

POSITION PAPER

of the European Association of Private International Law

in response to the Hague Conference on Private International Law'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

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The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has more than 500 members, mostly academics and practitioners, based in more than 60 countries.

By this position paper, EAPIL intends to take part in the discussion launched by the Hague Conference on Private International Law (HCCH) on the Practical Operation of the 1980 Hague Convention on International Abduction of Children in regard to a specific topic.

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A. AIM OF THE PRESENT PAPER

1. Through the following paper, the *European Association of Private International Law* (EAPIL) aims to draw the attention of the Eighth Special Commission on a specific topic it considers of continued relevance: the need for and the role of protective measures in abduction proceedings.
2. The topic of protective measures in the context of Hague return proceedings is certainly not a new one. It has been the object of several studies within and outside the Hague Conference's institutional frame. The topic was dealt with in the context of the 2001, 2006 and 2011 Special Commissions, all of which made some general recommendations in regard to the use of protection measures.¹ The use of protective measures was then dealt with in 2019 in the context of the *Guide to Good Practice. Part VI. Article 13(1)(b)*,² and a special issue of *The Hague Judges' Newsletter*³ was devoted to it. Scholars have also shown their interest in the topic of protective measures, especially but not exclusively in the context of domestic violence cases.⁴
3. Notwithstanding this material, there still is a need for clarifying the role and promoting the use of protective measures. The practice in Contracting States is very different – with some States making wide use of some kind of ameliorative/protective measures (sometimes also where these are not fully appropriate), and other States showing limited attention to and understanding of such measures. Recent case law in national and international courts may have an impact on the future practice of this controversial but crucial matter and calls for additional consideration.

B. PROTECTIVE MEASURES IN THE CONTEXT OF ABDUCTION PROCEEDINGS

4. Based on the general understanding that this is in the best interests of all children, the 1980 Hague Convention requires that the abducted child is promptly returned to the country of his or her habitual residence (article 12(1)). While this is the general rule, there are exceptions. Return is thus not ordered mechanically but following judicial proceedings and on a case-by-case analysis. Among other grounds for refusing return, the court in the State of refuge is required to examine whether the return may expose the child to a grave risk of physical or psychological harm (article 13(1)(b)). Where the court finds that a grave risk of harm is possible, the court "is not bound to order return of the child" and may refuse return. This clarifies that the general presumption that a prompt return is in the interest if the child can

¹ See Fourth Special Commission (March 2001), para 5.1; Fifth Special Commission (November 2006), paras 1.8.1 and 1.8.2; Sixth Special Commission (June 2011), para 41 in regard to the use of the 1996 Hague Convention.

² *Guide to Good Practice*, Part VI, Article 13(1)(b) (2020).

³ *The Judges Newsletter, Special Focus. Urgent Measures of Protection*, vol. XXIV/2019.

⁴ C. Honorati, 'Protecting Mothers against Domestic Violence in the Context of International Child Abduction: Between Golan v Saada and Brussels II-ter EU Regulation' *Laws* 2023, 12, 79; O. Momoh, 'The Need for Cross-border Protective Measures in Return Proceedings', in K. Trimmings, A. Dutta, C. Honorati, M. Zupan (eds), *Domestic Violence and Parental Child Abduction* (Intersentia: 2022); S. Bartolini, *Mutual trust through the looking glass: The protection of children's fundamental rights in EU return proceedings* (Oñati Socio-Legal Series; 2022); *Best Practice Guide: Protection of Abducting Mothers in Return Proceedings: Intersection between domestic violence and parental child abduction. POAM Project*, 2020, online at <https://research.abdn.ac.uk/poam/resources/guide-to-good-practice/>; M. Župan, S. Ledić, M. Drventić, 'Provisional Measures and Child Abduction Proceedings' *Pravni vjesnik* 35(2019) 9-31; I. Pretelli, 'The law applicable to provisional and protective measures with a focus on the EU system of ancillary reliefs', *Yearbook of Private International Law* 21(2019/2020) 97-223.

be rebutted, whenever in the case at hand this is not in the best interests of the individual child concerned.

