Domestic Violence and Parental Child Abduction

The Protection of Abducting Mothers in Return Proceedings

Katarina Trimmings, Anatol Dutta,
Costanza Honorati and Mirela Župan (eds.)

INTERSENTIA

DOMESTIC VIOLENCE AND PARENTAL CHILD ABDUCTION

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Katarina Trimmings
Anatol Dutta
Costanza Honorati
Mirela Župan

INTERSENTIA
Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

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FOREWORD

The changing context that the Hague Child Abduction Convention has had to operate in has been well-documented. It has emerged that the type of abduction that is most prevalent is not the type that was in the minds of the drafters. Thanks to statistics collected by the central authorities of State Parties and their regular analyses by Professor Nigel Lowe and his colleagues, we now know that mothers are the abducting parents in around 70% of cases. From other research, we also know that the reasons underlying these abductions are diverse.

Today, between the fortieth birthday of the Hague Child Abduction Convention's creation and the fortieth birthday of its entry into force, the Convention has over 100 State Parties. It has solicited a wealth of literature and case law on all possible levels. The European Court of Human Rights has issued no less than 78 judgments on the Child Abduction Convention and its application in light of the European Convention on Human Rights. The Court of Justice of the EU, through its interpretation of the Brussels IIa Regulation (2201/2003), has ruled on matters of child abduction in 17 cases. Add to this the numerous policy meetings, briefings and documents, and practice guides, at international, European Union and national levels, as well as EU-funded and postgraduate research; one would think that everything has been said.

Yet, sticky issues remain. The one addressed by this book is one that is pervasive and difficult to tackle. When mothers take their children and go to another country to get away from domestic violence, how can the law protect the children against the negative effects of abduction and, at the same time, protect the mothers from the violence they set out to guard themselves and their children against? Can the law provide an adequate response? Can the Hague Child Abduction Convention operate in such situations at all? Some courts have devised legal mechanisms such as undertakings or mirror orders to accompany return orders. These are meant to protect the returning parent, most frequently the mother. They are, however, not always easy to implement in the country to which the child (and parent) return(s).

The European Union legislator has, over the past twenty years, been thoroughly committed to cooperation in the fields of civil and criminal law. Many regulations and directives have resulted. Some of these might be underused. The editors of this book, and the researchers involved in the POAM project that led to it, identified two underused instruments in EU law that might help to solve the problem of abducting mothers fleeing from domestic violence. Their approach was to look not only at what the current law does, but also at its potential. Their research confirmed the perceived underuse of the Regulation for the Recognition of Protection Orders in Civil Law and the Directive on the European Protection Order in child abduction cases, but they went further. They investigated the ways in which protection orders could, and perhaps should, be used to provide protection to abducting mothers. If the legal instruments can be used in this manner, the Hague Child Abduction Convention can continue to operate, but with the aid of newer instruments that are adapted to the newer reality of child abduction cases. Getting more than a hundred States to agree to an amendment or an addition to an international convention is nearly impossible, and perhaps not desirable. Using guides and soft law to convince State Parties to operate in a particular way is feasible but strenuous and time-consuming. So why not use what we have in terms of other legislation, at least at the level of the European Union? That is what this book is seeking to do.

In what has become a good tradition for EU-funded research projects, outputs provide knowledge in an accessible way to practitioners of various domains and, in addition, advance the state of legal knowledge for academia. The contributions published in this book are only a part of the outcome of the project: the partners have also published national reports about the current state of affairs. They have made available the POAM Best Practice Guide, which will assist with improving the situation of mothers abducting, or considering abducting, their children due to violence that they face at home.

Thalia Kruger
Professor of Private International Law, University of Antwerp
Honorary Research Associate, University of Cape Town

PREFACE

This book marks the conclusion of the POAM (Protection of Abducting Mothers in Return Proceedings) project, a collaborative research project conducted between 2019 and 2021, which explored the intersection between domestic violence and international parental child abduction within the European Union. The project, which was funded by the European Union's Rights, Equality and Citizenship Programme (2014–2020), was concerned with the protection of abducting mothers who had been involved in return proceedings under the 1980 Hague Abduction Convention and the Brussels IIa Regulation, in circumstances where the child abduction had been motivated by acts of domestic violence from the left-behind father. In the project, we examined the usefulness of Regulation 606/2013 on Mutual Recognition of Protection Measures in Civil Matters and Directive 2011/99/EU on the European Protection Order – which both allow cross-border circulation of protection measures and, so far, have not attracted much attention in practice – in the context of such return proceedings.

The volume mainly collects the ideas given at our final conference, where the POAM research team presented the results of the project: the event was held online due to the pandemic, and not, as initially planned, in Munich. During this conference, each project partner presented a part of the project, and distinguished external speakers commented on each part presented. Based on these presentations and comments, the contributions of this book, highlighting some of the topics of our project, were drafted. Furthermore, the Best Practice Guide developed during the project for the application of Regulation 606/2013 and Directive 2011/99/EU in child abduction cases committed against the background of domestic violence will be documented as an annex.

We have to thank many individuals and institutions for their invaluable help during the project: the European Union for the generous funding (and our EU project officer for flexibility in adapting our project to the needs of the pandemic), our four universities (the University of Aberdeen, the Ludwig Maximilian University of Munich, the University of Milano-Bicocca and the Josip Juraj Strossmayer University of Osijek)

for the constant support, the POAM research team for their excellent work, and many colleagues from academia and practice for their valuable participation during the many workshops and training sessions held. Finally, we are deeply indebted to the authors for their manuscripts, Onyója Momoh and Tatjana Tertsch for their editorial work, and Intersentia for publishing this book.

Aberdeen, Munich, Milan and Osijek, December 2021
Katarina Trimmings, Anatol Dutta, Costanza Honorati
and Mirela Župan

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JURISDICTION TO TAKE PROTECTIVE MEASURES IN THE STATE OF REFUGE IN CHILD ABDUCTION CASES

Costanza Honorati

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1. SEEKING PROTECTION MEASURES AGAINST DOMESTIC VIOLENCE IN HAGUE RETURN PROCEEDINGS

This contribution focuses on where to apply for measures for the protection of a mother who, with the intent of escaping domestic violence, has removed her child from his/her habitual residence, and taken him/her to a different State, thus committing international abduction. The underlying situation is one where the left-behind father starts return proceedings in the State of refuge and the court will seek to order the return of the child pursuant to the 1980 Hague Convention. This contribution will, therefore, concentrate on jurisdictional issues enabling the granting of measures for the protection

of the mother in the State of refuge, pending the Hague return proceedings. The interconnected issue of whether domestic violence, in practice, amounts to a grave risk of harm for the child and is, thus, a cause for refusing the return of the child is dealt with in a separate contribution.[1]

