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Child Abduction Caused by Domestic Violence: How Private International Law Makes the Best of both the Child Abduction Convention/Brussels II-*ter* Regulation and the Istanbul Convention

Caterina Benini

Institute of International Studies, Catholic University of the Sacred Heart, Milan

Abstract

The paper addresses international child abduction resulting from domestic violence perpetrated by the left-behind parent against the abducting parent. It emphasizes the importance of safeguarding the child from the adverse effects of abduction while also protecting the domestic violence victim from further abuse. To achieve this, it proposes a gender violence-sensitive interpretation of the grave risk exception of Article 13(1)(b) of the Hague Child Abduction Convention (as complemented by the Brussels II-*ter* Regulation within the EU). This interpretation is grounded on a reading of the Hague Convention in light of the Istanbul Convention, relevant customary international law, and the subsequent practice of some Contracting States to the Hague Convention that aims to provide adequate protection to domestic violence victims during return proceedings. The same result is ensured, for the Brussels II-*ter* Regulation, by the prevalence of the Istanbul Convention over EU secondary law. Furthermore, the paper illustrates how private international law reconciles the Istanbul Convention with the Hague Convention/Brussels II-*ter* Regulation, allowing the gender violence-sensitive interpretation of the grave risk exception to be applied without infringing the Hague Convention.

*Il presente contributo si occupa dei casi in cui un genitore compie una sottrazione internazionale di minore per fuggire alla violenza domestica di cui è vittima per mano del coniuge/partner. Al fine di garantire adeguata protezione sia al minore sottratto che alla vittima di violenza domestica, l'articolo propone un'interpretazione dell'eccezione del grave rischio di cui all'articolo 13, paragrafo 1, lettera b), della Convenzione dell'Aja sulla sottrazione di minori (integrata dal regolamento Bruxelles II-*ter *nei casi intra-UE) sensibile alla violenza di genere. Tale interpretazione si basa su una lettura della Convenzione dell'Aja alla luce della Convenzione di Istanbul, delle rilevanti regole di diritto internazionale consuetudinario e della prassi*

*successiva di alcuni Stati contraenti la Convenzione dell'Aja che mirano a proteggere le vittime di violenza domestica nei procedimenti di rimpatrio previsti da tale Convenzione. Stesso risultato è garantito, rispetto al regolamento Bruxelles II-*ter*, dalla prevalenza della convenzione di Istanbul rispetto al diritto secondario UE. Infine, l'articolo illustra come l'interpretazione dell'eccezione del grave rischio sensibile alla violenza di genere possa trovare attuazione senza con ciò violare la Convenzione dell'Aja stessa grazie a strumenti di diritto internazionale privato.*

1. Introduction

Cassandra Hasanovic is an Australian mother who fled with her two sons from the UK to Australia to escape her abusive husband. Despite the UK police had already considered Cassandra and her children at high risk, the requested court in Australia ordered, under the Child Abduction Convention, the return of the children to England, relying on the husband's undertaking not to approach his wife. Cassandra was devastated when she was ordered to return the boys to England. She told a relative: "He is going to kill me". Despite her fears, Cassandra returned to England with the children. She was on her way to a women's refuge when her husband killed her. [1]

[1] See TOTARO, "In memoriam: Following a Hague return order killed her", *the hague papers*, 2 May 2009, available at: haguepapers.net. This tragic case made headlines in several newspapers. See: "Wife killed by 'abusive' husband", BBC, 15 April 2009, available at: news.bbc.co.uk.

Cases like that of Cassandra Hasanovic [2] necessitate a critical analysis of the Child Abduction Convention and its European counterpart, the Brussels II-*ter* Regulation (Section 2). This analysis will evaluate whether the interpretation and application of these instruments in cases when international child abduction occurs due to domestic violence conform with obligations States have in combating violence against women and domestic violence, as notably provided under the Istanbul Convention (Section 3). This paper argues that, by interpreting the Hague Convention in light of the Istanbul Convention, relevant customary international law, and the subsequent practice of some Contracting States to the Hague Convention that aims to provide adequate protection to domestic violence victims during return proceedings (Section 4), a gender violence-sensitive interpretation of the grave risk exception of the Child Abduction Convention is ensured (Section 6). The same result is achieved with respect to the Brussels II-*ter* Regulation, given the prevalence of international agreements concluded by the EU over EU secondary law (Section 5). Private international law tools are vital to ensure that the implementation of the proposed interpretation of the grave risk exception does not conflict with the Hague Convention itself (Section 6). Some concluding remarks will follow (Section 7).

2. Legal Instruments Applicable to International Child Abduction in the EU

The legal instruments considered in this section are those applicable by authorities of EU Member States ("MS") in international child abduction cases.

2.1. The Child Abduction Convention

The Hague Convention on the civil aspects of international child abduction ("Hague Convention") was concluded on 25 October 1980 and entered into force on 1 December 1983. At the time of writing, it has 103 Contracting States (including all EU MS). [3]

[2] Several women have reported their experiences to the Hague Mothers, an international initiative aiming to end the injustices caused by the Child Abduction Convention to mothers fleeing abusive relationships. See: www.hague-mothers.org.uk.

[3] Official information on the Contracting States to the Hague Convention is available at: www.hcch.net.

Rather than adopting rules on jurisdiction over custody or on recognition and enforcement of foreign custody orders, the Hague Convention aims to restore the *status quo ante* the abduction.[4] It does so by establishing an interim and summary procedure designed to result in an order by the authority of the State where the child is present ("State of refuge") that the child is returned to the State where the child was habitually resident before the abduction ("State of habitual residence").[5] Any decision on the custody of the case is left to the competent court, which generally is the court of the State of habitual residence.[6]

Key to the Hague Convention's success is the creation of Central Authorities in each Contracting State.[7] Central Authorities are required to cooperate between themselves and with competent authorities to secure the prompt return of abducted children. When needed, they must discover the whereabouts of a child who has been wrongfully abducted[8] and exchange information on the social background of the child.[9]

The Hague Convention applies when a child below the age of sixteen is wrongfully abducted from one Contracting State to another Contracting State. When the authorities of the State of refuge (also called "requested State") re-

[4] BEAUMONT and MCELEAVY, *The Hague Convention on International Child Abduction*, Oxford, 1999, at p. 216 write that "[t]he 1980 Hague Convention stands alone in the realm of international family law. It eschews traditional private international law remedies and consciously avoids make any determination on the merits of any custody issue". The reasons why such peculiar approach was chosen are recalled by ANTON, "The Hague Convention on International Child Abduction", *International and Comparative Law Quarterly*, 1981, p. 537 ff.

[5] BRYANT, "The 1980 Child Abduction Convention – The Status Quo and Future Challenges", in JOHN, GULATI and KÖHLER (eds.), *The Elgar Companion to the Hague Conference on Private International Law*, Cheltenham/Northampton, 2020, p. 183 ff., at p. 184 describes it as an "untried procedural mechanism".

[6] Articles 17 and 19 of the Hague Convention emphasize the difference between custody cases, which are full-fledged cases on parental responsibility and custody of children, and return proceedings, which are interim and summary proceedings. The system of the Hague Convention has been described as the "logic of first-return-then-resolve" by KRUGER *et al.*, "Current-day International Child Abduction: Does Brussels IIb Live up to the Challenges?", *Journal of Private International Law*, 2022, p. 159 ff., p. 171.

[7] SCHICKEL-KÜNG and ALFIERI, "International Child Abduction from the Perspective of a Central Authority under the 1980 Hague Convention", in FREEMAN and TAYLOR (eds.), *Research Handbook on International Child Abduction. The 1980 Hague Convention*, Cheltenham/Northampton, 2023, p. 331 ff., at p. 343 acknowledge that the "specialized, straightforward and cost-effective access to justice in the foreign State" granted through Central Authorities "has been important to the success of the Convention".

[8] Article 7(a) Hague Convention.

[9] Article 7(d) Hague Convention.

ceive a return request within one year from the abduction, they are required to order the return of the child to the State of habitual residence, unless a ground for non-return is proved to exist ("return proceedings").

According to Article 3 of the Hague Convention, an abduction – whether through removal or retention – is considered wrongful when it violates the custody rights of the left-behind parent as established by the law of the State of habitual residence. This is applicable as long as the left-behind parent was exercising these rights at the time of the abduction or would have exercised them if not for the abduction. [10]

The Convention stipulates four grounds for non-return. [11] When a ground for non-return is proved to exist by the person objecting to the return, the requested authority may refuse the return of the child.

The ground for non-return which is relevant when domestic violence is alleged to be the cause of child abduction [12] is interpreted to be the grave risk exception of Article 13(1)(b) of the Hague Convention, [13] which provides that:

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[10] Throughout this paper, the left-behind parent is referred to in the masculine form, whereas the abducting parent is referred to in the feminine one. This linguistic declination reflects the fact that in 2021 the 75% of taking persons abductors were mothers, 23% were fathers and the remaining 2% were grandparents, institutions or other relatives. See LOWE and STEPHENS, "Global Report – Statistical Study of Applications Made in 2021 under the 1980 Child Abduction Convention", Prel. Doc. No. 19A of September 2023, available at: www.assets.hcch.net, para. 14.

[11] In addition to the grave risk exception, which is analyzed in more details *infra*, the other grounds for non-return are: (*i*) the acquiescence ground, *ie*, when the person having the care of the child consented to or subsequently acquiesced in the removal or retention (Article 13(1)(a) Hague Convention); (*ii*) the mature child's objection, *ie*, when the child, who has reached an age and degree of maturity at which it is appropriate to take into account their views, objects to being returned (Article 13(2) Hague Convention); (*iii*) the return being contrary to the fundamental principles of the requested State (Article 20 Hague Convention). For a detailed analysis of the exceptions: BEAUMONT and MCELEAVY, *cit. supra* note 4, pp. 114-202.