5. It is to be also noted that where the court is satisfied that there is a grave risk of harm, that court still has discretion - thus no more an obligation - to return the child. Returning the child notwithstanding a risk of harm is however a difficult decision, and one that courts are more and more at difficulty with. The increasing relevance and far-reaching effect of the principle of the best interests of the child has led courts to prioritize the interests of the individual abducted child over the general policy of deterring abduction. Possibly as a consequence of such trend, the *Statistical Analysis* for 2021 shows a marked increase in the refusal of return grounded on Article 13(1)(b), amounting to 46% of all refusals, this being the highest proportion which was ever registered.⁵ While this result may be a cause for concern, especially when coupled with the mere 23% of judicial return orders,⁶ this may be explained with an increasing importance attached to the individual child's best interests, which are prioritized over the international obligation to return all abducted children.
6. In the light of this tension, the *Guide to Good Practices. Part VI. Article 13(1)(b)* provides some guidelines on how to balance the return of the child and his or her safety in the State of habitual residence. It thus clarifies that "... even where the court determines that there is a sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, *it must nevertheless duly consider* the circumstances as a whole, *including whether adequate measures of protection are available* or might need to be put in place *to protect the child from the grave risk* of such harm or intolerable situation".⁷ On a textual understanding, the quoted passage implies that the assessment of whether sufficient protective measures exist to ensure the child's safe return, is an essential element of the determination of whether or not the child faces a "grave risk of harm."
7. It should however be reminded that, even when such evaluation is made and the court concludes that a grave risk exception is established, it is still not bound to order the return of the child, "which means that it is within the court's discretion to order return of the child".⁸
8. In conclusion, notwithstanding the court's ultimate discretion to order or refuse the child's return, in cases where the court considers that there might be a grave risk of harm, the adoption of protective/ameliorative measures is the legal means to bridge the gap between two opposite alternatives: on the one hand, returning the child notwithstanding the risk of harm; on the other hand, refusing to return the child and allowing the abducting parent to gain an advantage from his or her illegal behaviour. In other terms, protective measures – to be understood as per below at section C – 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.

⁵ See N. Lowe, V. Stephens, *Global Report, Statistical study of applications made in 2021 under the 1980 Child Abduction Convention*, Prel. Doc. n. 16, para 83 and at para 165, where it is concluded that there is "A striking finding that 46% of refusals were based in whole or in part on Article 13(1)(b), which was the greatest proportion ever recorded and compares with 25% in 2015 and 34% in 2008". The drafters of the Study estimate that this captures 94% of all return applications received and sent through Central Authorities in 2021 (at para 3).

⁶ *Ibidem*, at para 58-59, also showing that the proportion is decreasing from the 28% recorded in the 2015 and the 27% recorded in 2008 studies.

⁷ *Guide to Good Practice Under the Child Abduction Convention*, Part VI, Article 13(1)(b), (2020), para 41. Emphasis added.

⁸ *Ibidem*, para. 42.

B. ORDERING A SAFE RETURN AS A TREATY OBLIGATION

9. Focusing on the role of and the need for protective measures may, however, be misleading. The point has rightly been made that protective measures are mentioned nowhere in the Hague Convention.⁹ Indeed, it must be acknowledged that there is little textual support in the Hague Convention for the adoption of protective measures.
10. The closest reference to something similar to protective measures may be found in Article 7 of the 1980 Hague Convention in regard to functions of Central Authorities. Article 7(h) requires Central Authorities to “provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child” (emphasis added). Role of Central Authorities in securing safe return was already clarified by the Third and Fourth Special Commissions, in 1997 and 2001 respectively, where it was clarified that “Contracting States accept that Central Authorities have an obligation under Article 7(h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.”¹⁰ The measures which may be taken in fulfilment of the obligation under Article 7 (h) may include, for example:
 - a) alerting the appropriate protection agencies or judicial authorities in the State of habitual residence of the return of a child who may be in danger;
 - b) advising the State of refuge, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
 - c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.
 - d) protection of the child may also sometimes require steps to be taken to protect an accompanying parent.
11. Emphasis should be laid, however, not on the obligation to adopt ‘administrative arrangements’, or protective measures as such, but on the final objective to ‘secure the safe return’ of the child. In this respect, the above-mentioned rule is of relevance. Central Authorities act as State organs and they discharge an obligation which is placed on the State as a whole. Such an obligation, which is grounded in a wider context of rules, can and should be discharged by any organ of the State which is in the position to do so, including courts. As early as in 2001, the Fourth Special Commission clarified that ‘safe return orders’ entail more than merely action by Central Authorities: “*Contracting States* should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, *any necessary provisional protective measures* prior to the return of the child” (emphasis added).¹¹
12. The view that the Hague Convention sets a treaty obligation on all Contracting States to ensure the child’s *safe return* is supported here. This requires that all States, i.e. the State of the child’s habitual residence and the State of refuge, shall cooperate one with each other to