While the scope of this contribution – and, indeed, the aim of the whole POAM research project – focuses on the issuance and circulation of protection measures, this should not be seen as implying that the present author minimises or overlooks the effects of domestic violence in abduction cases. Indeed, domestic violence is a serious plague, far from being extinguished, and with rising figures. Courts should never handle a case superficially or mechanically where domestic violence is alleged, and such violence should always be weighed in and considered with extreme caution. In fact, when proved at a reasonable level, domestic violence may well be considered a ground for refusing return, as it will expose the child to a real and actual risk of grave harm. For an overall analysis of this kind of consideration, the reader is referred to other legal analyses, whose content and conclusions are fully endorsed here.[2]

It is precisely because an exception based on domestic violence should always be taken seriously, even when it does not reach the standard of proof for refusing return, that focusing on protection measures is of relevance. Besides some (rare) cases where domestic violence reaches the required standard of proof, and some other cases (unfortunately not so rare), where domestic violence allegations are ill-used and used in the first pleading by unprofessional legal advisers only to catch the court's empathy, in the majority of cases there may be hints of proof of some form of violence – not necessarily physical, as domestic violence may also take the form of psychological abuse – giving the court a clear picture of an unfriendly,

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1 The subject is dealt with by M. Freeman and N. Taylor, in this volume.

2 O. Momoh, 'The interpretation and application of Article 13(1) b) of the Hague Child Abduction Convention in cases involving domestic violence: Revisiting *X v. Latvia* and the principle of "effective examination"' (2019) 15 *Journal of Private International Law* 626 et seq.; C. Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) *Family Law Quarterly* 529; M. Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) *Fordham Law Review* 593 et seq.; M. Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 192 et seq.; and, in more general terms, but with specific attention to the problem of domestic violence, reference may also be made to: C. Honorati, 'Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della convenzione dell'Aja del 1980' (2020) *Rivista di diritto internazionale privato e processuale* 796 et seq.; M. Distefano, *Interesse superiore del minore e sottrazione internazionale dei minori*, Cedam, Padova 2012, pp. 131 et seq.

stressful and traumatic or fearful environment. While this may not amount to a justification for non-return, the court may feel uncomfortable (and should, indeed, avoid) returning the child (and the mother with him/her) with no protection, as if the challenge of domestic violence had not been raised. It is for this middle-ground, i.e. cases where domestic violence is not clearly and manifestly unfounded and is clearly also not so grave as to justify the refusal of returning the abducted child, that the court may need to issue a protection measure for the child and/or the mother. The background to this contribution is, therefore, those cases where there is *some proof* of domestic violence, although this may not be of such gravity as to convince the court to refuse return. The crucial and delicate question of how to meet the evidential threshold in domestic violence cases is handled elsewhere.[3]

2. THE LACK OF RULES ON JURISDICTION IN REGULATION 606/2013 AND ITS DIFFICULT COORDINATION WITH BRUSSELS IIA

The issue of jurisdiction deserves particular attention because, surprisingly, Regulation 606/2013[4] lacks any guidance on this basic requirement. As has been noted previously, the Regulation sets only uniform rules that provide for the circulation and enforcement of protection measures in civil matters, but not rules on international competence for issuing protective measures.[5] Interestingly, the Commission's original proposal did contain a jurisdictional rule;[6] but this was removed from the final version of the instrument with no apparent explanation.

The failure to include a jurisdictional rule in the final version of the Regulation appears questionable.[7] Various different reasons may be given

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3 The subject is dealt with by M. Zupan and M. Mrčela, in this volume.

4 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4.

5 On the structure, scope and content of Reg. 606/2013, see the contribution by A. Dutta in this volume.

6 Proposal of the Commission for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, COM(2011) 276 final. The proposed Article 3 was as follows: 'The authorities of the Member State where the person's physical and/or psychological integrity or liberty is at risk shall have jurisdiction.'

7 See, e.g. the criticism expressed by A. Dutta, 'Cross-border protection measures in the European Union' (2016) 12 *Journal of Private International Law* 169, 171 et seq.

to explain such decision, all of which lead, nonetheless, to an unsatisfying legal gap.

Firstly, one may suppose that the instrument was drafted having in mind cases that are fully internal to a particular State at the time the measure is issued, and where the need for recognition abroad of such measure arises only subsequently. In other words, if the case is a purely internal one, a ground for jurisdiction is not needed at the stage when the measure is taken. Regulation 606/2013 will, instead, come into play only later, when the protected person needs to move to a different Member State, and requires the extension of the protection order's effects to that Member State. This may appear consistent with the assumption, made by Article 2(2), that the Regulation applies to cross-border cases, such as 'where the recognition of a protection measure ordered in one Member State is sought in another Member State'.

While this construction may explain some cases, it seems that it does not fit all possibilities. The same wording of the Regulation, in fact, seems to encompass the case where the person causing the risk is resident in a Member State different from the one in which the protection order is issued. In particular, Articles 8 and 11 of Regulation 606/2013, which deal with the obligation to notify the person causing the risk of the issuing of the certificate, and of the adjustment of the protection measure, both refer to a situation: 'where the person causing the risk resides in a Member State *other than the Member State of origin* or in a third country'.[8]

In other words, while the person to be protected will likely find him- or herself in the forum, the (assumed) abusive and violent other party may already be in a different country when the measure is adopted (and not only at a later stage, causing an issue of recognition to arise). In such a situation, the court will have to face the question of jurisdiction and search for a legal basis that permits the adoption of a restrictive measure against such person. This may be the case with measures addressed to the father, who is in a Member State other than the forum, that forbid him from approaching the residence of the mother in the forum, and which, consequently, limit access rights to the child residing with the mother. In essence, while there may be cases where the international element arises only at a later stage, surely the EU legislator will also have considered the possibility that the situation will also be a cross-border one at the stage where the measure is issued. To limit the application of Regulation 606/2013 to measures that

8 Articles 8(2) and 11(4) Reg. 606/2013. Emphasis added.

are taken in internal cases, and where the need for cross-border circulation arises only later, would mean greatly reducing the potential use of this instrument. Therefore, a rule on jurisdiction must be searched for.

Jurisdiction could, then, be governed either by *other* EU instruments on jurisdiction, or by national law. National law will rarely be an appropriate ground. Although Regulation 606/2013 is founded on mutual trust, this does not mean that whatever decision is adopted under any national forum (included so-called 'exorbitant fora') should be recognised across the EU. Indeed, as a general principle, EU instruments that provide for automatic recognition and abolish the exequatur procedure, such as Regulation 606/2013, rely on the fact that a decision is being adopted under uniform rules of jurisdiction. It is, therefore, consistent with the general EU legal framework to consider that the EU legislator has relied on the idea that, in cross-border cases, the decision would be granted under one of the already available EU instruments governing international competence. In particular, reference should be made to the Brussels Ia Regulation on civil and commercial matters,[9] and, parallel to this, the Brussels IIa[10] (and IIb[11]) Regulations on matrimonial matters, parental responsibility and international abduction.