[12] This occurs in a non-trivial proportion of cases. According to the Special Rapporteur on violence against women and girls, its causes and consequences, ALSALEM, "Report on Custody, Violence against Women and Violence against Children presented to the fifty-third session of the United Nations Human Rights Council in June 2023", UN Doc. A/HRC/53/36 (2023), p. 10: "Around three-quarters of all cases filed under the Hague Convention are against mothers, most of whom are fleeing domestic violence or seeking to protect their children from abuse".

[13] Back in 2004, prominent scholars noted that Article 20 of the Hague Convention could also be a viable defense against return for domestic violence victims. See WEINER, "Strengthening Article 20", *University of San Francisco Law Review*, 2004, p. 701 ff.; ID., "Using Article 20", *Family Law Quarterly*, 2004, p. 583 ff. However, since 2011, the Permanent Bureau ("PB") of the Hague Conference on Private International Law ("HCCH") identified the grave risk exception as the only defense which could ensure, in return proceedings, adequate protection to mothers who abducted their children to escape from domestic violence: PB of the HCCH, "Domestic

> "[…] the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establish that – b) 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".

As pointed out by the explanatory report, the grave risk exception is grounded on a "fragile compromise" [14] because the Convention's drafters intended to ensure full efficacy to the prompt return mechanism, but, at the same time, were aware that ordering returns at all costs could have infringed the interests of the individual child. To get out of the conundrum, they decided to introduce the grave risk exception, which, under certain circumstances, allows the requested authority to deny the return.

For the grave risk exception to be triggered, there should be a grave risk that the return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". This means that the requested authority is allowed to deny the return of the child when there is more than a serious risk that, upon return to the State of habitual residence, the child is going to be exposed to physical or psychological harm or be placed in an intolerable situation. [15]

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and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Reflection Paper", Prel. Doc. No. 9 of May 2011. Not by chance, in HCCH, "Guide to Good Practice under the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.* Part VI – Article 13 (1)(b)" (2020), elaborated with a view to promote the consistent application of the grave risk exception also when allegations of domestic violence are raised, no mention is made to Article 20. Similarly, Article 20 does not appear among the issues discussed in the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention, held in South Africa in June 2024. The fact that some Contracting Parties, such as the United Kingdom and Finland, did not enact Article 20 in their national implementing legislation, while others, such as the United States, require that the defense be established by clear and convincing evidence, may have discouraged the PB to explore the potential of Article 20 in domestic violence-induced child abduction cases. The PB could have been also discouraged by the fact that Article 20 has been rarely applied in practice and that there is no specific guidance on its application and interpretation. In this author's view, when it is possible to argue that the risk of harm against the abducting mother represents a grave risk of harm to the child (as it is almost always the case in domestic violence cases, as explained *infra*), the grave risk exception is the relevant ground for non-return. In cases where the risk of harm against the abducting parent does not amount to a grave risk of harm against the child, Article 20 would be relevant as it permits the requested authority to consider possible violations of the abducting parent's human rights when deciding to return or not the child.

[14] PÉREZ-VERA, "Explanatory Report to the Convention on the Civil Aspects of International Child Abduction" (1980), available at: www.hcch.net, p. 49.

[15] As pointed out by SCHUZ, *The Hague Child Abduction Convention. A Critical Analysis*,

The perspective the requested authority must adopt is forward-looking, *ie*, it shall evaluate which consequences will arise in the future due to the return of the child, [16] and must be limited to allegations of grave risks for the child. [17]

A mother victim of domestic violence who abducted the child to escape from her abusive partner can successfully invoke the grave risk exception when she can prove (*i*) she had suffered domestic violence at the hands of her partner, the reason for which she went abroad with the child; and (*ii*) the return to the State of habitual residence would expose the child to the grave risk of physical or psychological harm or would place the child in an intolerable situation.

The burden of proof is not met when the mother proves that the return of the child would expose herself – who will, in most cases, accompany the child to the State of habitual residence, even if she is not ordered to do so [18] – to further abuse. What is necessary, under the grave risk exception, is that the child risks being exposed to grave harm upon return.

Additionally, it is not sufficient for the mother to demonstrate that the child experienced psychological harm in the past. While past incidents provide a basis for predicting future behavior, the mother must also establish a high probability that the father is likely to continue his violent behavior in the future.

If the child has been a direct victim of domestic violence, the proof that they risk being exposed to harm after return is, in principle, not difficult to provide. The evidence submitted in support of this contention could be hindered, however, if the mother never reported the violence she and her child suffered to competent authorities, [19] or if she withdrew the complaint out of fear of repercussions. [20]

Oxford/Portland, 2013, pp. 276-277, the intolerable situation is rarely used because it is generally conflated with the grave risk of harm to the child.

[16] BARUFFI and HOLLIDAY, "Child Abduction", in BEAUMONT and HOLLIDAY (eds.), *A Guide to Global Private International Law*, Oxford, 2022, p. 481 ff., p. 491.

[17] WEINER, "You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence", *UCLA Journal of Gender and Law*, 2021, p. 223 ff., pp. 234-235.

[18] TRIMMINGS and MOMOH, "Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings", *International Journal of Law, Policy and The Family*, 2021, p. 1 ff., p. 4.

[19] The lack of police reports does not automatically entail a return order. See the Southern District Court of Florida, *Sadoun v. Guigui*, No. 16-cv-22349 (2016), para. 6: "Courts frequently recognize that victims of spousal abuse often do not come forward to report instances of domestic violence for many reasons, and, therefore, a lack of near-contemporaneous documentation does not necessarily render a victim's claims unbelievable".

[20] According to UN Women, less than 40% of the women who experience violence seek

The burden of proof becomes heavier when domestic violence has targeted the mother only. In these cases, the mother should allege and prove that if the child is returned to a household imbued with a culture of violence, the child risks being exposed to physical or psychological harm. [21] Leveraging on the intimate link between abuse of partners and abuse of children, [22] the mother could allege and prove that there is a serious risk that the child will be directly targeted by the violence of her partner. Alternatively, the mother could establish that there is a serious risk to the child, as past and future violence against her would likely impair her ability to focus on and protect the child. [23] Additionally, the mother could argue that if she returns with the child to the country where the perpetrator lives, there will almost certainly be a resurgence of violence against her. This prospect would also negatively impact the child's well-being. [24]

Evidence of this kind could only be offered by psychological and/or sociological experts. The financial difficulties in which domestic violence victims often find themselves explain why it is common for them to lose their "Hague

help. In the majority of countries with available data, women who seek help look to family and friends, and very few seek support from formal institutions. Less than 10% of those seeking help reported the violence to the police. More information at: www.eca.unwomen.org.

[21] For a detailed explanation on why adult domestic violence is a grave risk to the child: EDLESON, SHETTY and FATA, "Fleeing for Safety: Helping Battered Mothers and their Children Using Article 13(1)(b)", in FREEMAN and TAYLOR (eds.), *Research Handbook on International Child Abduction. The 1980 Hague Convention*, Cheltenham/Northampton, 2023, p. 96 ff., pp. 98-101. For a detailed overview of the reasons why children not directly targeted by domestic violence should be considered direct victim of the abuse, see HERRING, *Domestic Abuse and Human Rights*, Cambridge, 2020, pp. 159-173, and European Economic and Social Committee ("ECOSOC"), "Opinion on Children as Indirect Victims of Domestic Violence" (2006), p. 60 ff.

[22] ECOSOC Opinion, *ibid.* p. 62. That "a range of studies have found a correlation of between 30 to 60% between instances of spousal abuse and abuse of children" is stated by the PB of the HCCH, "Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Prel. Doc. No. 3 of June 2017, Annex III: Dynamics of Domestic Violence, International Norms Relevant to Domestic Violence and Violence against Children, p. 14.

[23] ECOSOC Opinion, *cit. supra* note 21, p. 62: "[B]attered women are often under such strain that they are unable to care properly for their children. Exposure to long-term abuse by their partners robs many women of the ability to do anything to protect their children".

[24] *Ibid*., p. 62. The World Health Organization ("WHO") recognized that "[v]iolence against women has a substantial impact on women's health and well being and on that of their children. Both in the short and in the long term, it puts them at higher risk for a wide range of physical and mental health problems". See WHO, "Multi-Country Study on Women's Health and Domestic Violence Against Women: Summary Report of Initial Results on Prevalence, Health Outcomes and Women's Responses", WHO/FCH/GWH/02.2 (2002), p. 3.

case": if they cannot pay and hire experts who could testify in court, they fail to meet their burden of proof, and, therefore, they cannot prove the existence of the grave risk exception.

Considering the above, it becomes clear that the most common solution under the Hague Convention – also when the abduction occurs due to domestic violence – is an order for the return of the child to the State of habitual residence. [25]

This result is aligned with the Convention's goal "to secure the prompt return of children wrongfully removed to or retained in any Contracting State". [26] Indeed, the assumption underlying the Hague Convention is that children, as a collective group, are best protected through an instrument that mandates their prompt return. In this sense, the Hague Convention protects the "best interests of children" [27] not to be abducted, rather than the interest of the individual child to be placed in a position that best serves his/her interests.

The fact that the Hague Convention protects children as a collective group prompted allegations of its non-compliance with the European Convention on Human Rights ("ECHR"). [28] This issue was ultimately referred to the European Court of Human Rights ("ECtHR"). [29] The central question was whether the framework of the Hague Convention, which mandates the return of the child with certain narrow exceptions, is consistent with Article 8 of the ECHR, and in particular with the right of the abducting parent to have her private and family life respected.

