protection measures against violence and threat, especially against VAW as a human rights violation, are exactly the type of measures that the principle of regulating jurisdiction and recognition in the same EU instrument would not be necessary. Nevertheless, it is understandable that the primacy of protection may turn out to be difficult to reconcile with the regulation of child abduction, which prioritises the swift return of the child.

4. RECONCILIATION OF THE INSTRUMENTS

4.1. THE CONVENTION: GRAVE RISK

The two discourses described above, the 'abduction discourse' and the 'protection against violence discourse', have evolved independently of each other. However, there is a link between the two, in the 'grave risk' exception contained in the Convention and the Brussels IIa Regulation. Article 13(1)(b) of the Convention states that 'the requested state is 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'.

The grave risk exception seems to be a kind of irritant in the Convention system, which aims at a rapid return of the child. Indeed, as Katarina Trimmings has shown, concern about the overuse of the exception played a major role in the incorporation of the Convention system into the Brussels IIa Regulation in the early 2000s.[70] As a result, the Regulation was

69 A. Dutta, 'Cross-Border Protection Measures in the European Union' (2016) 12 *Journal of Private International Law* 169.

70 K. Trimmings, *Child Abduction Within the European Union*, Hart Publishing, Oxford 2013.

complemented by provisions limiting the possibility to refuse the return of a child on the basis of the 'grave risk' exception (Article 11(4)): 'A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.[71]

The court should always order the return of the child, if the child can get protection in the Member State of habitual residence. As the Convention and Brussels IIa Regulation do not regulate to where, or to whom, in the country of habitual residence the child should be returned, there is not a straightforward assumption that the child should be returned to the seeking parent, especially in cases where allegations of domestic violence have been made during the process.

Thus, within the EU, the risk of violence, and protection against it – both central concepts in European and national laws and policies against VAW and VAC – are key elements in the evaluation of grave risk, according to the Convention and the Brussels IIa Regulation. Since VAW is increasingly seen as a violation of human rights, there is reason to refer to Article 20 of the Convention: 'The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'.

According to the Explanatory Report on the Convention, this Article should be used very exceptionally, and its interpretation should not follow the evolving nature of human rights at international level, but refer to the internal interpretations (or lack of them) in the returning State.[72] According to Arenstein, for example, an appeal to Article 20 has never been successful in return proceedings in the United States.[73] However, a distinction

71 The Brussels IIb Regulation modifies this point, at Art. 27(3): 'Where a court considers refusing to return a child solely on the basis of point (b) of Article 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.'

72 E. Pérez-Vera, *Explanatory Report on the HCCH Child Abduction Convention*, Acts and Documents of the XIVth Session, Hague Conference on Private International Law, The Hague 1981 <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 26.05.2021, paras. 11–15. Para. 118 uses the terminology of 'requested state'.

73 R. Arenstein, 'How to Prosecute an International Child Abduction Case under the Hague Convention' (2017) 30 *Journal of the American Academy of Matrimonial Lawyers* 1–26.

between human rights at the international level, and at the national level, is hard to maintain in the EU, where all countries are parties to the ECHR, and adhere to the Fundamental Rights Charter and principles of the EU.[74] In particular, human rights standards regarding gender-based violence, as confirmed by the ECtHR, should be the same for all EU countries. Yet, the ECtHR has found several violations of these.[75]

4.2. ECHR: PROTECTION OF PRIVATE AND FAMILY LIFE IN CHILD ABDUCTION CASES

In the case law of the ECtHR on violence against women, a State violates human rights if either its laws, policies or responses to risk are not at the level of due diligence.[76] Typically, violation of the ECHR occurs when violence is reported to the police, but the police do nothing, or too little in relation to the severity of violence.[77] Thus, the ECtHR makes an assessment, taking into account both the severity of violence and the State's response in protecting or failing to protect against it. The ECtHR has addressed cases of domestic violence as violations of Article 3 (cruel and inhuman treatment), or Article 8 (protection of private life).