⁹ By the US Supreme Court, in the *Golan v. Saada*, 596 U.S. (2022), p. 9: “Nothing in the Convention’s text either forbids or requires consideration of ameliorative measures in exercising this discretion. The Convention itself nowhere mentions ameliorative measures”.

¹⁰ Conclusions and Recommendations of the Fourth Special Commission (March 2001), 1.13. See also *Guide to Good Practice on the 1980 Child Abduction Convention: Part I - Central Authority*, p. 39, para 3.18.

¹¹ *Ibidem*, 5.1.

ensure the physical and psychological safety of the child when implementing the main obligation of returning the child.

13. While the obligation is on all Contracting States, the main responsibility for discharging such obligation is on the court of the State of refuge. The Treaty's main obligation to return the child is only discharged when such court is convinced that the return is safe and will not cause any harm - either physical or psychological - to the child. It is the duty of the court in the State of refuge in particular to make sure that the child will suffer no physical or psychological harm from complying with the Hague main obligation and returning to the State of habitual residence.
14. The treaty obligation to guarantee the safe return of the child is grounded in the purpose and the context of the Hague Convention.
15. The general purpose of the Hague Convention is to pursue the best interests of children and their parents. While this is generally served by returning the abducted child, the point has been clearly made several times that this objective should not be elevated above others, equally served by the Convention. Avoiding that the child is exposed to any risk of harm upon his or her return is a clear obligation resting on the Hague court.
16. Although the principle of the best interests of the child has always been at the ground of the 1980 Hague Convention as a whole, over the years it has gained more and more relevance. State courts are increasingly concerned with directly assessing the best interests of the child and balancing general needs and policies with the paramount consideration of the individual child's best interests in the given case. In the context of abduction proceedings this implies that, when pursuing the aim of returning the abducted child to the place of his/her habitual residence, the court should pay the greatest attention to safeguarding the overall physical and psychological safety of the child.
17. The legal context in which the Convention operates is also of special importance. States Parties to the 1980 Hague Convention are bound by the UN Convention on the Rights of the Child and its Optional Protocols, and the former should be interpreted and applied in the light of all relevant international instruments. Failure to consider and adopt provisional measures in order to guarantee a safe return may also result in a breach of fundamental rights.
18. This is shown by the *N.E.R.Á.* case, where the CRC Committee was asked to assess if the decision of the Supreme Court of Chile ordering the return to Spain of a child suffering from autism was in breach of Articles 3, 9, 11 and 23 of the 1980 Hague Convention and of Articles 3, 9, 11 and 23 of the United Nations Convention on the Rights of the Child (CRC), and of Articles 6, 7 (c) and (f) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC).¹²

¹² Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No. 121/2020 - The *N.E.R.Á.* case concerned a child born in Chile but habitually resident in Spain. Following a diagnosis of autism with respect to the child, the father consented that the mother and the child relocated to Chile for medical support. The father was supposed to join them. However, in 2018 he initiated a return procedure. In 2019, a Chilean first instance Hague court as well as appellate court refused to return the child on the grounds of Article 13 (a) – i.e., the father's consent to the removal. However, the Chilean Supreme Court later reversed the rulings and ordered the child's immediate return to Spain. The Supreme Court did not make protective measures to secure a safe return of a child with autism. The decision did not indicate the conditions under which child's return should take place, in whose company he should travel, or with whom the child would reside immediately after return. Due to the particularly