The application of the Brussels Ia Regulation in order to ground jurisdiction over protection measures in civil matters is undisputed. Firstly, such protection measures are not excluded from the scope of the Brussels Ia Regulation (see Article 1 thereof); secondly, Article 67 of the Brussels Ia Regulation gives priority to other EU provisions governing jurisdiction, recognition and enforcement in 'specific matters'. Hence, there will be no problem with cases where jurisdiction is based on the Brussels Ia Regulation, and recognition and enforcement is grounded in Regulation 606/2013.

Whether such a patchwork of rules is meaningful and useful is, however, open to discussion, especially since Regulation 606/2013 has applied from

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9 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

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

11 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1.

the same date as the Brussels Ia Regulation, i.e. since January 2015.[12] Both instruments depart from the regime set by the previous Brussels I Regulation (Regulation 44/2000), and provide for a fast and effective enforcement of decisions, grounded on the abolition of exequatur and the issuance of a certificate. This issue will be investigated further below.[13]

More complex is the relationship between Regulation 606/2013 and the Brussels IIa Regulation. The framework here is complicated by an express rule, Article 2(3) of Regulation 606/2013, according to which: 'the Regulation shall not apply to protection measures falling within the scope of Regulation (EC) No 2201/2013'. This provision is unsatisfactory overall, and has an unclear rationale.[14]

It has been suggested[15] that the exclusion was drafted in view of orders, prohibiting contacts between spouses, that are imposed in connection with proceedings relating to divorce, legal separation or marriage annulment. It is, however, unclear and disputable that such orders would fall under Brussels IIa Regulation, given that ancillary measures to divorce and separation are not covered by the Regulation.[16]

Recital 11 gives a tentative explanation for such an approach, stating that:

> This Regulation *should not interfere* with the functioning of Council Regulation (EC) No 2201/2013 of 27 November 2013 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ('Brussels IIa Regulation'). Decisions taken under the Brussels IIa Regulation should continue to be recognised and enforced under that Regulation.[17]

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12 More precisely, from 15 January 2015 (Brussels Ia Regulation), and 11 January 2015 (Reg. 606/2013). See also C. Moioli, *Le nuove misure 'europee' di protezione delle vittime di reato in materia penale e civile*, 2015, s. 4 <http://rivista.eurojus.it/le-nuove-misure-europee-di-protezione-delle-vittime-di-reato-in-materia-penale-e-civile/> accessed 06.09.2021, emphasising how Reg. Brussels I*bis* overlaps with Reg. 606/2013, therefore reducing the impact of the latter.

13 See section 3 in this contribution.

14 For a similar criticism, A. Dutta, 'Cross-border protection measures in the European Union' (2016) 12 *Journal of Private International Law* 169, 180 et seq.

15 By M. Bogdan, 'Some Reflections on the Scope of Application of the EU Regulation No. 606/2013 on Mutual Recognition of Protection Measures in Civil Matters' (2015) 16 *Yearbook of Private International Law* 405.

16 Recital 8 of the Brussels IIa Regulation states that the Regulation applies only to the dissolution of matrimonial ties, and should not deal with 'any other ancillary measures'. See further, below, at section 3.

17 Emphasis added.

It seems that the legislator conceived the Brussels IIa Regulation as a 'closed package': a complete and self-standing system, having its own rules on jurisdiction and on circulation of decisions, with which no other instrument should 'interfere'. This approach is questionable, given the multiple instruments in civil justice that the EU legislator has adopted over the years, and which are meant to coordinate with one another in the same area of Freedom, Security and Justice. Such approach would have had at least a technical justification, if, as originally planned by the Commission, Regulation 606/2013 was also a complete and self-standing instrument. Instead, this is not the case. Regulation 606/2013 provides no solution, and one is left with great uncertainty, and is forced to search jurisdictional rules within other EU instruments on jurisdiction.

In all cases, on a textual construction, Article 2(3) of the Regulation 606/2013 will exclude most protective measures that are adopted in view of alleged domestic violence, as these are usually connected to family law proceedings. This is regrettable. Although the Regulation has a general scope of application, and applies to all kinds of protection measures when a person's 'physical or psychological integrity may be at risk' (see Article 3(1)), there is no doubt that the Regulation could be of greatest relevance mainly in the field of domestic violence[18] (stalking may be another possible case). It is also well known that violence escalates during matrimonial crises, or when a separation or divorce is sought. Excluding all cases where there is a matrimonial or parental responsibility issue from the scope of Regulation 606/2013 (as these fall under Brussels IIa) would deprive Regulation 606/2013 of its greatest, and most relevant, purpose.

Keeping in mind the above-mentioned considerations and limitations to the Brussels Ia and IIa Regulations, this contribution now turns to examination of the available grounds of jurisdiction for protection measures to be issued in the State of refuge, in the context of international abduction. It should be noted that the situation where measures are requested and issued in the State of habitual residence of the child, once the child and the mother have returned there, is not dealt with here.

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18 M. Bogdan, 'Some Reflections on the Scope of Application of the EU Regulation No. 606/2013 on Mutual Recognition of Protection Measures in Civil Matters' (2015) 16 *Yearbook of Private International Law* 405.

3. A STRAIGHTFORWARD (BUT INEFFECTIVE) PATH: PROTECTION MEASURES AS SELF-STANDING MEASURES UNDER BRUSSELS IA

Where the abducting mother feels compelled to relocate abroad with her child because of domestic violence, she may find it appropriate, at a given stage, to seek protection measures that are effective both in the State of refuge and in the State of the child's habitual residence, to which she might find herself returning, depending on the outcome of the Hague proceedings.

The first option she has is to seek such measures in a venue unrelated to the Hague return proceedings. In this scenario, the measure is completely disconnected from the abduction proceedings, and the seised court will only assess the relationship between the man and the woman.