Since 2000, the ECtHR has developed valuable case law, under Article 8 of the ECHR, concerning child abduction. First, the Court has concluded that a violation of Article 8 takes place when a country has not taken adequate steps to enforce an applicant's (return-seeking parent's) right to have their child returned,[78] or when the national court has not examined

74 Strictly speaking, the FRC is binding for the Member States only when they implement EU law.

75 See case law referred to in n. 43.

76 E.g. Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993, Art. 4(c); Istanbul Convention, Art. 5(2).

77 E.g. *Opuz v. Turkey*, no. 33401/02, ECHR 2009. In *Opuz*, the court formulated the duty to take concrete measures if the authorities are aware of an immediate risk. In *Talpis v. Italy* (no. 41237/14, ECHR 2017), the Court concluded that the duty to act cannot be avoided by police passivity. Even though the lethal risk (father killed the son of the applicant) materialised months after the applicant had made a complaint of violence, and after the police inactivity, the Court held that there had been a breach of the Convention.

78 E.g. *Maire v. Portugal*, no. 48206/99, ECHR 2003: 'the Court considers that each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify'. Further, 'the Court concludes that the Portuguese authorities failed to make adequate and

the situation adequately.[79] The return-seeking parents in these cases have been both mothers and fathers, but usually fathers.

In cases where the child and/or the protection-seeking parent have been applicants, the Court's focus has been on the procedural requirements of the returning State. The Court has consistently held that the courts in the returning State should give sufficient consideration to the alleged grave risk, in their proceedings.[80]

In the Grand Chamber case *X v. Latvia*, the ECtHR laid down the principles to reconcile the requirements of the Convention and Article 8 of the ECHR. Emphasising the harmonious application of these instruments.[81] The Court stated that, '[t]he decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck'.[82] In the following paragraphs, the Court underlined the principle of the best interest of the child, with references to the EU Fundamental Rights Charter and the Brussels IIa Regulation.[83] The conclusion of the Court was that the Convention shares this same philosophy.[84] This is interesting, since the Convention does not include the concept of the 'best interest of the child', besides mentioning the 'interests of children' in its preamble. According to the Explanatory Report, this concept is sociological, cultural, and too vague to be used as a legal standard.[85] According to the Convention, the best interest of wrongfully removed children is their prompt return to the State of habitual residence.

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effective efforts to enforce the applicant's right to the return of his child and thereby breached his right to respect for his family life as guaranteed by Article 8 of the Convention'. In *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECHR 2000, 'The Court concluded that the Romanian authorities had not taken adequate or appropriate steps to respect the mother's right to have the children returned. By a majority of 6 votes to 1, the Court ruled that Article 8 had in consequence been breached.'

79 E.g. *Ilker Ensar Uyanik v. Turkey*, no. 60328/09, ECHR 2012.

80 E.g., in *B.V. v. Belgium* (no. 61030/08, ECHR 2012) the court had made no risk assessment.

81 *X v. Latvia*, no. 27853/09, 26.11.2013 (Grand Chamber), paras. 93–94.

82 Ibid., para. 95.

83 Ibid., paras. 96–97.

84 Ibid., para. 97, 101.

85 E. Pérez-Vera, *Explanatory Report on the HCCH Child Abduction Convention*, Acts and Documents of the XIVth Session, Hague Conference on Private International Law, The Hague 1981 <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 26.05.2021, para. 22: 'recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched'.

The ECtHR, notwithstanding its emphasis on the harmonious interpretation of these instruments, is distant from such an understanding of the best interest of the child. The Court holds that the principle, in the context of Article 8 and the Convention, is mainly procedural: it requires that the States sufficiently evaluate the best interest of the child in the return proceedings, when the grave risk exception has been invoked. Thus, the national court must genuinely take into account the factors allegedly constituting a grave risk, and give a sufficiently reasoned decision on these points.[86]

In *X v. Latvia*, as in other decisions, the ECtHR held that the parent who opposes the return must 'adduce sufficient evidence' of the facts that constitute the exception, such as grave risk.[87] Further, the ECtHR considered that the Latvian courts had not complied with the procedural requirements of Article 8 of the ECHR, in that they had refused to take into consideration an arguable allegation of 'serious risk' to the child in the event of her return to Australia. In *Neulinger and Shuruk v. Switzerland*, the ECtHR considered that the mother would sustain a disproportionate interference with her right to respect for her family life, if she were forced to return to Israel.[88]