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[25] This outcome is defined as "wholly inappropriate in cases in which mothers have taken their children to escape domestic violence" by KEYES, "Women in Private International Law", available at: www.papers.ssrn.com, p. 8. It is illustrative, to this purpose, the compendium of cases where allegations of inappropriate behavior/sexual abuse have been raised under the grave risk exception created for the International Child Abduction Database (available at: www.incadat.com). Cases where allegations were dismissed or the return was ordered doubled those where the return was refused or investigation were carried out in the State of refuge.

[26] Article 1 Hague Convention.

[27] BARUFFI and HOLLIDAY, *cit. supra* note 16, p. 483.

[28] On the tension between the collective approach of the Hague Convention and the individual approach of the United Nations Convention on the Rights of the Child ("CRC"): SCHUZ, "The Hague Child Abduction Convention and Children's Rights", *Transnational Law & Contemporary Problems*, 2002, p. 393 ff., p. 396 ff.; MOL and KRUGER, "International Child Abduction and the Best Interests of the Child: An Analysis of Judicial Reasoning in Two Jurisdictions", *Journal of Private International Law*, 2018, p. 421 ff., pp. 431-436.

[29] European Court of Human Rights ("ECtHR"): *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Grand Chamber, Judgment of 6 July 2010; *X v. Latvia*, Application no. 27853/09, Grand Chamber, Judgment of 26 November 2013; *M.V. v. Poland*, Application no. 16202/14, Judgment of 1 July 2021.

The ECtHR ruled that, in assessing whether return proceedings strike a fair balance among the rights of the child, the abducting parent, the left-behind parent, and the interests of society at large, it is essential to consider that the Hague Convention does not mandate the automatic return of a child. Instead, it allows the requested authority to deny the return if the opposing party successfully proves that a ground for non-return exists. [30]

The main concern then becomes the level of detail required in analyzing the grounds for non-return to ensure that the Hague Convention aligns with the ECHR. The ECtHR addressed this by stating that the requested authority complies with the ECHR if it genuinely considers the objections to the child's return raised by the abducting parent. The requested authority must provide a well-reasoned decision regarding these objections, allowing the ECtHR to effectively verify that the relevant issues have been thoroughly examined. [31]

2.2. The Brussels II-*ter* Regulation

If the State of habitual residence and the State of refuge are both Contracting States to the Hague Convention and EU MS, [32] the Hague Convention is complemented by 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 ("Brussels II-*ter* Regulation"). [33] While the Hague Convention continues to apply in intra-EU cases, [34] the Brussels II-*ter* Regulation give specific directions on how the Hague regime applies between EU MS. [35] It provides,

[30] SCHUZ, *cit. supra* note 15, p. 312.

[31] *X v. Latvia*, *cit. supra* note 29, para. 106.

[32] Except for Denmark, which is not bound by the Brussels II-*ter* Regulation (Recital 96 Brussels II-*ter* Regulation).

[33] The Brussels II-*ter* Regulation applies only to return proceedings instituted on or after 1 August 2022 (Article 100 Brussels II-*ter* Regulation). For those started before this date, the 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 responsibility ("Brussels II-*bis* Regulation") applies.

[34] Article 96 Brussels II-*ter* Regulation.

[35] LOWE, HONORATI and HELLNER, *Brussels II-ter. Cross-border Marriage Dissolution, Parental Responsibility Disputes and Child Abduction in the EU*, Cambridge, 2024, p. 223. According to WILDERSPIN, *European Private International Family Law. The Brussels IIb Regulation*, Oxford, 2023, p. 297: "Its provisions [of the Brussels II-*ter* Regulation] do not disapply the provisions of the Abduction Convention but, rather, are grafted on to them, although, to a certain extent, they modify them".

for instance, specific time limits for the processing of applications by Central Authorities [36] and for courts' decisions on return requests; [37] it subjects courts' refusals to return the child to conditions not specified under the Hague Convention, [38] and it governs the procedure to be followed when the return is denied based on certain grounds. [39]

The most relevant provision of the Brussels II-*ter* Regulation for this paper is Article 27.

Article 27(3) states that the requested authority cannot refuse the return based on the grave risk exception if it is convinced, either by the evidence presented by the party seeking the child's return or by information received from the State of habitual residence, that proper arrangements have been made to ensure the child's protection upon return. [40] Examples of such arrangements include a court's order from the State of habitual residence prohibiting the applicant from coming close to the child, and provisional measures from the same State allowing the child to stay with the abducting parent who is the primary caretaker until a custody decision is taken. [41]

Article 27(3) applies when the authority intends to deny the return based on the grave risk exception only. This narrow ambit of application is coherent with the purpose of the rule, which is to prevent returns being denied too easily based on the grave risk exception. [42] It is also coherent with the purpose and function of the adequate arrangements contemplated under this provision. If a court intends to deny the return for grounds other than the grave risk exception (*eg*, objection of a mature child or the acquiescence of the left-behind parent), [43] adequate arrangements cannot do anything against the child's objections or the left-behind parent's acquiescence.

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[36] Article 23 Brussels II-*ter* Regulation.

[37] Article 24 Brussels II-*ter* Regulation.

[38] Article 27(3) Brussels II-*ter* Regulation analyzed *infra.*

[39] Article 29 Brussels II-*ter* Regulation.

[40] As pointed out by HAUSMANN, *Internationales und Europäisches Familienrecht*, 3rd ed., Munich, 2024, p. 709, the adequate arrangements referred to by Article 27(3) of the Brussels II-*ter* Regulation resemble the "undertakings", with which the applicant assumes certain obligations *vis-à-vis* the court in common law jurisdictions, and "safe harbor orders" or "mirror orders", by which the court in a common law State of refuge makes the order for return dependent on certain protective measures being ordered in favor of the child in the State of habitual residence.

[41] Recital 45 Brussels II-*ter* Regulation.

[42] *Contra* LOWE, HONORATI and HELLNER, *cit. supra* note 35, p. 252, who suggest interpreting it as applying whenever the requested authority invokes the grave risk exception, alone or together with other exceptions.

[43] All grounds for non-return provided by the Hague Convention are described *supra* note 11.

It is overall clear that the EU legislator wanted to limit the functioning of the grave risk exception in intra-EU cases, [44] in the belief that prompt return, at most accompanied by adequate arrangements, is the best remedy for international child abduction. [45] By narrowing the grave risk exception's operation, the EU legislator also intended to reinforce mutual trust between EU MS' authorities in the management of intra-EU child abduction cases. [46]

It is questionable whether such a solution is adequate for cases where the abduction is caused by domestic violence. [47] Research has shown that abusive partners cannot contain their violence against their intimate partners, especially after a period of separation. [48] Any legal arrangement they may enter during return proceedings and any order limiting their possibility to contact the child and the partner do not effectively prevent a further resurgence of violence against the partner, [49] which will most likely negatively impact the child.

In case the return is ordered, the court ordering the return may, where appropriate, take provisional, including protective, measures to protect the child from the grave risk they will face upon return, provided that taking such

[44] In 2021, the grave risk exception was the most common sole reason for refusal (29% of the cases). LOWE and STEPHENS, *cit. supra* note 10, para. 81.

[45] This has been recognized by the Court of Justice of the European Union ("CJEU"). See CJEU: *Rinau*, Case C-195/08 PPU, Judgment of 11 July 2008, para. 52. As pointed out by MCELEAVY, "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?", *Journal of Private International Law*, 2005, p. 5 ff., at p. 25, the agenda of the EU legislator "had at its core the desire to prioritize the return of abducted children".

[46] PRETELLI, "Three Patterns, One Law: Plea for a Reinterpretation of the Hague Child Abduction Convention to Protect Children from Exposure to Sexism, Misogyny and Violence Against Women", in PFEIFFER *et al.* (eds.), *Liber Amicorum Monika Pauknerová*, Prague, 2021, p. 384 ff.; BIAGIONI, "The Interplay of EU Regulation 2019/1111 with the 1980 Hague Convention in Matters of Child Abduction", *Cuadernos de Derecho Transnacional*, 2023, p. 1081 ff.

[47] BARUFFI, "The Interaction of the 1980 Child Abduction Convention with the Brussels II-ter Regulation: A Focus on the Regime of Recognition and Enforcement", *Laws*, 2023, p. 83 ff., at pp. 83-84 doubts that the Brussels II-*ter* Regulation can be effective in "hard cases" (where domestic violence is involved).

[48] That "it may be directly after leaving an abusive situation (by seeking divorce or leaving the family residence, for instance) that the abused person is most at risk of being seriously injured or even killed by a violent partner" is acknowledged by the Draft Guide, Annex III, *cit. supra* note 22, p. 13. On post-separation violence, see BRUCH, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases", *Family Law Quarterly*, 2004, p. 529 ff., pp. 541-542 and literature referred.

[49] EDLESON, SHETTY and FATA, *cit. supra* note 21, pp. 104-105. BRUCH, *ibid.*, at p. 541 defines these orders "naïve at best".

measures would not unduly delay the return proceedings (Article 27(5)). [50] The wording of this provision and the examples provided in Recital 46 seem to suggest that these measures can be adopted for the protection of the child only. This does not align, however, with the protective purpose of the measures at hand. Since the recast legislator wanted to give requested authorities a further tool through which to ensure that the child is not exposed to harm upon return, it is coherent with such purpose to argue that the content, scope and beneficiary – or beneficiaries – of the provisional measures should be determined based on the circumstances of the case.