In this case, the alleged violence against the woman amounts to a (civil) tort. As is well known, Article 7(2) of the Brussels Ia Regulation gives jurisdiction over torts to the courts of the place 'where the harmful event may occur', which, in this case, could be the State of refuge.[19] Such a ground will be met, in the first place, where the man has followed the woman, and is now present in the State of refuge, therefore constituting an actual risk of harm. However, jurisdiction may also be grounded in a situation where the man has showed his intention to harm the woman by making threats to her, for example, via phone or email. The physical presence of the man in the State of refuge is, therefore, not necessary, as long as the woman has received the threats there. Indeed, Article 7(2) of the Brussels Ia Regulation also covers the risk of a prospective tortious event, and the likelihood of damage occurring in a particular Member State will also ground jurisdiction there.[20]

Once a protective order has been issued, the question arises of its circulation and enforceability in a different Member State. Regulation 606/2013

[19] Art. 7(2) states: 'A person domiciled in a Member State may be sued in another Member State … in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'

[20] In Case C-167/00, *Henkel*, ECLI:EU:C:2002:555, paras. 47–48, the Court of Justice had already given an extensive interpretation of Art. 5(3) of the 1968 Brussels Convention (which, at that time, only referred to the place where 'the harmful event occurred'), stating that such rule also covered actions 'whose aim is to prevent the imminent commission of a tort'. Following the entry into force of the Brussels I and Ia Regulations, the Court of Justice has repeatedly stated that the likelihood of damage occurring in a particular Member State shall also ground jurisdiction based on Article 7(2), subject to

and the Brussels Ia Regulation appear to be concurrent, and may be applied as alternatives to one another, as nothing in the wording of either seems to exclude the other.[21] One may suggest that a protection order would be better circulated under Regulation 606/2013 rather than under the Brussels Ia Regulation, as the former is a dedicated instrument that should be more effective and bring added value over the more general instrument.

However, that this really is the case, and that there really is added value in Regulation 606/2013, should be verified in each individual case, the difference between the two procedures being very subtle.

Both regimes are, in fact, grounded on the abolition of the exequatur procedure in the Member State of enforcement, and the concurrent issuance of a certificate in the Member State of origin when the conditions for the enforcement of the decision are fulfilled. As is well known, this model, which was first tested by the Brussels IIa Regulation in 2005 with reference to some very peculiar decisions in parental responsibility cases, is now the common cornerstone of all EU instruments in civil justice. The requirements for the issuance of the certificate are, thus, very similar under both instruments, although the regime under Regulation 606/2013 may seem less detailed (and probably less cumbersome). The same may be said, in principle, for the grounds of opposition to enforcement, based mainly on public policy, and on irreconcilability with a decision given or recognised in the requested Member State.[22]

There are, however, some minor differences that could be relevant in specific cases. For example, the instruments take different approaches to decisions adopted *inaudita altera parte*, i.e. under procedures that do not provide for prior notice to be given to the person causing the risk, something that is often the case for civil protection measures, as it allows

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the requirement that the right in respect of which infringement is alleged is protected in that Member State (see Case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220, para. 25; Case C-170/12, *Pinckney*, ECLI:EU:C:2013:635, para. 33; Case C-441/13, *Hejduk*, ECLI:EU:C:2015:28, para. 29). While such a clarification may result in a limitation with regard to infringement of intellectual property rights or personality rights, it certainly does not apply with regard to physical or psychological harassment or abuse. For a more general overview, see also G. van Calster, *European Private International Law Commercial Litigation in the EU*, Hart Publishing, Oxford 2016, pp. 176 et seq.

21 See above, at section 2. See also Recital 16 to Reg. 606/2013, stating that the provisions of the Regulation 'should be without prejudice to the right of the protected person to invoke that protection measure under any other available legal act of the Union providing for recognition'.

22 Compare Art. 13 of Reg. 606/2013 with Arts. 45 and 46 of the Brussels Ia Regulation.

for a 'surprise effect', granting better protection to the alleged victim. Interestingly, however, the Brussels Ia Regulation may result in better protection, at least in some cases. For the certificate to be issued under Regulation 606/2013, it is in fact necessary not only for the final decision on the protection measure to have been notified to the person causing the risk, but also that, when the decision was adopted *inaudita altera parte*, such person had the right to challenge the protection measure under the law of the Member State of origin (see Articles 6(1) and 6(3) of Regulation 606/2013). A decision will, therefore, not be allowed to circulate until the person causing the risk has been made aware of the protection measure, and has been heard by the court of the Member State of origin. Under the Brussels Ia Regulation, instead, where the measure has been ordered without the defendant being summoned to appear, the necessary certificate may be issued on proof of service of the judgment (compare Article 42(c) of the Brussels Ia Regulation). It is true that a judgment given in default of appearance is subject to refusal of recognition and refusal of enforcement (pursuant to Articles 45 and 46 of the Brussels Ia Regulation, respectively), but this will require *subsequent*[23] action to be taken in the State of enforcement on the part of the person causing risk, in the meantime allowing the measure to fully produce its protective effects.

Furthermore, irrespective of the duration of the protection measure granted, the effects of recognition, and of the certificate issued, will, under Regulation 606/2013, be limited to a period of 12 months, starting from the date of issuance of the certificate (see Article 4(4), Regulation 606/2013). For longer-lasting effects, enforcement under the Brussels Ia Regulation will, therefore, be more suitable.

On the other hand, Regulation 606/2013 contains more limited grounds for refusing the enforcement, as it does not include grounds for refusal or suspension under the law of the requested Member State, as long as they are not incompatible with the Regulation, as allowed by Article 41 of the Brussels Ia Regulation. Depending on the State in which enforcement is required, this could be a ground for refusal that one should look into.

In light of the above, a careful assessment of the situation, and a comparison of the pros and cons of each instrument – something that is possible only for an experienced private international lawyer – should be carried out before deciding how to deal with a foreign measure.

A different situation may also raise a different opportunity to apply for protection measures, independently from the Hague return proceedings.

23 Emphasis added.

The runaway wife and abducting mother may seek divorce or separation from the violent spouse, and in the course of such proceedings may also wish to apply for protection measures from her former spouse, such as a no contact or no access order. From the wife's point of view, this appears reasonable, as evidence of domestic violence would, among other considerations, justify applying for damages under a fault-based divorce, where this is provided by the *lex fori*. As seen above, this may be the kind of situation where the legislator feared 'interferences' between the two Regulations and, hence, ordered the Brussels IIa Regulation to prevail over Regulation 606/2013. Prima facie, in fact, one could argue that the court having jurisdiction over the principal question (the couple's separation/divorce) would also have jurisdiction over the ancillary request for protection measures, asked in such proceedings.

The application of the Brussels IIa Regulation is, however, less obvious than one would think. In a very early decision, the *De Cavel I* case, the CJEU clarified that protective measures (in that case, provisional measures relating to property, but the reasoning may be applied in more general terms) 'can serve to safeguard a variety of rights' and that, consequently, 'their inclusion in the scope of the Convention [at the time, the 1968 Brussels Convention] was determined not by their own nature but *by the nature of the rights which they serve to protect*'.[24] Furthermore, Brussels IIa applies only to the dissolution of matrimonial ties and, pursuant to its Recital 8, 'should not deal with issues such as the grounds for divorce, property consequences of the marriage or *any other ancillary measures*'.[25] This leads to the conclusion that the tortious behaviour of the violent husband will not fall under the scope of the application of the Brussels IIa Regulation, even if committed in the context of a matrimonial relationship. As in the previous scenario, the wife in need of protection will have to apply to the court having jurisdiction on tort, under the Brussels Ia Regulation, which may be different from the court seised of the separation/divorce proceedings thus requiring her to institute separate proceedings elsewhere.