It is a common argument that providing evidence of domestic violence and abuse is difficult. However, even in the cases that have come before the ECtHR, there are examples of sufficient evidence. In *OCI v. Romania*, the Court held that a violation of the right to private life had taken place, where there was evidence of ill-treatment of the children in the country of habitual residence.[89] In particular, when the justice system of the habitual State has initiated proceedings concerning such actions, the ECtHR has indicated that the courts in the returning State have a specific duty to examine these.[90] In this regard, protection orders, whether civil or criminal in nature, should give reason for the court in the returning State to examine the situation of the child. Additional evidence, such as

86 *X v. Latvia*, no. 27853/09, 26.11.2013 (Grand Chamber), para. 106.

87 Ibid., para. 116.

88 *Neulinger and Shuruk v. Switzerland*, no. 41615/07, ECHR Grand Chamber 2010.

89 *OCI and others v. Romania*, no. 49450/17, ECHR 2019. The court held that the Romanian authorities had been presented with an arguable allegation of a grave risk of harm, but had failed to examine the allegations of 'grave risk' to the children. The court found that Romania had violated Article 8 of the ECHR: 'The courts should have at least ensured that specific arrangements were made in order to safeguard the children.'

90 *Neulinger and Shuruk v. Switzerland*, no. 41615/07, ECHR Grand Chamber 2010.

the records of child welfare officials, social workers, schools, police and healthcare authorities, should be easy for the actors of the justice system to acquire. Further, cooperation between the officials of the Member States should play a vital role in these cases.[91]

At this point, the criminal justice system provides certain advantages. First, the police have responsibility for collecting the evidence, and the means to do so, including seizure, interrogations and, ultimately, arrest. Criminal protection orders are part of the arsenal of the police, specifically aimed at protection of the victim, and the sanctions for the breach of such orders (usually arrest) are rather straightforward. There is no reason to dismiss civil protection measures, which are equally likely to provoke the duty to examine the grave risk exception. Due to a lower evidentiary threshold, civil protection measures may be easier to obtain.[92] In the light of the case law of the ECtHR, both civil and criminal protection orders should be effective in prompting the returning courts to examine the grave risk exception.

Subsequently, formal questions about jurisdiction and cross-border enforcement of the protection orders and measures should be of lesser importance. The courts in either the State of habitual residence or the returning State may have jurisdiction to impose a protection order, if the threat of violence or harassment is likely to be experienced there. The importance of the orders is primarily evidentiary, and their role is to raise the duty of sufficient examination in the return proceedings.

It is necessary to underline here that a parent can also invoke other types of evidence of grave risk, but since the threshold is 'grave' risk, and there is time pressure, official documents and procedures are most effective.

The Brussels IIa Regulation emphasises the protection of the child in the State of habitual residence (Article 11(4)). It is an open question: what kind of measures would count as adequate protection, according to Article 11(4)? The Brussels IIb Regulation envisions the following:

> Which type of arrangement is adequate in the particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return

91 R. Schuz, *The Hague Child Abduction Convention – A Critical Analysis*, Hart Publishing, Oxford and Portland, OR 2013.

92 More about the comparison between civil and criminal protection can be found in L. Sosa, J. Niemi and S. Van der Aa, 'Protection Against Violence: The Challenges of Incorporating Human Rights' Standards to Procedural Law' (2019) 41 *Human Rights Quarterly* 939–61.

> without such arrangements. The court seeking to establish whether adequate arrangements have been made should primarily rely on the parties and, where necessary and appropriate, request the assistance of Central Authorities or network judges.[93]

As this quotation indicates, there are no clear guidelines on what qualifies as evidence of adequate protection, nor on how the national courts are to assess and ensure evidence that fulfils the Article 11(4) requirement of 'adequate arrangements to secure the protection of the child'.