19. The Committee found that the Supreme Court’s decision ‘ordered the *immediate return of [the child] to Spain without any indication of the conditions under which his return should take place*’ (para. 2.6), and further considered that ‘the court ordering the return of a child *must be satisfied*, at the time of issuing the return order, that all necessary steps will be taken *for the safe return of the child*’. The Committee therefore concluded that the decision to return the child to Spain was in violation of article 3 (1) of the UN Convention on the Rights of the Child, read alone and in conjunction with articles 9 and 23, as it did not meet the condition entailed by the child’s right to have his best interests considered as a primary consideration (para 8.9). Furthermore, the CRC Committee made it clear that “*it cannot simply be stated that all domestic court decisions made solely on the basis of the Hague Convention will inevitably result in compliance with article 3 of the Convention on the Rights of the Child*”. In fact, the child’s right to have his or her best interests considered as a primary consideration entails the application of procedural safeguards and interpretative standards on a case by case analysis. It is thus up to the domestic courts to ensure compliance with the standards of article 3 of the Convention in every decision in which the exceptions provided for in articles 12, 13 and 20 of the Hague Convention apply or have been invoked. In the given case, and with regard to the defence contained in Article 13(1)(b), the Committee clearly calls for steps to be taken ‘for the safe return of the child’.
20. In a similar way, the recent practice of Contracting States highlights a trend for the courts’ increasing attention in regard to the safety of the child as based not only on the Hague rules, but on a wider understanding of the principle of the child’s best interests.
21. In *Golan v Saada*,¹³ an abduction case from Italy to the US grounded in domestic violence, the USSC concluded that “The District Court should determine whether the measures in question are adequate to order return in light of its factual findings ... bearing in mind that *the Convention sets as a primary goal the safety of the child*”.¹⁴ When giving directions to the referring court, the USSC emphasized that “any consideration of ameliorative measures must prioritize the child’s physical and psychological safety”.¹⁵
22. In a recent Spanish case, the appellate court in Barcelona¹⁶ ordered protective measures for the safe return of the child to Germany, even though it was unconvinced by the abducting mother’s allegations of grave risk under Article 13(1)(b). The court noted that the German court had not adopted any adequate arrangements to protect the child (nor the mother). It further considered itself to be bound by the principle of the best interests of the child, which required the court to adopt measures to ensure that the child could return safely. Accordingly, on its own motion, the court ordered an independent accommodation for the child and the mother in Germany; the right of access to the left-behind father; and

vulnerable situation of the child, the mother decided not to comply with the return order and consequently was declared in contempt of court.

¹³ The *Golan* case concerned a minor abducted from Italy to the US by the mother. The mother opposed the return order of the NY District court on the ground of grave risk arising out of a situation of undisputed domestic violence. The District Court asked the parties to make sure that ameliorative measures are in place in Italy, and parties arrange for an order for protection measures to be adopted by the Italian Tribunal of the place where the child should return to.

¹⁴ *Golan v Saada*, p. 16. (emphasis added)

¹⁵ *Golan v Saada*, p. 9.

¹⁶ Court of Appeal of Barcelona, 7 March 2023, (Section 18^a) num. 126/2023, JUR\2023\207814 (ECLI:ES:APB:2023:2226).

maintenance for the child. It should be noted that such measures were grounded in the newly enacted Article 27(5) of the Brussels II-ter Regulation.¹⁷

23. A similar approach, highlighting the need to secure the safe return of the child, is shown by several other Contracting States' decisions.¹⁸ It is to be noted that the practice of Contracting Parties in regard to the adoption of protective measure is increasing also in civil law countries, where traditionally there was a less frequent use thereof.

C 'PROTECTIVE MEASURE' NEED TO BE ENFORCEABLE IN THE STATE OF THE CHILD'S HABITUAL RESIDENCE

24. Firmly grounding protective measures in the need to effectively guarantee a safe return entails a few consequences. The first one is that not all ameliorative or soft-landing measures which are taken by and in the State of refuge will amount to 'protective measures' for the purpose of guaranteeing the safe return of the child. Child abduction cases relate to highly conflictual family relations. A voluntary commitment will rarely suffice to effectively protect the child. A protection measure in the light of the above should only be a court order which is capable of being enforced in the State of habitual residence.
25. The requirement of enforceability in the State where protection is sought, i.e. in the State of habitual residence, thus should become a constitutive element of any measure which aims to effectively protect the child on his or her return.
26. The Fourth Special Commission, in 2001, indicated that Contracting States should consider necessary provisional protective measures in the jurisdiction to which the child is being returned.¹⁹ Similarly, the Fifth Special Commission in 2006 drew attention to the desirability of safe-return orders and mirror orders emphasizing that "When considering measures to

¹⁷ For which see below at para. 32.