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24 Case C-143/78, *Jacques de Cavel v. Louise de Cavel*, ECLI:EU:C:1979:83, para. 8 (emphasis added). In this case, the Court considered that judicial decisions authorising provisional protective measures, such as the placing under seal or freezing of the assets of the spouses, in the course of proceedings for divorce, did not fall within the scope of the Convention if those measures concerned, or were closely connected with, either questions of the status of the persons involved in the divorce proceedings, or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof.

25 Emphasis added.

There is only one way in which the Brussels IIa Regulation could be applied to protection measures being sought outside of, and independently from, abduction proceedings. This would be to ground jurisdiction on Article 20 of the Regulation. According to the rule therein, a court may, in urgent cases, take provisional measures that are available under the *lex fori* in respect of persons who are present in that State, even if that court has no jurisdiction as to the substance of the matter under the Regulation. This rule would allow the court of the State of refuge to take protective measures under national law in respect of the abducting mother who is present in such Member State. Any such measure, however, being established on a national ground for jurisdiction, will not be eligible for circulation under the Brussels IIa Regulation and will have limited territorial effects, hence will be of little help for the escaping mother. This situation will be dealt with below,[26] as similar problems arise when the measure is taken in view of the protection of the abducted child.

As seen above, notwithstanding some difficulties and uncertainties, Article 7 of the Brussels Ia Regulation, and possibly Article 20 of the Brussels IIa Regulation, may indeed confer jurisdiction on the State of refuge to adopt protection measures that, depending on which of these regimes is used, may be capable of being recognised and enforced in the State of the child's habitual residence. The major problem with this pathway, however, is that it seems too theoretical, and very unlikely to happen in practice.

The procedure presupposes an application by the mother/spouse, seeking measures for her own protection (and, indirectly, for the protection of the child). The underlying assumption is that the mother will seek such protection *upon her return* to the State of the child's habitual residence. This assumption is, however, ill-founded and unverified. In most cases, the mother, either through ignorance of the law, or because she is driven by desperation, assumes that she will protect herself and her child against domestic violence by *escaping to a different country*. It is not in her plans, and not in her interests, to return to the State that she has just escaped from. It is even less likely that such a mother will seek to have protection measures enforced in such State. Indeed, asking for, and obtaining, a measure that is capable of guaranteeing protection upon her return may even be counterproductive to the mother's plans.

Things may be different if the Hague return proceedings have already been instituted. In this case, and if the mother senses that a return order is the most likely outcome, then she may value measures to protect herself.

[26] See below, at section 4.

But, even in this case, the pathway described here, which requires the filing of new and separate proceedings for a protection measure, will rarely be viable, especially if the Hague return proceedings are expected to keep to the six-week time-frame.

For all the above-mentioned reasons, this first path, although clear and straightforward from the technical (legal) point of view, will not, in practice, lead to real and effective protection against domestic violence in cases where a child has been wrongly removed or retained.

4. A 'CREATIVE' PATH: PROTECTION MEASURES ISSUED IN THE HAGUE RETURN PROCEEDINGS: PROTECTING THE CHILD BY PROTECTING THE MOTHER

Preventing and combating domestic violence is increasingly a front-line issue nowadays, both at a national and a supranational level. It also is one of the policies of the EU legislator, who has adopted several measures in this field.

What is even more important, with regard to the present contribution, is the growing awareness and evidence that domestic violence directed towards a mother has a severe impact on her children, including in situations where they do not directly witness the abuse. Being aware of violent behaviour against one's own mother is a psychological and emotional stressor that affects the child's life in many respects. Furthermore, in the longer term, such behaviour may be internalised by the child and accepted as a model, leading the adult-to-be to consider violence as the ordinary way to solve conflicts or address difficult situations.[27]

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[27] See Best Practice Guide – Protection of Abducting Mothers in Return Proceedings (hereafter 'POAM Best Practice Guide'), reprinted in this volume, s. 2.1.3. In particular, see also the views of B. Hale, 'Taking Flight – Domestic Violence and Child Abduction' (2017) 70 *Current Legal Problems* 7, finding that 'domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their well-being'; also J.L. Edleson, 'Should childhood exposure to adult domestic violence be defined as child maltreatment under the law?', available at <http://www.mincava.umn.edu/link/documents/shouldch/shouldch.shtml> accessed 06.09.2021. In general terms, see also Robert Koch-Institut (eds), 'Gesundheitliche Folgen von Gewalt unter besonderer Berücksichtigung von häuslicher Gewalt gegen Frauen', Heft 42, Berlin 2008, available at <https://pub.uni-bielefeld.de/download/1857826/2656432/Gesundheitliche_Folgen_von_Gewalt.pdf> accessed 06.09.2021, for further legal references.

As early as 2006, the European Economic and Social Committee (EESC) circulated the *Opinion on Children as indirect victims of domestic violence*, calling for further action.[28] The document clearly acknowledged how domestic violence not only constituted a threat to the lives and well-being of women, but also affected and endangered the welfare of children. Based on academic evidence, it recognised that:

> Violence against the mother is a form of violence against the child. Children who witness domestic violence and have to experience and watch their father, stepfather or mother's partner hitting and abusing her are always victims of psychological violence. Although domestic violence does not constitute direct violence against children, *violence against the mother is always harmful to children*.[29]

The *Opinion* expands on the effects of domestic violence on children,[30] concluding that children who grow up in a context of domestic violence are

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28 Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, [2006] OJ C 325, pp. 60–64.

29 Ibid., para. 2.24 (emphasis added). It then continues as follows: 'Furthermore … domestic violence against women and child abuse often occur in the same families. Men who abuse their partners often also perpetrate violence against children. Because they live in a climate where it is routine, women who suffer violence may sometimes also be violent in turn towards their children' (para. 2.25).