The POAM Best Practice Guide endorses the proposition that the allegations of a grave risk of harm should be investigated first and, after this, the court should consider the availability, adequacy and effectiveness of protective measures to dispel the grave risk of harm to the child.[94] We find three problems with this approach. Firstly, in our opinion, domestic violence always constitutes a grave risk to the child. Thus, elaboration of the severity of the 'grave risk' is, in most cases, unnecessary. Secondly, obtaining evidence and elaborating on future protection measures can be difficult and take time, at best, and be speculative, at worst. Thirdly, even though the protection requirement in the Brussels IIa Regulation mentions only the child, in practice the protection is conditional on the returning parent participating in the protection. With a grave risk of harm, the return to the original shared home is not likely to be an option. Many other issues remain, including the question of whether it is enough that the State offers the returning parent a place in a shelter.

A different approach is suggested. The court should, first, examine how the State of habitual residence has responded to the allegations of domestic violence before the abduction. Normally, a victim considers other means of protection before moving to another country. In many cases, the abused parent will already have tried to seek help in the State of habitual residence. Therefore, failures to respond, to offer protection, and to take the necessary and effective steps to protect the child and the parent in the country of habitual residence, will be violations of their fundamental rights. Thus, such failure should encourage the court to refuse the return of the child. In addition, judicial protection orders, either civil or criminal, are often the

93 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Preamble 45.

94 POAM Best Practice Guide, ss. 5.1.1, 5.1.2, and 5.1.3.1.

first measures to be ordered. However, the perpetrators frequently violate them.[95] Thus, an order, as such, would rarely count as sufficient protection, but can be part of the protective measures. It is important to document any breaches of protection orders, as they are evidence of the insufficiency of protection. Rather than risk lengthening the process, due to investigations into the allegations and available protection measures, the court should focus on evaluating whether, and how, the State of habitual residence has reacted to the family's situation before the abduction.

It is true that some women do not speak about violence to anyone, or make a complaint to the authorities. However, if a victim has evidence of the violence (grave risk), it is possible to produce evidence of other cases in which the State of habitual residence has not protected women who have reported violence. The case law of ECtHR may provide some indicative evidence, and the Committee monitoring the Istanbul Convention provides information about the practices of the State Parties.[96] The investigations into the allegations should be concluded in the same way that the ECtHR investigates and evaluates whether a State has secured that adequate and effective protection measures have been put in place for the child's (and mother's) return.

5. CONCLUSIONS

Since 1980, when the Hague Convention on Child Abduction was adopted, the situations in which a parent may move from one country to another with their child have changed significantly, and, therefore, the original objectives and reasoning behind the Convention might have become, to some extent, outdated. Especially in the EU, with free movement across borders, and common regulations on jurisdiction, the fear of one parent cutting the ties between the child and the other parent by moving the child to an unknown environment and culture may be overstated. Yet, the prejudiced and stigmatising language of 'abductions' persists in the discussion of international moves with children.

Neither the language nor the regulation of cross-border child removals (abductions) pay much attention to the reasons why the removal takes

95 S. Van der Aa et al., *Mapping the Legislation and Assessing the Impact of Protection Orders in European Member States*, Wolf Legal Publishers, AH Oisterwijk 2005. <http://poems-project.com/> accessed 26.05.2021.

96 <https://www.coe.int/en/web/istanbul-convention/grevio> accessed 26.05.2021.

place, but instead prioritise a swift return of the child. The most important exception is a risk of grave harm. Empirical studies have shown that the majority of parents who move with their children are mothers, and that a great majority of parents who invoke the grave risk exception are mothers. This contribution pleads for respectful language towards parents who have experienced the necessity of moving with their children, irrespective of the reasons for the move, which may include fear of violence, ignorance of the international rules on jurisdiction, longing for extended family, or fear of losing the children.

Since 1980, the international law on the protection of children and women, as victims of violence, has evolved remarkably. The Convention on the Rights of the Child, adopted in 1989, gave children protection, and a voice in the international arena. Several international legal instruments seek to protect women against domestic violence and other forms of violence, especially in Europe. These legal instruments, and the growing body of research on the effects of violence, show that living in a violent home is harmful to children. Therefore, there is a strong argument for always holding domestic violence to be a grave risk to a child. The ideology of a rapid return of a child to the country of habitual residence, with limited possibilities to examine the circumstances and the best interest of the child, does not fit in with these developments. The ECtHR has concluded, several times, that returning courts have not made a sufficient examination of the circumstances, and have thus violated the protection of private life, according to Article 8 of the ECHR.