Hence, if the cause of physical or psychological risk to the child is the abusive attitude of the father towards the mother, it is consistent with the origin and nature of such a risk that the mother can benefit from the provisional measure as well. [51]

3. The Istanbul Convention

The Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011 ("Istanbul Convention") entered into force on 1 August 2014. At the time of writing, it has 39 Contracting Parties, including all EU MS and the EU. [52]

The Istanbul Convention builds upon the United Nations Convention on the elimination of all forms of discrimination against women ("CEDAW Convention") [53] and the general recommendations adopted by the CEDAW Committee. [54]

The Istanbul Convention aims to prevent and combat all forms of violence against women and domestic violence. Violence against women encompasses all acts of gender-based violence which target women because they are wom-

[50] Recital 46 Brussels II-*ter* Regulation.

[51] The same conclusion is reached by HONORATI and RICCIARDI, "Violenza domestica e protezione cross-border", *Rivista di diritto internazionale privato e processuale*, 2022, p. 225 ff., pp. 241-242, 251-252.

[52] The official table of signatures and ratifications is available at: www.coe.int.

[53] Convention adopted on 18 December 1979 and entered into force on 3 September 1981. At the time of writing, it counts 189 Contracting States. An updated status table is available at: www.indicators.ohchr.org.

[54] ŠIMONOVIĆ, "Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions", *Human Rights Quarterly*, 2014, p. 590 ff., p. 604.

en, [55] whereas domestic violence is any form of context-based violence that occurs within the family or domestic unit or between former or current partners. [56]

When the victim of domestic violence is a woman, one could discuss whether it constitutes gender-based or context-based violence. Domestic violence against women is the manifestation of historically unequal power relations between women and men, which led to domination over, and discrimination against, women. Hence, even if it occurs in the context of a household, it remains a form of gender-based violence. [57]

Contracting States to the Istanbul Convention are under an obligation to exercise due diligence to prevent acts of violence against women and acts of domestic violence by private parties. [58] When the violence has already occurred, they are required to protect victims from further acts of violence. [59]

When violence is inflicted in households with children, Contracting States are required to ensure that, when they provide protection and support to the victims, "due account is taken of the rights and needs of child witnesses". [60] With this provision, the drafters of the Istanbul Convention recognized that when a child witnesses abuse against their mother, the child is impacted by that abuse. [61]

Relevant to cases where violence is inflicted in households with children is also Article 31, which provides that:

> "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 visiting or custody rights does not jeopardise the rights and safety of the victim or children".

[55] Article 3(a)(d) Istanbul Convention.

[56] Article 3(b) Istanbul Convention.

[57] Article 2(1) Istanbul Convention.

[58] Article 5(2) Istanbul Convention.

[59] Article 18(1) Istanbul Convention.

[60] Article 26 Istanbul Convention.

[61] Significantly, one of the recitals of the Istanbul Convention recognizes that "children are victims of domestic violence, included as witnesses of violence in the family". BERGAMINI and LIZZI, "Article 26: Protection and Support for Child Witnesses", in DE VIDO and FRULLI (eds.), *Preventing and Combating Violence Against Women and Domestic Violence. A Commentary on the Istanbul Convention*, Cheltenham/Northampton, 2023, p. 339 ff., at 340 note that "gender violence, including domestic violence, is recognized by the Istanbul Convention also as a child protection issue".

When regulating proceedings on custody and visitation rights, Contracting States shall balance the right of the mother who is a victim of domestic violence to be protected against further violence, the right of the father to have a family relationship with the child, [62] and the rights of the child to have their well-being protected [63] and maintain personal relations with both parents on a regular basis. [64]

Contracting States shall also take all necessary measures to ensure that the exercise of custody and visiting rights granted to the perpetrator does not pose any additional risk to either the domestic violence victim or the child. To fulfill this obligation, Contracting States may implement a range of protective measures to ensure the safety of domestic violence victims both during and after judicial proceedings. When there is a serious risk to the life and health of the victim, this may entail adopting measures to ensure distance between the perpetrator and the victim. In particularly severe cases, it may be necessary to revoke the parental rights of the perpetrator to prevent any potentially dangerous interactions occurring due to child custody. [65]

Even though Article 31 refers only to custody and visitation proceedings, there is no doubt that it applies to return proceedings as well. As seen above, through return proceedings, the return of the child to the State of habitual residence, where custody proceedings will normally be celebrated, is generally ordered. In this sense, return proceedings set the scene for custody proceedings. Additionally, like custody proceedings and custody orders, return proceedings and return orders are an occasion of contact between the perpetrator and the victim. Hence, their regulation requires a careful balance between the rights of the child, the abducting parent and the left-behind parent.

Putting custody and return proceedings on the same footing entails that, under Article 31 of the Istanbul Convention, Contracting States must take adequate measures to ensure that incidents of violence are duly considered in return proceedings. They must also ensure that enforcing any return order does not compromise the rights and safety of domestic violence victims and of the children involved.

When fulfilling these protective obligations, a Contracting Party to the Istanbul Convention that is also a Party to the Hague Convention must adhere to the regulation of return proceedings established by the Hague Convention. The challenge then is how a State bound by both the Hague and the Istanbul

[62] Article 8 ECHR.

[63] Article 3 CRC.

[64] Article 9(3) CRC.

[65] Article 45(2) Istanbul Convention.

Convention should manage return proceedings in cases involving domestic violence to comply with the obligations of both conventions.

4. The Interpretation of the Hague Convention in Light of External Elements Requiring Adequate Protection of Domestic Violence Victims

The way the grave risk exception is generally implemented in domestic violence-induced child abduction cases often exposes abducting mothers and their children to the risks of further violence. When a child is ordered to return to the State of habitual residence, they are not necessarily returned to the left-behind parent's home. [66] However, this distinction does little to mitigate the risk faced by the child and the mother. Upon returning to the State of habitual residence, they go back to living in the same country where the perpetrator resides. This situation increases the likelihood of fatal encounters between the mother and the abusive father, which, in turn, heightens the risk of harm to the child.

This state of affairs, which results from analyzing the Hague Convention in isolation rather than in relation to other international instruments, is highly unsatisfactory when child abduction is caused by domestic violence.

In the following sub-sections, it will be explored whether a more domestic violence victim-friendly interpretation of the grave risk exception of the Hague Convention is achievable. This will be done by interpreting the Hague Convention in light of the Istanbul Convention (section 4.1) and customary international law rules (section 4.2), and considering the subsequent practice some Contracting States to the Hague Convention have developed to protect domestic violence victims during return proceedings (section 4.3).

A gender violence-sensitive reading of the Hague Convention avoids the occurrence of a situation where international obligations deriving from different sources (the Hague Convention, on one hand, and the Istanbul Convention and relevant customary international law, on the other) cannot be simultaneously complied with, thus giving rise to a conflict of international obligations. [67]

[66] If the court believes it is not suitable for the child to return to the left-behind parent's house, it may direct that the child stays in a city other than the place of residence of the left-behind parent. This is acknowledged by the HCCH 2020 Guide, *cit. supra* note 13, p. 23.

[67] Two treaties are said to conflict when the obligations set out thereunder cannot be simultaneously complied with by BORGEN, "Resolving Treaty Conflicts", *The Georgetown Washington International Law Review*, 2005, p. 573 ff., p. 575. On the role of treaty interpretation as a

4.1. Systemic Interpretation of the Hague Convention in Light of the Istanbul Convention under Article 31(3)(c) VCLT

Is it possible to interpret the Hague Convention in light of the Istanbul Convention when child abduction occurs due to domestic violence?

To answer this question, reference must be made to Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 ("VCLT"), which set out the criteria to be used when interpreting international treaties.

Article 31(3)(c) VCLT provides that when interpreting an international treaty: "There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties".

This interpretative criterion is to be added to those listed under the first two paragraphs of Article 31, namely the text of the treaty to be read in good faith and in its context, the object and purpose of the treaty, and any act of authentic interpretation made by the parties to the treaty.

Unlike the criteria established in Article 31(1) and (2) – which focus on internal elements of the treaty being interpreted (the treaty's text, object, and purpose) and on agreements made at the time the treaty was concluded – Article 31(3)(c) allows for the consideration of elements external to the treaty under interpretation. It thus enables a systemic interpretation of the treaty. [68]

Such a systemic interpretation is possible only when the conditions indicated under Article 31(3)(c) are met, namely that, in relation to the treaty under interpretation, (*i*) there are rules of international law, (*ii*) which are relevant and (*iii*) applicable in the relations between the parties.

When all these conditions are met, the court is obligated to interpret the treaty in accordance with the relevant rules of international law that apply between the parties. [69] This means that, when the above conditions are satisfied, the systemic criterion for interpreting an international treaty must be used in conjunction with the other interpretative criteria outlined in Article 31(1) and (2). [70]

"conflict-avoidance tool", see PAUWELYN, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*, Cambridge, 2003, p. 244 ff.

[68] DÖRR, "Article 31. General rule of interpretation", in DÖRR and SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed., Berlin, 2018, p. 559 ff., p. 593.

[69] In addition to the fulfilment of these conditions, Article 31(3)(c) VCLT is conditional upon a systemic interpretation being needed in each case. See GARDINER, *Treaty Interpretation*, 2nd ed., Oxford, 2015, p. 298.

[70] As the International Law Commission ("ILC") put it, "the application of the means of interpretation in the article [31] would be a single combined operation. All the elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation": ILC, "Report of the International Law Commission on the work of its eighteen session", UN Doc. A/6309/Rev. 1 (1966), pp. 219-220.

As for the first condition, it is generally accepted that all sources of international law listed in Article 38 of the Statute of the International Court of Justice are "rules of international law" which could be used in interpreting treaty provisions. [71] Hence, a treaty can be interpreted in light of another treaty.

The requirement of relevance is met if the rules of international law that the interpreter intends to use relate to the topic of the treaty being interpreted or affect it in any way. [72]

The meaning of the third requirement is debated. It is not clear what it means that the relevant rules of international law are "applicable in the relations between the parties".