30 See ibid., para. 2.3, where it reads: 'Growing up in a climate of physical and psychological violence can have serious consequences for children. Children – even young children – feel very helpless and vulnerable in the face of the father's, stepfather's or mother's partner's violence and her powerlessness. They also sometimes feel responsible for what is happening. They often believe that the violence is their fault, or they try to intervene and protect the mother, and are then themselves abused. Although the effects on each individual child are different and not all children develop behavioural problems as a result of violence, and although there are no empirically established criteria for determining how great the risk is (if any) in each individual case, there do seem to be clear links. The main stress factors that need mentioning are: living in a threatening atmosphere; not knowing when an attack will happen next; fear for the mother's survival; the feeling of helplessness in the situations in question; the feeling of isolation, because such children are often warned not to tell outsiders; conflicts of loyalties towards the parents; and impairment of the parent–child relationship. This can cause children to develop massive problems and behavioural disorders, including psychosomatic symptoms and psychological problems such as low self-esteem, restlessness, sleep disorders, difficulties at school, anxiety, aggression, and even suicidal thoughts. … Growing up in a context of domestic violence can also have an impact on the children's attitude to violence and to their own violent behaviour. By observing their parents' behaviour or experiencing violence themselves, children can take on the adults' problematic behaviour patterns. The cycle of violence can lead boys to learn the role of perpetrator and girls to learn that of victim, and can mean that they themselves become perpetrators or victims of domestic violence when they are adults. The effects on children who experience or witness their mother being killed by her partner seem to be particularly severe.'

exposed to numerous stress factors that can have significant and long-term effects on their well-being and behaviour. Most interestingly, one of the policy recommendations of the EESC points to '[i]mproving cooperation between women's protection and child protection',[31] disclosing how empirical results point unambiguously to the need for better coordination between these two protection aims.

Proceeding from this starting point, the POAM research team investigated how cases of domestic violence resulting in the international abduction of a child should make room for the adoption of protection measures for the mother, within the framework of the Hague return proceedings. The underlying assumption is that, in the very particular scenario of abduction against a background of domestic violence, the dichotomy between mother and child is an artificial one, given that what happens to one will clearly affect the other. Protecting the mother will *always* mean also protecting the child (albeit indirectly). Moreover, a child cannot be fully and properly protected if its own mother is at risk of physical or psychological harm. This is now recognised by the newly adopted Hague *Guide to Good Practice on Article 13(1)(b)*, which makes it clear that '[t]he Article 13(1)(b) exception does not require … that the child be the *direct* or *primary* victim of physical harm'.[32] While protection measures for the mother can, and should, also be requested in the State

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31 Ibid., para. 2.3.8.

32 Hague Conference on Private International Law, *Guide to Good Practice under the HCCH Convention of 25 October 1980 on the Civil Child Abduction – Part VI, Article 13(1)(b)*, The Hague 2020 (hereafter 'HCCH Guide'), para. 33 (emphasis added) <https://www.hcch.net/en/publications-and-studies/details4/?pid=6740&dtid=3> accessed 06.09.2021. The different approach is more evident if compared to the previous, and more 'traditional', wording offered by the Permanent Bureau of the Hague Conference, *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*, The Hague 2017 <https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf> accessed 06.09.2021, whose paras. 52–53 read as follows: 'The wording of Article 13(1)(b) [that his or her return would expose the child] clarifies that the issue is whether the return of the child would subject the *child* to a grave risk, and not whether the return would place another party's safety at grave risk. Thus, it is the situation of the child which should be the prime focus of the inquiry. However, Article 13(1)(b) does concern itself with the predicament of, for example, a taking parent, to the extent that the situation of the taking parent has an impact on the child. In a situation where there is evidence of a serious risk of harm to the taking parent upon his/her return with the child to the State of habitual residence, which cannot be adequately addressed by protective measures in that State, and which, if it occurred, would *expose the child* to a grave risk in accordance with Article 13(1)(b), the grave risk exception may be established.'

of prior habitual residence, the Hague return court should not rely solely on the theoretical obligation of such State to protect *the mother*, given the possible effects of such a situation on the child.

Of course, the Hague return proceedings cannot deal with domestic violence, as such, as is the case with any other matter related to the mother. The Hague return proceedings have a very precise and limited object, and should focus only on the return of the child. However, it is a primary responsibility of the court of the State of refuge to *protect* the child, upon ordering his or her return. This implies that, when the risk of harm is grave and there is no way to mitigate such harm, the court is left with no option but to refuse return. Adopting effective protective measures is the only way to ensure a safe return and, thus, the only way to order return. Adopting effective protection measures is even more crucial in the EU context, given that the Brussels IIa framework implements an even stronger child return policy. The point is well known and well explored, and needs no further investigation.[33]

Based on the Brussels IIa Regulation, two alternative grounds for achieving the necessary protection can be explored, although neither of these seems to be a perfect fit.

The first option would be to base the jurisdiction to take a protection measure on the provision dealing with this kind of order, i.e. Article 20 of the Regulation. As explored above (at section 3), this provision allows a court (in our case, a court in the State of refuge), in an urgent case, to take any 'provisional or protective measure' with regard to a 'person present on its territory'. The territorial requirement may be referred to either the mother or the child who finds themselves in the State of refuge, depending on whether the protective aim relates to mother or child. For the reasons explained above, however, it is maintained that, where evidence of (past) domestic violence reaches a reasonable standard, such a dichotomy is ill-founded, and any measure prohibiting (or regulating) the contacting

[33] C. Honorati, and A. Limante, 'Jurisdiction in Child Abduction Proceedings' in C. Honorati (ed), *Jurisdiction in Matrimonial Matters in Parental Responsibility and International Abduction: A Handbook on the Application of Brussels IIa Regulation in National Courts*, Giappicchelli and Peter Lang, Torino and Frankfurt 2018, pp. 128–31; P. McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?' (2005) *Journal of Private International Law* 5 et seq.; A Schulz, 'The New Brussels II Regulation and the Hague Conventions of 1980 and 1996' (2004) *International Family Law* 22 et seq.; M. Ballesteros, 'International Child Abduction in the European Union: the Solution Incorporated by the Council Regulation' (2004) *Revue générale de droit* 343 et seq.

or approaching of the mother will, in fact, also protect the emotional well-being of the child. Furthermore, such measure will reassure both the mother and child who are bound to return. In concrete terms, a provisional measure should probably concern both child and mother, and always consider both sides of the matter.

While jurisdiction would easily be assumed on the basis of Article 20, the problem arises at the stage of recognition and enforcement of such measures. As is well known, measures based on Article 20 have only territorial effects, and are not enforceable outside the territory of the Member State where they were taken.[34] In this situation, the point is made that such a protection measure should be recognised and enforced under Regulation 606/2013.