¹⁸ EU Member States' practice relies heavily on the rules under the Brussels IIa Regulation. Among many, see: Austria, Oberster Gerichtshof, 28 August 2013, (INCADAT 6Ob134/13v): the Supreme Court found that, under Article 11(4) of the Brussels IIa Regulation, it was a prior requirement for the court in the State of refuge to ascertain *sua sponte* that the necessary protective measures to make the return possible could not be taken before that court could refuse the return of the child. The court should not merely wait for the parent, whose right of custody would be affected by such measures, to ask the court to adopt protection measures; France, Cour de Cassation, 1st Chamber civil, 20 March 2013 (in a case of abduction from UK to France, the Cour de Cassation orders return, notwithstanding an exception of grave risk alleged by the mother, because of protective measures taken by the UK authorities (in particular financial aid for the mother permitting her to live in the UK with the children; a prohibition on the father to contact the children and the mother); Paris Court of Appeal, 15 February 2007, No de RG 06/17206, INCADAT: in a case of abduction from Italy to France, the mother opposed return on the ground of domestic violence. The court, noting that under Article 11(4) of the Brussels IIa Regulation return could not be denied when adequate provisions were taken to ensure the child's protection after his return, found that return should be granted because Italian authorities had taken adequate provisions by entrusting the child to the municipality of Milan and the Italian ministry of justice had reassured its French counterpart that the judicially established protection measures and support for social workers in Italy would be implemented upon the child's return; Court of Appel of Barcelona (Section 18^a), 15 July 2022, n. 7839/2022 (ECLI:ES:PAB:7839:2022). In an abduction case from the UK to Spain, the mother claimed sexual abuse of the child by the father. Despite this, the Court ordered the return of the child to the UK, but pursuant to Article 11 of the 1996 Hague Convention ordered that upon the return the mother would provisionally take sole care of the child and would live with the child in the family home; the father would be prohibited to have direct contact with the child and contact could be only by video conference or telephone.

¹⁹ Fourth Special Commission, 2001, Conclusions and Recommendations, para. 5.1: (Safe return orders) Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child.

protect a child who is the subject of a return order [...] a court should have regard to the enforceability of those measures within the country to which the child is to be returned”.²⁰

27. However, courts in common law countries have been, and still are, keen on issuing protective measures in the form of undertakings.²¹ It is true that the Fifth Special Commission in 2006 considered undertakings (and similar conditions) as a ‘useful tool to facilitate arrangements for return’ and declared they are ‘in keeping with the spirit of the Convention’.²² However, undertakings should not be considered as ameliorative or protective measures for the current purposes, as they cannot be enforced in the State where protection is needed. This is especially so when the State of habitual residence is a State of civil law tradition, which traditionally attaches no importance to personal commitment undertaken in another State. This state of affairs is now largely acknowledged in the practice,²³ and courts are generally alerted not to rely on undertakings for the purpose of minimizing a grave risk of harm in return proceedings in abduction cases. Nonetheless, the point should be more firmly asserted.
28. Even where protective measures are enforceable in the State of habitual residence, caution is needed when considering the issuance of such measures in child abduction cases committed against the background of undisputed domestic violence, in particular when there has been severe and repeated violence, with a disregard for the law such as breaches of previous protection orders. In such cases, protection measures are unlikely to prevent/avoid the risk because they may be breached, while satisfactory follow-up measures by relevant authorities in the State of habitual residence may be lacking.²⁴

D. HOW CAN PROTECTIVE MEASURES BE EFFECTIVE IN THE STATE OF HABITUAL RESIDENCE PRIOR TO ABDUCTION?

29. In the following context, a ‘protective measures’ is only a court order which is capable of obliging the left-behind parent to comply with the directions given by the court. In order to meet this condition, it has to be enforceable in the State of the child’s habitual residence

²⁰ Fifth Special Commission, 2006, Conclusions and Recommendations, para. 1.8.2.

²¹ See among many: High Court of Australia, case *De L v Director General, NSW Department of Community Services* (1996) 139 ALR 417; (1996) 20 Fam LR 390 the undertakings must be ‘within the spirit of the convention’; Canadian Supreme Court, *Thompson v Thompson* (1994) 6 RFL (4th) 290, at 318, Sup Ct of Canada; *Q v R* [2022] EWHC 2961 (Fam) 21 September 2022.