The EU has essentially copied the Hague Convention's rapid return ideology. In addition to this, the Brussels IIa Regulation has underlined the requirement for protective measures after returning the child to the country of habitual residence. However, the Regulation remains silent on what level of protection is sufficient. Moreover, the Regulation only refers to the protection of the child, and not the protection of the parent – usually the mother – who is forced to return, too, if the child is small. According to Bartolini,[97] the ECJ has never reflected on the problems which the return with the child to the place of habitual residence would entail for the parent.[98] Beaumont, Walker and Holliday have suggested that the renewed

97 S. Bartolini, 'In the Name of the Best Interests of the Child: The Principle of Mutual Trust in Child Abduction Cases' (2019) 56 *Common Market Law Review* 1–30.

98 E.g. P. Beaumont, L. Walker and J. Holliday, 'Parental responsibility and international child abduction in the proposed recast Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings' (2016) 4 *International Family Law Journal* 307–18.

Brussels IIa Regulation could, and should, include a provision that allows urgent protective measures for the returning abducting parent (usually the mother).[99] However, the Brussels IIb Regulation, effective from 1 August 2022, does not include protection measures for the 'abducting parent'. Thus, it remains that the returning parent may file for protection either in the court of the returning State, or in the State of habitual residence. In either case, the EU instruments provide for recognition of both civil and criminal protection measures in other EU countries. While the acknowledgement of the judicial protective measures is welcome, it is necessary to recognise that they are not very effective; breached orders are commonplace. Their most important value is providing proof of grave risk.

This contribution has not examined whether the rather strict time limits in the Convention, and even more so in the Brussels IIa Regulation, are sufficient for the assessment of the grave risk, and the adequacy of protection measures in the country of habitual residence. In the light of the ECtHR case law, an investigation that fulfils the requirements of Article 8 (and possibly Article 6) of the ECHR is hardly possible, in the tight timescales. As long as these two legal instruments – that is, the ECHR and the Brussels IIa Regulation – must be reconciled, the approach of the POAM Best Practice Guide, advocating for the evaluation of the merits of the allegations first, might not be suitable in the majority of cases. Instead of evaluating and considering the level of risk and harm (whether grave or not), we suggest that the court should look at the protection measures first. The rich case law of the ECtHR shows that, in many cases, women seek protection, but the justice system does not respond.[100] Thus, looking at protection measures would provide evidence of both the risk and the protection.

In conclusion, the protection of private life according to the ECHR, and the swift return procedure of the Convention and the Brussels IIa Regulation, seem to be difficult to reconcile. Therefore, there is reason to ask whether the persistent adherence to the Convention abduction system is necessary or sensible in the EU, which has free movement, clear rules on jurisdiction and cross-border enforcement, and, finally, mutual trust in the legal systems of other Member States. Is the situation that different from a situation in which one parent moves out of the house, but settles

99 P. Beaumont, L. Walker and J. Holliday, 'Conflicts of EU Courts on Child Abduction: the reality of Article 11(6–8) Brussels IIa proceedings across the EU' (2016) 12(2) *Journal of Private International* 211–60.

100 See n. 43 and section 4.2, for case law.

within the borders of the same State? Why, for example, are there different rules when a parent moves with a child from Maastricht (the Netherlands) to Liege (Belgium), than when they move from Lund to Kiruna (both in Sweden). The distance in the former case is 30 kilometres; in the latter case, 1,800 kilometres. There may be delays in processing child custody cases in national courts, but the automatic return of abducted children does not cure such problems. Rather, the national and EU legislators should work towards better procedures for mediating and adjudicating child custody disputes. Perhaps it is time to rely on the courts to which the Brussels IIa Regulation gives jurisdiction, and the national laws that recognise the best interest of the child.