Circulating under Regulation 606/2013 a protection measure based on Article 20 of the Brussels IIa Regulation may seem at odds with the structure of the latter Regulation, given that measures based on Article 20 are clearly not imbued with extraterritorial effects. The result is, however, acceptable and consistent, in light of the structure and scope of Regulation 606/2013. This instrument has a special scope of application, and envisages only certain types of protection measures, defined by Article 3 as those 'imposing *one or more of the following obligations* [i.e. a prohibition or regulation on entering a place, having contact or approaching the protected person] on the person causing the risk *with a view to protecting* another person, when the latter person's physical or psychological integrity may be at risk'.[35] In brief, Regulation 606/2013 only applies to a certain type of measure having a well-defined content, issued for the protection of a person's integrity. The special aim and scope of Regulation 606/2013 justifies that, while a 'normal' provisional or protection measure grounded in Article 20 will not be recognised and enforced in other Member States, such recognition and enforcement may occur when the measure is taken in view of a special

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34 I. Kunda and D. Vrbljanac, 'Provisional and Protective Measures' in C. Honorati (ed), *Jurisdiction in Matrimonial Matters in Parental Responsibility and International Abduction: A Handbook on the Application of Brussels IIa Regulation in National Courts*, Giappicchelli and Peter Lang, Torino and Frankfurt 2018, pp. 249 et seq. The point of the limited territorial effect of provisional measures based on Article 20 was clarified by the CJEU in Case C-256/09, *Purrucker v. Vallés Pérez*, ECLI:EU:C:2010:437. On this decision, see also O. Feraci, 'Riconoscimento ed esecuzione all'estero dei provvedimenti provvisori in materia familiare: alcune riflessioni sulla sentenza Parrucker' (2011) *Rivista di diritto internazionale privato e processuale* 107 et seq.; C. Honorati, 'Parrucker I e II ed il regime speciale dei provvedimenti provvisori e cautelari a tutela dei minori' (2011) *Int'l Lis* 66 et seq.

35 All emphasis added.

(protective) aim that the EU legislator considers so relevant as to adopt a specific instrument in order to guarantee the production of extraterritorial effects.

It could also be argued that Regulation 606/2013 is not only *lex specialis*, but also *lex posterior*, with regard to the Brussels IIa Regulation, and that the *ratio legis* embodied in the later instrument should be upheld. Indeed, when multiple options are given, the interpreter is called to choose a construction giving an *effet utile* to all instruments concerned, and not one that frustrates and deprives all utility of one of the instruments (especially the more recent one).

Furthermore, as Regulation 606/2013 refers elsewhere for rules on jurisdiction, it cannot be excluded that jurisdiction is grounded in national rules.[36] Indeed, as seen above, one possible construction is that protection measures falling under Regulation 606/2013 may be granted on the basis of national fora. This is, however, also the case when triggering Article 20 of the Brussels IIa Regulation, which makes implicit reference to measures available under the *lex fori*. It would be odd to allow a provisional measure to circulate under Regulation 606/2013 when it is grounded *only* in national fora, and then refuse to circulate it under the same instrument when the same national fora is triggered by a uniform rule, as Article 20 of the Brussels IIa Regulation is.

Finally, this construction is also consistent with the limitation set by Article 2(3) of Regulation 606/2013. Circulating provisional measures taken on the grounds of Article 20 of the Brussels IIa Regulation under the special regime set by Regulation 606/2013 would not amount to an 'interference' with Brussels IIa, as circulation of this kind of measure is not envisaged by the latter Regulation.

A second possibility may be explored, in relation to applying for protection measures in the context of abduction proceedings. This approach builds on the special rules provided by the Brussels IIa Regulation, in order to enhance the Hague return proceedings in intra-EU cases. In particular, Article 11(4) of the Brussels IIa Regulation is meant to support and foster the very strict return policy envisaged by the Brussels IIa Regulation, by forbidding the court of the State of refuge to refuse the return of the child if 'adequate arrangements' have been taken to secure the protection of the child after his or her return. The underlying idea is that, even when return constitutes a grave risk for the child, a return order should, nevertheless, be issued if effective and adequate arrangements are to be taken to protect

[36] See above, at section 2.

the child on his or her return.[37] Of course, the subject to be protected is the child and not the mother. However, as has already been seen, in cases where there is reasonable evidence of domestic violence affecting the mother, the court should be very cautious, and should be prepared to protect the child from any possible risk, including risk of indirect harm. One could, therefore, argue that 'adequate arrangements', for the purposes of Article 11(4), could also be made to protect the mother in return proceedings involving allegations of domestic violence.

The real problem with this provision is that it is doubtful that it may be used as an effective jurisdictional ground for international cases, especially because any provisional and urgent measure will have limited territorial effects. The rule requires 'arrangements' to be made, directly or through the channels of judicial or administrative cooperation, so that measures are taken in the State of habitual residence.[38] On its face, it does not require the court of the State of refuge to grant protective measures directly. In the current Brussels IIa framework, protection measures, the need for which arise in the course of abduction proceedings, be they focused on the mother or the child, are a matter for the court of the State of habitual residence. This is a weak point of the current Regulation, as is confirmed by the fact that the Brussels IIb Regulation, coming into application from August 2022, will provide for a different, better solution. Investigating this will be the object of the next and last section of this contribution.

5. THE WAY FORWARD: PROTECTION MEASURES IN ABDUCTION PROCEEDINGS UNDER THE NEW BRUSSELS IIB REGULATION

The analysis conducted above pointed to a gap in the current legal framework of mother/child protection when domestic violence is a

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37 This approach is also inherent in the 1980 Hague Convention, and has, today, been made clear by the HCCH Guide, para. 44–48.

38 See, e.g. the European Commission, *Practice Guide for the Application of the Brussels IIa Regulation* (hereafter 'Practice Guide of the Brussels IIa Regulation'), Brussels 2014, para. 4.3.3, p. 55, stating that the mere possibility of protective measures is not enough to order return, since 'it must be established that the *authorities of the Member State of origin have taken concrete measures* to protect the child in question' (emphasis added). Similarly, see E. Pataut and E. Gallant, 'Article 11 para. 46' in U. Magnus and P. Mankowsky (eds), *Brussels IIbis Regulation Commentary*, Otto Schmidt, Cologne 2017; and R. Hausmann, *Internationales und Europäisches Ehescheidungsrecht. Kommentar*, CH Beck, Munich 2013, para. 124, p. 200.

background feature of an international abduction case. Although different pathways for achieving protection may be outlined, none of them are fully appropriate.

Seeking protection measures as self-standing measures, to be filed in proceedings independent from the Hague return proceedings, may be the right pathway from a theoretical and abstract point of view, but it is not an appealing one, and it may be counterproductive to the interests of the mother seeking protection (see section 3 above). The hope that protection measures will be taken in the framework of the Hague return proceedings, as established by the court on its own motion, in the interest of the child, or applied *ex parte*, appears more appropriate to the needs of the mother, but is less convincing from the point of view of the legal structure of the rule (see section 4 above).