One approach is to consider that "the parties" are the parties to the treaty being interpreted. This reading is in line with the definition of "party" of Article 2(1)(g) VCLT ("party means a State which has consented to be bound by the treaty and for which the treaty is in force"). This "clear but very narrow standard" [73] means that all parties to the treaty being interpreted must be parties to the other treaty used for interpretative purposes. [74]

To avoid the systemic interpretation being restricted to a few cases where there is coincidence of the entirety of the parties to the treaty under interpretation and to the treaty used for interpretative purposes, it has been suggested that "the parties" are the parties to the interpretative dispute. [75] This would mean that if there is a dispute between States A and B over the interpretation of treaty *Alfa* ratified by States A, B, C and D, and treaty *Beta* is binding over States A and B, treaty *Beta* may be used for interpreting treaty *Alfa* in the dispute between States A and B, even if treaty *Beta* has not been ratified by all the parties to treaty *Alfa*.

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[71] DÖRR, *cit. supra* note 68, pp. 559, 604-605.

[72] GARDINER, *cit. supra* note 69, p. 299. As acknowledged by DÖRR, *cit. supra* note 68, pp. 609-610, the relevance is "a rather vague condition, which leaves the interpreter much room in the selection of pertinent extrinsic material". On this basis, he considers that external rules, despite having a different subject matter, "can be relevant when they are created to solve the same or similar factual, legal or technical problems".

[73] It has been defined so by the ILC. See ILC, "Report of the International Law Commission on the work of its fifty-seventh session (2 May – 3 June and 11 July – 5 August 2005)", UN Doc. A/60/10 (2005), p. 88.

[74] This narrow reading is followed by VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, p. 433. On the limits of such a narrow reading: MCLACHLAN, "The Principle of Systemic Interpretation and Article 31(3)(c) of the Vienna Convention", *International Comparative Law Quarterly*, 2005, p. 279 ff., p. 314; GARDINER, *cit. supra* note 69, pp. 311-314.

[75] ILC Report, *cit. supra* note 73, p. 88. GARDINER, *cit. supra* note 69, pp. 302-304 seems to favor this reading based on a contextual interpretation of the VCLT.

In case this second approach is followed, it is not clear whether, to argue that there is a dispute on the interpretation of a treaty, it is sufficient that two Contracting States of a treaty (States A and B, in the example above) endorsed a different interpretation of a treaty provision or whether a claim must have been filed by one Contracting State against the other in front of competent authorities. Considering that it is highly unrealistic that a claim of this type would ever be raised with respect to private international law treaties, [76] it would seem preferable to consider the existence of a divergent interpretation of a treaty provision enough to say that there is an interpretative dispute.

A common objection to this approach is that it does not promote a uniform interpretation of international treaties. [77] If treaty *Alfa* is interpreted in light of treaty *Beta* which binds the parties to a given interpretative dispute over treaty *Alfa* (States A and B), it suffices that a dispute arises between other Contracting Parties to the same treaty *Alfa* (States C and D) which are Parties to treaty *Gamma*, for treaty *Alfa* being interpreted differently (in light of treaty *Beta* in the first case, and in light of treaty *Gamma* in the second case) depending on who the parties to the interpretative dispute are.

Divergent interpretations of the same treaty undoubtedly arise under this approach. However, the need to promote uniformity in the interpretation of a treaty is less pressing when the treaty aims to achieve cooperation between Contracting States (*traité-contrats*). [78] Unlike law-making treaties, which provide a general and abstract regulation applicable to all Contracting States (*traités-lois*), [79] treaties of cooperation function on a bilateral basis between

[76] It is discussed whether the types of problems solved by private international law treaties require approaching treaty interpretation in a way that is reflective of these treaties' peculiarities. LO, *Treaty Interpretation under the Vienna Convention on the Law of Treaties. A New Round of Codification*, Singapore, 2017, pp. 131-149 argues that, because of their different subject-matter and purpose, private international law treaties should be subject to rules different from the VCLT rules on ordinary treaty interpretation. *Contra* MARONGIU BUONAIUTI, "The Interpretation of Uniform Law and Private International Law Conventions: What Role for the General Interpretation Rules under the Vienna Convention on the Law of Treaties?", in PASCALE and TONOLO (eds.), *The Vienna Convention on the Law of Treaties. The Role of the Treaty on Treaties in Contemporary International Law*, Napoli, 2022, p. 189 ff. argues that the VCLT rules on treaty interpretation are of sufficient generality and flexibility that they can apply also to private international law treaties.

[77] MCLACHLAN, *cit. supra* note 74, p. 314.

[78] *Traités-contrats* are defined by FITZMAURICE, "Third Report on the Law of Treaties", UN Doc. A/CN.4/115 (1958), p. 27 as: "[…] treaties which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually".

[79] *Traités-lois* are defined by FITZMAURICE, "Second Report on the Law of Treaties", UN

pairs of Contracting States. The success of such treaties depends on maintaining a harmonious relationship between the two states involved. Therefore, fostering a uniform interpretation among all Contracting States is not as crucial as it is for law-making treaties, where achieving the treaty's goal relies on states adhering to the same consistent international regulations. In the case of treaties of cooperation – like the Hague Convention – it is more important to refine the relation between the two cooperating states. This can be accomplished by interpreting the treaty in the context of other shared rules between these two states, rather than prioritizing a universally uniform interpretation of the treaty that may not support the effective bilateral implementation of the treaty. [80]

By applying Article 31(3)(c)'s requirements to the Hague-Istanbul Conventions relationship, there is no doubt that the rules of the Istanbul Convention are "relevant rules of international law" *vis-à-vis* the Hague Convention. They are rules enshrined in a treaty which is relevant when international child abduction occurs due to domestic violence. However, it may be doubted as to whether the Istanbul Convention provisions are "applicable in the relations between the parties".

If "the parties" are the Parties to the Hague Convention (the treaty being interpreted), clearly the Istanbul Convention (39 Contracting Parties) is not applicable in the relations between *all* the Contracting Parties to the Hague Convention (103 Contracting Parties).

If "the parties" are the parties to the interpretative dispute, then the Istanbul Convention "applies in the relations between the parties" if the Istanbul Convention has been ratified by the Contracting Parties to the Hague Convention which do not agree on the interpretation of the Hague Convention. Assume that the State of refuge (State X) and the State of habitual residence (State Y) are Contracting Parties to the Hague Convention. They do not agree on whether the return should be denied based on the grave risk exception because of the violence the abducting mother suffered at the hands of the left-behind parent. [81] If both State X and Y are Contracting Parties to the Istanbul Conven-

Doc. A/CN.4/107 (1957), p. 31 as: "In the case of law-making treaties (*traités-lois*), […] or of any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty […]".

[80] This conclusion seems to be confirmed by the fact that treaty law scholars acknowledge that "if the treaty obligation in question, even if contained in a multilateral treaty, is in fact owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes*: in those cases of bilateral implementation structure, the treaty obligation may very well be considered in the light of other obligations applying bilaterally between those two parties only": DÖRR, *cit. supra* note 68, p. 611. In similar terms, MCLACHLAN, *cit. supra* note 74, p. 315.

[81] The existence of "a broad range of practices employed across jurisdictions (and indeed,

tion, then the Hague Convention shall be interpreted in light of the Istanbul Convention pursuant to Article 31(3)(c) VCLT, as the Istanbul Convention sets out "relevant provisions of international law applicable in the relations between the parties" (to the interpretative dispute).

When, however, not every party to the interpretative dispute (States X and Y, in the example above, which are Contracting Parties to the Hague Convention) is bound by the Istanbul Convention (which has been ratified only by one or none of them), it is not possible to interpret the Hague Convention in light of the Istanbul Convention under Article 31(3)(c) VCLT, as the Istanbul Convention is not applicable in the relations between *all* the parties to the interpretative dispute.

4.2. Systemic Interpretation of the Hague Convention in Light of Relevant Customary International Law under Article 31(3)(c) VCLT

That the grave risk exception of the Hague Convention shall be interpreted in a gender violence-sensitive manner is further reinforced by considering the Hague Convention in conjunction with relevant rules of customary international law.

As mentioned earlier, all sources of international law – including customary international law – qualify as "rules of international law" that shall be used to interpret treaty provisions under Article 31(3)(c) VCLT as long as they are "relevant", meaning they pertain to the subject matter of the treaty under interpretation.

The requirement that these relevant rules of international law must be "applicable in the relations between the parties" is always satisfied by customary international law rules. Since these rules apply to all States, they are indeed applicable "to the relations between the parties".

The rules of customary international law relevant to child abduction occurring due to domestic violence are those relating to the right to life and the right to personal integrity. [82] Every State must protect the inherent right to life of

within jurisdictions) in situations where various patterns or incidents of domestic violence are alleged or found to be present" had been acknowledged by the PB of the HCCH in the Reflection Paper *cit. supra* note 13, p. 37. For an overview of the diverse approaches followed see *ibid.*, pp. 17-28.

[82] It is discussed whether the prohibition of gender-based violence against women is a rule of customary international law. This contention, made by the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") Committee, "General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation

every human being – and especially of those facing foreseeable threats to their lives – against life-threatening assaults by third parties. [83] States must also protect every individual – including domestic violence victims – from any act of torture and cruel, inhuman or degrading treatment other individuals may commit against them. [84]

The CEDAW Committee has recognized that gender-based violence against women, including violence against women that occurs in a domestic context, may in certain circumstances amount to torture or cruel, inhuman or degrading treatment. [85]

Additionally, the Istanbul Convention acknowledges that gender-based violence against women is a violation of women's human rights. [86] These include women's right to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association. [87]

If domestic violence can, in extreme cases like that of Cassandra Hasanovic, result in a violation of the right to life of the victim, or in a form of torture or cruel, inhumane or degrading treatment against her, then States must always take steps to prevent such acts, also when the domestic violence victim commits child abduction to escape from the violence suffered.