Things may be changing in the near future, when the new Brussels IIb Regulation comes into effect. Pursuant to Article 100 thereof, the Regulation will apply to all legal proceedings instituted on or after 1 August 2022. Legal proceedings instituted before (and still pending at) that date, and recognition of decisions rendered in such proceedings, will continue under the current Brussels IIa Regulation.

Hague Proceedings instituted after that date will, thus, benefit from the new Article 27(5), which reads:

> Where the court orders the return of the child, the court may, where appropriate, take provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings.

Article 15, to which the rule refers, is concerned with '[p]rovisional, including protective, measures in urgent cases'. Its paragraph 1 states that:

> In urgent cases, even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of:
>
> (a) a child who is present in that Member State; or
> (b) property belonging to a child which is located in that Member State.

What is more interesting, and which makes these measures special, is that, as a derogation to the general rule, a measure grounded in Article 27(5)

will be recognised and enforced in all Member States. This result does not stem clearly from the rule, but is reached indirectly through a rather cumbersome referral to the definition of 'decision'. According to Article 2(1)(b), for the purposes of recognition and enforcement under the Brussels IIb Regulation, the notion of decision includes:

> provisional, including protective, measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter or measures ordered in accordance with Article 27(5) in conjunction with Article 15.

While the final outcome may not be immediately obvious to a lawyer less experienced in private international law, the result is, nonetheless, unequivocal. The court of the State of refuge, while not having jurisdiction over the substance of parental responsibility or custody, will have jurisdiction to take provisional and protective measures addressing the child, and such measures will have extraterritorial effects. The only difference between this and a decision on the substance is that the provisional measure is inherently limited in time, and will cease to apply when any further measure is taken by the court having jurisdiction over the substance (see Article 15(3)). The rule mirrors Article 11 of the 1996 Hague Convention, which also reflects the same extraterritorial, but temporary and limited, effects.

Article 27(5) is a very welcome step forward in the field of child protection. Indeed, it gives answers to a few of the issues that have been highlighted above. In particular, it sets a clear jurisdictional rule for protective measures to be taken by the State of refuge, in the context of abduction proceedings. Protecting the child will no longer be a question only for the State of habitual residence, but will become a clear responsibility of the State of refuge, which will be required to take an active role in achieving this result.

The rule also opens the door to extraterritorial effects of (some, very special) provisional measures that are taken by the court that does not have jurisdiction on the substance. This will exclude any need to revert to complicated legal constructions in order to achieve this result. It will also exclude the need to apply Regulation 606/2013.[39]

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[39] It may be noted that reference to Reg. 606/2013 will still be useful in cases where a woman seeks protection against domestic violence in a State different from the one of her own habitual residence, outside of a pattern of international abduction of children. Art. 27(5) of the Brussels IIb Regulation, in fact, only applies to cases of international abduction of children.

While these are all very important steps forward, one last step is still missing. The rule still makes reference only to the protection of *the child*, and gives no consideration whatsoever to the primary caregiver, who may also be in need of protection. It is a pity that the legislator did not include the parent who is a victim of domestic violence in the scope of the application of the rule.[40] A reference could, at least, have been made in the corresponding Recital. Instead, Recital 46, when giving examples of possible protection measures, does not refer, even implicitly, to situations that could involve the mother, as explored in the POAM project.[41] Once again, the mother is left alone to face a terrible dilemma: either return with the child and go back to the situation of violence she had escaped from, or stay safe and protected, but abandon her child. Pleading for protection measures will be her own responsibility, and will require her to file a separate proceeding, according to one of the pathways described under section 3.

Building further awareness of this situation, and the underlying gaps and needs, was one of the aims of the POAM research project and of this contribution in particular. Although the Brussels IIb Regulation represents an improvement, more is still to be done. It is up to the legal practitioner – be it the judge, the practising lawyer, or the academic – to make good use of all available means to achieve adequate protection for any woman suffering from domestic violence.

40 Such a proposal had already been suggested by K. Trimmings, *Child Abduction within the European Union*, Hart Publishing, Oxford 2013, p. 154, in light of a possible amendment to Article 11(4) of the Brussels IIa Regulation.

41 Recital 46 gives the following example: 'Such provisional, including protective, measures could include, for instance, that the child should continue to reside with the primary care giver or how contact with the child should take place after return until the court of the habitual residence of the child has taken measures it considers appropriate.'

ABOUT THE EDITORS

Katarina Trimmings is a Senior Lecturer in Law at the University of Aberdeen, and the Director of the Aberdeen Centre for Private International Law. She has written extensively on cross-border parental child abduction, and published a monograph titled *Child Abduction within the European Union* (Hart Publishing, 2013), and is one of the authors of the 15th edition of *Cheshire's Private International Law* (Oxford University Press, 2017). She led the EU-funded project 'Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction' (https://research.abdn.ac.uk/poam/ POAM, 2019–2021).

Anatol Dutta holds a Chair of Private Law, Private International Law and Comparative Law at the Ludwig Maximilian University of Munich. Previously, he was Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg (2003–2014) and was Professor at the University of Regensburg (2014–2017). Anatol Dutta is a member of the editorial board of *Zeitschrift für das gesamte Familienrecht* (FamRZ), a leading family law journal for practitioners and academics in Germany, and is a member of the German Council of Private International Law. He has a special interest in family and succession law, from a private international law as well as a comparative and interdisciplinary perspective.

Costanza Honorati is a Full Professor of European Union Law at the University of Milano-Bicocca, School of Law where she also holds the Chair of EU Private International Law. She has been Co-ordinator of the PhD Program in European Union Law since 2017 and was the Head of the PhD School between 2009 and 2013. She is currently Chair of the EU Commission's Working Group on a Guide to the Maintenance Regulation and was previously a member of the Expert Group assisting the Commission on the Recast of the Brussels IIa Regulation (2015). She has been a Visiting Scholar and Visiting Professor at several institutions. She is a member of the Editorial Board of *Rivista di diritto internazionale privato e processuale* and the Special Editor for private international law of *European Papers*.

Mirela Župan is a Full Professor at the Josip Juraj Strossmayer University of Osijek, Faculty of Law, and Head of the PhD Programme in Law. Her main professional interests include private international law of family and contractual matters, as well as the impacts of ICT on law and the protection of the vulnerable (children, adults, companion animals). She was awarded the Max-Planck Society Doctoral and Postdoctoral Grant from the Max Planck Institute for Comparative and International Private Law in Hamburg. As a member of several research groups, she has organised and participated in conferences, seminars and workshops, and has published a number of books, chapters and papers. She has acted as a member of the Expert Group assisting the Commission on the Recast of the Brussels IIa Regulation and was nominated as a national reporter for European Commission studies.