This entails that when the authorities of the State of refuge decide on the existence of the grave risk exception under the Hague Convention in cases where child abduction has been caused by domestic violence, they shall interpret this exception against the background of their international law obligations to prevent acts which violate the right to life and the right to integrity of domestic violence victims. [88]

No. 19", UN Doc. CEDAW/C/GC/35 (2017), pp. 1-2, is not fully shared by DE VIDO, "The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35", *Diritti umani e diritto internazionale*, 2018, p. 379 ff.

[83] For an overview of international human rights documents emphasizing the primacy of the right to life, see CASEY-MASLEN, *The Right to Life under International Law. An Interpretative Manual*, Cambridge, 2021, pp. 11-15.

[84] For an analysis of the plethora of international legal instruments establishing the right to personal integrity, see HENNEBEL and TIGROUDJA, *International Human Rights Law. A Treatise*, Cambridge, 2025, p. 644 ff.

[85] CEDAW Committee General Recommendation No. 35, *cit. supra* note 82, p. 6.

[86] Article 3(a) Istanbul Convention.

[87] CEDAW Committee General Recommendation No. 35, *cit. supra* note 82, p. 6.

[88] This conclusion seems to underpin the Joint Letter to the HCCH from the Special Rap-

Such a systemic interpretation of the Hague Convention in conjunction with rules of customary international law further corroborates the need for courts to uphold a gender violence-sensitive interpretation of the grave risk exception.

4.3. Relevance of the Subsequent Victim-Friendly Practice of Some Contracting States to the Hague Convention under Article 32 VCLT

Key actors involved in the implementation of the Hague Convention have increasingly recognized that abducting mothers who are domestic violence victims deserve adequate protection within the framework of return proceedings.

Some Contracting States to the Hague Convention have established in their national implementing legislation that instances of domestic violence against abducting mothers are eligible to trigger the grave risk exception under the Hague Convention.

Japan, for instance, has clarified in its act for the implementation of the Hague Convention that:

> " […] in judging whether grave risk of the child's return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the court shall consider all of the circumstances […], including […] (ii) whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence […]". [89]

Switzerland has established that:

> "Under Article 13 paragraph 1 letter b of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:

porteur on violence against women and girls, the Special Rapporteur on the sale, sexual exploitation and sexual abuse of children, and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of 19 September 2023, Info Doc. No 15 of October 2023, available at: www.assets.hcch.net. At pp. 3-4, the Special Rapporteurs encourage the HCCH to acknowledge the links between the grave risk exception, Article 20 of the Hague Convention, the customary international law rule prohibiting torture and inhuman and degrading treatment and the principle of *non-refulement* prohibiting the return of a person to a country where their life may be in danger or where they may be exposed to torture.

[89] Article 28(vi) of Act No. 48 of 19 June 2013, whose English translation is available at: www.japaneselawtranslation.go.jp. For an analysis: NISHITANI, "International Child Abduction in Asia", in FREEMAN and TAYLOR (eds.), *Research Handbook on International Child Abduction. The 1980 Hague Convention*, Cheltenham/Northampton, 2023, p. 200 ff., pp. 207-209.

a. placement with the parent who filed the application is manifestly not in the child's best interests;
b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent […]". [90]

Australia has amended the Family Law (Child Abduction Convention) Regulations 1986, [91] by adding the following note to sub-regulation 16(3), which lists the grounds for non-return:

"Note 1: In considering whether the matter mentioned in paragraph (3)(b) [grave risk exception] is established:
(a) the court may have regard to any risk that the return of the child under the Convention would result in the child being subject to, or exposed to, family violence; and
(b) the court may have regard to the extent to which the child could be protected from any such risk if the child was returned under the Convention; and
(c) the court may have regard to the matters mentioned in paragraphs (a) and (b) of this note regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur".

Other Contracting States are considering a possible amendment to their national implementing legislation to make it clear that domestic violence can amount to a grave risk to the child. One example is the United States, [92] where the proposal to amend the implementing legislation followed the example of some US courts, which in several cases ruled that adult domestic violence can pose a grave risk to the child under the Hague Convention. [93]

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[90] Article 5 of the Swiss Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults of 21 December 2007. For an analysis: BUCHER, "The New Swiss Federal Act on International Child Abduction", *Journal of Private International Law*, 2008, p. 139 ff.

[91] Family Law (Child Abduction Convention) Amendment (Family Law Violence) Regulations 2022, which amends the Family Law (Child Abduction Convention) Regulations 1986, which, together with Section 111B of the Family Law Act 1975, is the implementing legislation of the Hague Convention in Australia.

[92] A bill drafted in 2014 sought to amend the International Child Abduction Remedies Act (the act through which the Hague Convention is implemented in the US), with the objective to require judges to recognize domestic abuse as a grave risk for the child. Such a bill however was not passed. See *International Child Abduction: Broken Laws and Bereaved Lives. Hearing Before the Subcommittee on Africa, Global Health and Human Rights of the Committee on Foreign Affairs House of Representatives*, 112th Congress, First Session, Serial No. 112–72, Washington, 2011, available at: www.congress.gov.

[93] For an overview of US case law, see EDLESON, SHETTY and FATA, *cit. supra* note 21, pp. 102-104.

Another example is Brazil, where two petitions challenging the constitutionality of the Brazilian law implementing the Hague Convention have been filed with the Brazilian Supreme Court. [94] The two petitions allege that, because under the Hague Convention the return of the child is not denied on account of domestic violence against the abducting mother, the national implementing legislation does not align with constitutional principles. The matter has not been decided yet. However, the Court's president has already said he is in favor of applying the grave risk exception in case of domestic violence against the mother, even if the child is not a direct victim. [95]

The Hague Conference on Private International Law ("HCCH"), on its part, held an unprecedented forum on domestic violence and the operation of Article 13(1)(b) of the Hague Convention in South Africa in June 2024. [96] The forum was convened because the HCCH acknowledged that the Hague Convention does not always operate effectively when the abducting parent is escaping from domestic violence. [97] This initiative followed in the footsteps of the publication in 2020 of a Guide to Good Practice under the Hague Convention devoted specifically to Article 13(1)(b), [98] which analyzed whether and under which conditions the grave risk exception could be used to face situations of domestic violence committed against the mother who abducted the child. [99] It speaks volumes that, in the context of this forum, there "was any

[94] Ação direta de inconstitucionalidade 4245, Origem Distrito Federal, available at: portal.stf.jus.br; Ação direta de inconstitucionalidade 7686, Origem Distrito Federal, available at; portal.stf.jus.br. For an overview of the petitions: CAVALCANTE, "Barroso propõe exceção em retorno de crianças em caso de violência doméstica", Consultor Jurídico, 13 August 2025, available at: www.conjur.com.br.

[95] See the decision of the suspension of the trial of 13 August 2025 for both petitions of unconstitutionality. See the two websites indicated *ibid*.

[96] For an analysis of the role of the PB of the HCCH in the operation of the Hague Convention: GOH ESCOLAR, "The Role of the Permanent Bureau in the Operation of the HCCH 1980 Child Abduction Convention", in FREEMAN and TAYLOR (eds.), *Research Handbook on International Child Abduction. The 1980 Hague Convention*, Cheltenham/Northampton, 2023, p 79 ff.

[97] In his opening remarks, Christophe Bernasconi, Secretary General of the HCCH, said that the HCCH needs to make "sure that the Convention also operates effectively in the difficult context of domestic violence, even if this issue was not part of the negotiations". The opening speech is available at: www.assets.hcch.net. For an account of how the forum unfolded see BARNETT, KAYE and WEINER, "The 2024 Forum on Domestic Violence and the Hague Abduction Convention", *International Journal of Law, Policy and The Family*, 2024, p. 1 ff.

[98] HCCH 2020 Guide, *cit. supra* note 13.

[99] *Ibid.*, note 13, at para. 58, reads as follows: "Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child". This paragraph has been criticized as "[t]he categorical language in the new

real disagreement with the core idea that domestic violence can be very traumatic for children and that the application of the Hague Convention can be improved in these cases". [100]

Lastly, in February 2024, the Rapporteur of the Hague Convention gave an interview in which she recognized that the social context of today has significantly changed from the time when the Hague Convention was negotiated. Back at that time, the typical abductor was the father, not holder of custody rights; nowadays, the typical abductor is the mother with rights of guardianship over the child, who flees from abuse. Significantly, the Rapporteur said that:

> "If I had to write it today, I would think that one of the circumstances that judges can take into account when affirming that there is an exception to the return of the child to the place of habitual residence is precisely the existence of an abuser, of a father who exercises gender violence on the mother, and normally also in a vicarious way, on the abducted child". [101]

The three developments just described reveal that, because of the radical change in the social context where child abduction takes place today, several Contracting States are progressively favoring a gender-violence sensitive application of the Hague Convention. This occurs under the guidance of HCCH, which aims to provide directions to Contracting States on how to protect domestic violence victims in return proceedings, while at the same time upholding a uniform and consistent interpretation of the Hague Convention.

Calling it with the language of the VCLT, this amounts to subsequent practice in the application of the Hague Convention, which establishes the agreement of some parties to the Hague Convention as to its interpretation when domestic violence is involved. Insofar as it does not establish the agreement of all parties to the Hague Convention on how the Convention shall be interpreted in these hard cases, this practice does not fall under Article 31(3)(b) VCLT. [102]

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sentence might be misinterpreted as meaning that domestic violence against the taking parent will not be sufficient to establish the exception, irrespective of the impact that it may have on the child" by SCHUZ and WEINER, "A Mistake Waiting to Happen: The Failure to Correct the *Guide to Good Practice on Article 13(1)(b)*", *International Family Law*, 2020, p. 87 ff., p. 89.

[100] BARNETT, KAYE and WEINER, *cit. supra* note 97, p. 6.

[101] ÁLVARES, "Exclusive: The 1980 Hague Convention's rapporteur proposes "to reinterpret" the treaty, considering GBV", *the hague papers*, 10 February 2024, available at: www.haguepapers.net.

[102] Article 31(3)(b) VCLT reads as follows: "There shall be taken into account, together

However, such a subsequent practice of a subgroup of parties to the Hague Convention may be used as a supplementary means of interpretation under Article 32 VCLT, which provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (*a*) leaves the meaning ambiguous or obscure; or
> (*b*) leads to a result which is manifestly absurd or unreasonable".

The list of documents mentioned in Article 32 as supplementary means of interpretation is not exhaustive. [103] In addition to preparatory works and circumstances that existed at the time of treaty conclusion, subsequent practice of some parties to the treaty under interpretation can be used to shed further light on the meaning of the treaty provisions. [104] This has been confirmed by the ILC in its 2018 Report, where, in Chapter IV devoted to subsequent agreements and practice in relation to the interpretation of treaties, it wrote that: "A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion". [105]

Article 32 VCLT allows the interpreter to use supplementary means of interpretation for two purposes only: to confirm the meaning of a treaty provision as resulting from the application of Article 31, or to clarify a treaty provision whose meaning, as determined through Article 31, remains obscure or is manifestly absurd or unreasonable.

In this context, the subsequent practice outlined above can be used to reinforce the conclusions drawn from a systemic interpretation of the Hague Convention in light of the Istanbul Convention and relevant customary international law under Article 31(3)(c) VCLT. Indeed, the subsequent practice of

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with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[103] According to YASSEEN, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours*, 1976, p. 1 ff., p. 79, by allowing the interpreter to discretionally identify the supplementary means of interpretation, the pursuit of the goal underpinning Article 32 VCLT, which is to shed further light on the meaning of the treaty, is fostered.

[104] DÖRR, "Article 32. Supplementary means of interpretation", in DÖRR and SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed., Berlin, 2018, p. 617 ff., p. 627; VILLIGER, *cit. supra* note 74, p. 446; YASSEEN, *cit. supra* note 103, p. 80.

[105] ILC, "Report on the work of the seventieth session", UN. Doc. A/73/10 (2018), conclusion 4(3) of Chapter IV.

some Contracting States to the Hague Convention supports the finding reached from such a systemic interpretation, namely that an interpretation of the Hague Convention which safeguards both the abducted child and the mother victim of domestic violence shall be adopted.

5. Prevalence of International Treaties Concluded by the EU over EU Secondary Law

The Istanbul Convention is open for signature by the member States of the Council of Europe, the non-member States of the Council of Europe which have participated in its elaboration, and the European Union. [106]

After having participated as an observer in the negotiation alongside EU MS, in 2023 the EU ratified the Istanbul Convention on its behalf in the exercise of its exclusive competence with regard to its own institutions and public administration (Article 336 of the Treaty on the Functioning of the European Union, "TFEU"), [107] and its shared competence in the field of judicial cooperation in criminal matters (Articles 82(2) and 83(1) TFEU), asylum and non-refoulement (Article 78(2) TFEU). [108]

Under Article 216(2) of the TFEU, international agreements concluded by the EU "are binding upon EU institutions and on its Member States". As a result of this, EU secondary law must abide by international agreements entered into by the EU.

This entails that if a provision of the Brussels II-*ter* Regulation is not aligned with the Istanbul Convention, interpreters are required to carry out a "conforming interpretation" of the Regulation. [109] This allows for the Brussels II-*ter* Regulation to be interpreted in a way that conforms with the Istanbul Convention.

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[106] Article 75(1) Istanbul Convention.

[107] Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the EU, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union.

[108] Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the EU, 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, asylum and non-refoulement.

[109] Other pieces of EU secondary law that are interpretatively affected by the Istanbul Convention are indicated by DE VIDO, "The Istanbul Convention as an Interpretative Tool at the European and National Levels", in NIEMI, PERONI and STOYANOVA (eds.), *International Law and Violence against Women: Europe and the Istanbul Convention*, London, 2020, p. 57 ff., pp. 67-71.

6. A Gender Violence-Sensitive Interpretation of the Grave Risk Exception

Having understood how the external elements requiring adequate protection of domestic violence victims just described can influence the interpretation of the Hague Convention's grave risk exception, it is important to consider what results come from this influence.

When performing a gender violence-sensitive interpretation of the grave risk exception, the interpreter cannot opt for an interpretation of the exception which collides with the text of the Hague Convention (as complemented by the Brussels II-*ter* Regulation within the EU). The interpreter must adhere to the structure of the exception, which requires assessing whether the return would expose the child to a grave risk of physical or psychological harm or to be placed in an intolerable situation. An interpretation of the grave risk exception in light of elements external to the Hague Convention (the Istanbul Convention, customary international law, or the subsequent practice indicated above) cannot justify deviating from the focus of the exception, which is and must remain *the child*.

What the interpreter can do is to use the margin of discretion offered by the grave risk exception to deliver an interpretation of this exception which is gender violence-sensitive. Such a margin of discretion can be found under the requirement of physical or psychological harm or intolerable situation. The Hague Convention does not provide a list of causes that are eligible to create physical or psychological harm to the child or could place them in an intolerable situation. Hence, the interpreter can qualify the risk of exposing *the mother* to further acts of violence by the left-behind parent as a cause of physical or psychological harm to *the child*, or a factor which renders the situation in which *the child* would be placed intolerable.

In light of this, the gender violence-sensitive interpretation of the grave risk exception proposed in this paper can be formulated as follows: in cases where child abduction is caused by domestic violence, the court of the State of refuge is left with the discretion to refuse the return of the child if the court determines that the return would likely expose the child to the risk of grave harm due to the violence perpetrated by the left-behind parent against the abducting mother, violence which is expected to continue if the mother and the child were to return to the State of habitual residence.

7. Implementation of the Proposed Interpretation of the Grave Risk Exception through Private International Law Tools

It remains to be seen how the proposed interpretation of the grave risk exception can be implemented without violating the obligations imposed by the Hague Convention. In other words, if a domestic violence victim-friendly interpretation aims to align the Hague Convention with the Istanbul Convention, customary international law and the subsequent practice of certain Contracting States to the Hague Convention, its implementation cannot result in a violation of the Hague Convention itself.

Both the Istanbul Convention and the Hague Convention must be respected and abided by. The challenge lies in accommodating the seemingly conflicting needs of protecting domestic violence victims during return proceedings while ensuring that the Hague Convention mechanism for the prompt return of abducted children is upheld.

Private international law ("PIL") is crucial in this context, as it provides tools that enable courts to implement a gender violence-sensitive interpretation of the grave risk exception in a manner consistent with the Hague Convention's obligations.

In the following subsections, three specific PIL tools will be examined. This analysis aims to demonstrate how PIL can address challenges that may hinder the implementation of a victim-friendly interpretation of the grave risk exception. In this regard, PIL effectively reconciles the Istanbul Convention and the Hague Convention/Brussels II-*ter* Regulation, allowing for a Hague-compliant implementation of a gender violence-sensitive interpretation of the grave risk exception. In this sense, PIL makes the best of both the Hague Convention/Brussels II-*ter* Regulation and the Istanbul Convention.

7.1. Central Authorities as Inter-State Cooperation Channels

The first challenge for implementing the proposed interpretation of the grave risk exception is the burden of proof. Abducting mothers who are domestic violence victims generally fail to meet their burden of proof of the grave risk exception. [110]

As things stand now, if the abducting mother objecting to the return does not offer enough evidence of the grave risk exception, the authority of the State of refuge must order the return of the child, even when domestic vio-

[110] See *supra* Section 2.1.

lence has been alleged as the cause of abduction. This state-of-the-art does not allow for the gender violence-sensitive interpretation of the grave risk exception to be implemented.

This challenge can be overcome through the PIL tool of cooperation between authorities of different States concerned by the same cross-border case.

Article 13(3) of the Hague Convention is crucial in this respect. It provides that: "In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence". This provision allows the requested authority to obtain relevant information from the Central Authority and/or the judicial authority of the State of habitual residence. [111]

This system of direct and privileged channels of communication among Central Authorities and competent authorities should deploy its potential when domestic violence is alleged to be the cause of child abduction, and the abducting mother is unable to prove the violence suffered. [112] In these cases, the requested authority should obtain, on its own, information on the social background of the child, including the family context existing in the household where the child was living before the abduction. This information should help the requested authority decide on the existence of a domestic violence situation, even if the abducting mother was not able to provide evidence, but only alleged incidents of domestic violence.

Expeditious channels of communication between the authorities of different States are also established in the Brussels II-*ter* Regulation. Article 86 provides that judicial authorities can cooperate and communicate directly between themselves, provided that such communication respects the procedural rights of the parties and the confidentiality of the information. Article 87(4) of the same Regulation allows for the transmission of information between Central Authorities.

As we have seen, it is through these privileged channels of communication that authorities of the State of refuge can obtain information from the authori-

[111] HCCH 2020 Guide, *cit. supra* note 13, p. 53, where the Guide indicates that as "part of effective case management" courts can seek additional information on the social background of the child or to clarify certain assertions of facts through Central Authorities. The Guide also indicates that courts "may also obtain relevant information by initiating direct judicial communications through contact with other judges".

[112] SCHICKEL-KÜNG and ALFIERI, *cit. supra* note 7, at p. 339 recognize that the exchange of information about the social background of the child through Central Authorities "might be essential […] in cases where an Article 13(1)(b) exception has been raised".

ties of the State of habitual residence on security arrangements which have been made in the latter State to protect the child upon return. [113]

If the former authorities can obtain on their own initiative information about protective arrangements made in the State of habitual residence, there is no reason why the same cannot be done with respect to information relating to the familiar context of the child.

The exchange of information about the child's background between the authorities of the State of refuge and those of the State of habitual residence enables the requested authority to take a non-stereotyped approach to the mother's allegations of domestic violence as ground for non-return. By proactively seeking information from the authorities of the State where the alleged violence occurred, requested authorities could look beyond the limited evidence provided by the mother regarding the incidents of violence she claims led to the child's abduction and could detect whether the familiar context in which the child was living before the abduction was an abusive one.

7.2. Recognition and Enforcement of Protective Measures Abroad

The second challenge for implementing the proposed gender violence-sensitive interpretation of the grave risk exception is the summary nature of return proceedings. These proceedings must be decided quickly to ensure the prompt return of abducted children. [114]

A gender violence-sensitive interpretation of the grave risk exception would require the authorities in the State of refuge to carefully consider any allegations of domestic violence raised by the abducting parent. Proper consideration of these allegations necessitates that, in cases where the abducting mother is unable to provide proof of the domestic violence she alleges to have experienced, the requested authority seeks information about the familiar background of the child from the authorities of the State of habitual residence.

The feasibility of conducting these activities during return proceedings depends on the circumstances of the case. When the facts of the case are so complex that they cannot be adequately assessed in the short timeframe of re-

[113] Article 27(3)(4) Brussels II-*ter* Regulation. See *supra* Section 2.2.

[114] The duty to return the child forthwith is reinforced by Article 11 Hague Convention, which provides that if a decision on a return request is not reached within six weeks from the commencement of proceedings, the applicant or the Central Authority of the requested State have the right to request a statement of the reasons for the delay.

turn proceedings, [115] the implementation of protective measures to ensure the safe return of the child is of paramount importance. [116]

When the authorities in the State of refuge are confident that, by ordering the left-behind parent not to approach the child and the mother, the child's safety upon return is ensured, they will order the child's return to the State of habitual residence, together with issuing a protective measure against the father.

However, what effectiveness can a protective measure issued in the State of refuge have in the State of habitual residence? Generally, protective measures do not qualify as decisions which can be recognized and enforced in a country different from the one where they have been issued. [117]

Aware of this problem, the EU legislator established, under Article 27(5) of the Brussels II-*ter* Regulation, that protective measures ordered by the court of the State of refuge to protect the child from the grave risk of harm can be recognized and enforced as "decisions" in other EU MS, including the State of habitual residence. [118] This is a valuable addition that enables cross-border protective measures to effectively address the challenges presented by the summary nature of return proceedings.

When both the State of refuge and the State of habitual residence are Contracting Parties to the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children of 19 October 1996 ("Child Protection Convention"), the enforceability of a protective measure issued in the State of refuge is ensured by Article 11. Paragraphs 2 and 3 of this Article

[115] According to the statistical data provided by LOWE and STEPHENS, *cit. supra* note 10, paras 98-102, out of 1,140 applications made in 2021, the average number of days to reach a decision in court was 220 days. These figures include applications decided on appeal.

[116] According to the Position Paper of the European Association of Private International Law ("EAPIL") in response to the HCCH's invitation to participate as an Observer in the Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention of 10 October 2023, available at www.eapil.org, p. 3, "protective measures […] amount to a fundamental tool to achieve compliance with the Convention's return obligation, while guaranteeing physical and psychological safety of the child and thus ensuring respect for the child's fundamental rights".

[117] Under the Brussels II-*bis* Regulation, provisional measures adopted by the authorities of the State of refuge are not recognizable and enforceable in the State of habitual residence. See CJEU: *Bianca Purrucker v. Guillermo Vallés Pérez*, case C-256/09, Judgment of 15 July 2010.

[118] This is because provisional, including protective, measures ordered under Article 27(5) in conjunction with Article 15 qualify as decisions under Article 2(1)(b) of the Brussels II-*ter* Regulation.

provide that the measures of protection taken by the Contracting State in whose territory the child is present shall lapse as soon as the authorities having jurisdiction over the custody case have taken the measures required by the situation.

When neither the Brussels II-*ter* Regulation nor the Child Protection Convention is applicable, and no other treaty provides for the recognition and enforcement of protective measures abroad, the only way to ensure protection for the child and the mother upon return is for the authority in the State of habitual residence to issue protective measures that mirror those issued in the State of refuge. [119]

7.3. The Transfer of Jurisdiction over Custody Cases

The third challenge to securing effective protection for abducting mothers who are victims of domestic violence is the interim nature of return proceedings. When the requested authority refuses the return of the child, this does not mean that danger for the domestic violence victim is forever averted. After return proceedings, parents should appear before the competent court of the State of habitual residence for the custody and visitation rights of the child. [120]

Under certain conditions, the authorities of the State of refuge can obtain competence over the custody case. [121] These conditions are not satisfied when the left-behind parent files a return request and return is denied because of the grave risk exception.

This entails that an abducting mother who is a domestic violence victim must return to the State of habitual residence to litigate the custody of the child, despite having won her "Hague case". If she does not appear in court, she will most probably lose custody of the child. This would lead to the return of the child (and most likely of the mother as well) to the State of habitual residence (where the father lives), with the risk of further resurgence of violence against her and the child.

Article 12 of the Brussels II-*ter* Regulation and Article 8 of the Child Protection Convention permit, under certain conditions, the competent court to stay the proceedings and request a court of another State, with which the child has a particular connection, to assume jurisdiction. The transfer of jurisdiction contemplated under these provisions is the PIL tool that permits overcoming

[119] EAPIL Position Paper, *cit. supra* note 116, p. 10.

[120] Article 9 Brussels II-*ter* Regulation; Article 7 Child Protection Convention.

[121] Article 9 Brussels II-*ter* Regulation; Article 7 Child Protection Convention.

the challenge posed by the interim nature of return proceedings.

A transfer of jurisdiction is possible under Article 12 of the Brussels II-*ter* Regulation if (*i*) the competent court considers, upon application from a part or of its own motion, that another EU MS that has a particular connection with the child would be better placed to assess the best interests of the child; [122] (*ii*) the competent court requests the court of the other MS to assume jurisdiction, or set a time limits for one or more parties to inform the court of the other EU MS of the pending proceedings and the possibility to transfer jurisdiction; (*iii*) the requested court accepts the jurisdiction informing the first court without delay.

Article 12(4) indicates under which circumstances the competent court can consider the court of another EU MS to have a particular connection with the child. This could happen when the child becomes habitually resident in another MS after the competent court has been seized (Article 12(4)(a)), or where a holder of parental responsibility (such as the abducting mother) habitually resides in such a MS (Article 12(4)(d)).

Almost the same conditions apply for a transfer of jurisdiction under Article 8 of the Child Protection Convention. This provision speaks of a possible transfer of jurisdiction to the authorities of a Contracting State which "would be better placed in the particular case to assess the best interests of the child". Article 8(2) exhaustively indicates the States to which the jurisdiction over the case could be transferred. The connecting factors employed for this purpose are the same of those used under Article 12(4) of the Brussels II-*ter* Regulation, except for Article 8(2)(d), which allows for a transfer of jurisdiction – if the other preconditions are met – to the authorities of "a State with which the child has a substantial connection".

If jurisdiction over the custody case is transferred to the courts of the State of refuge based on the above provisions, domestic violence victims would be saved from the distress of returning to the State where their abuser resides to address child custody and visitation matters. This shift not only provides crucial protection but also empowers survivors to pursue the custody of their children in a safe country.

[122] The court of the MS to which the first court intends to transfer jurisdiction does not need to have jurisdiction under the Brussels II-*ter* Regulation. See, on this, GARBER, "Art. 12. Transfer of jurisdiction to a court of another Member State", in MAGNUS and MANKOWSKI (eds.), *Commentary on the Brussels IIter Regulation*, Cologne, 2023, p. 192 ff., p. 200.

8. Concluding Remarks

Cases like that of Cassandra Hasanovic show how compelling it is to give adequate protection to abducting mothers who are domestic violence victims in the context of return proceedings.

This paper tried to contribute to the debate by considering the Hague Convention (as complemented by the Brussels II-*ter* Regulation for intra-EU cases) in conjunction with the Istanbul Convention, relevant customary international law and the subsequent victim-friendly practice of certain Contracting States of the Hague Convention in the application of this Convention. This led to a gender violence-sensitive interpretation of the grave risk exception, which ensures adequate protection to domestic violence victims in return proceedings.

Furthermore, this paper pointed out how PIL allows for a Hague-compliant implementation of such domestic violence victim-friendly interpretation of the grave risk exception.

By doing so, this paper aimed to unveil the potential of PIL as a set of tools which could contribute to the goal of combating the profound inequalities women suffer from in contemporary society, which is at the core of feminist legal thought. [123] Far from being the neutral and apolitical field many consider it to be, PIL is a discipline providing strategic tools which facilitate dialogue, coordination and cooperation between authorities of different legal orders. If PIL's contribution is welcome when the parties to the cross-border case are in a peaceful relationship, more than welcome – if not outright necessary – is its input in cases where the parties to cross-border cases are in a violent relationship, such as when child abduction is caused by domestic violence.

[123] For a feminist critique of PIL, see BORG-BARTHET and TRIMMINGS, "Private International Law as the Final Frontier for Feminist Scholarship?", in BORG-BARTHET *et al.* (eds.), *From Theory to Practice in Private International Law. Gedächtnisschrift for Professor Jonathan Fitchen*, Oxford/New York, 2024, p. 61 ff.