²² 2006 SC, para 1.8.1. See however para 1.8.2. where the SC clarified that ‘when considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including “mirror” orders) made in that country before the child’s return, as well as to the provisions of the 1996 Convention.’

²³ The distinction between ineffective undertakings and effective safe harbor orders or mirror orders was clearly made by the Second District Court in the *Golan v Saada* case (USCA, 2nd Circuit, No. 19-820 (19 July 2019)). For further analysis on this point see *Brief of Amici Curiae, Professors of Law Linda J. Silberman, Robert G. Spector, and Louise Ellen Teitz, in Support of Respondent*, p. 20 (Available online: <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1034.html>). In the US, see *Simcox v. Simcox*, 511 F.3d 594, 607-08 (6th Cir. 2007), clearly referring to ‘enforceable undertakings’; in Canada *F. v. N.*, 2022 SCC 51, at para. 77-81, noting that undertaking would only attenuate the risk of harm if there were satisfactory evidence that they would be respected and enforceable in the other jurisdiction. Undertakings are also discouraged in the *Guide to Good Practices. Part V. Article 13(1)(b)*.

²⁴ K. Trimmings, O. Momoh, C. Honorati, A. Dutta and M. Župan, ‘Best Practice Guide – Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction’ (POAM project), p 27.

upon his or her return. This occurs either because it is adopted by courts of that State (for example as mirror orders), or because it is adopted in another State (such as the State of refuge), but an international treaty makes it fully recognizable and enforceable in the State of refuge. This may happen for example in regard to States that are Contracting Parties to the 1996 Hague Convention or in the framework of intra-EU abduction cases.

30. When both the State of the child’s habitual residence and of refuge are Contracting Parties to the 1996 Hague Convention, the easiest way to ensure enforceability of an order protecting the child is to ground the order in Article 11 of the 1996 Hague Convention. Under the 1996 Hague Convention, such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned. As early as in 2011, the Sixth Special Commission noted that the 1996 Convention provides a jurisdictional basis for taking measures of protection in respect of a child in the context of return proceedings under the 1980 Convention and State practices have followed this guideline. Reference to Article 11 is today an important addition to the “toolbox” which authorities have at their disposal to ensure the “safe return” of a child. This is, however, by no means the only instrument.
31. In the regional framework of the European Union, an important step has been taken in this direction. Previous Brussels II-bis Regulation,²⁵ while overall strengthening the obligation to return the child, paid due weight to the safety of the child, limiting the discretion of the Hague court to refuse return to when the court is satisfied “that adequate arrangements have been made to secure the protection of the child after his or her return” (Article 11(4) Brussels II-bis Regulation).
32. The Recast Regulation, so called Brussels II-ter,²⁶ which is applicable since August 2022, moves a further step towards a more child-safety focus of the return. Article 27 thereof (Procedure for the return of the child), provides now for two different means for taking care of the child’s protection. Article 27(3) mirrors previous article 11(4). It thus provides that:

“Where a court considers refusing to return a child solely on the basis of point (b) of Article 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return”.
33. The most important provision in this regard is, however, Article 27(5) which provides that:

“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 ...”.

This rule now grants jurisdiction to the court in the State of refuge to adopt a provisional and protective order, aiming to guarantee a safe return of the child, which will be fully enforceable in the EU Member State of habitual residence.²⁷

²⁵ 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 (Brussels II-bis)

²⁶ 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).

²⁷ According to the special rules on enforcement set by the Regulation, there is no need for exequatur (Article 34 Brussels II-ter) but only for the issuance in the State where the decision is taken of a certificate (Article 36(1)(c)).

34. Outside of the EU, other regional, multilateral or bilateral treaties may provide the framework for judicial cooperation and thus recognition and enforcement in the State of habitual residence of orders taken in the State of refuge.
35. However, if none of the above provides for a viable solution, the court in the State of refuge should investigate the possibility to request mirror orders or protective orders directly in the State of habitual residence. This practice, which was recommended by the Fifth Special Commission,²⁸ albeit apparently more complex to be put in place, is also effective as it avoids the uncertainties and the delay connected to the need for exequatur of a foreign decision.
36. Direct judicial and administrative cooperation is a useful resort to be used in the enforcement of decisions. Central Authorities of both States will also have an important role in the adoption and enforcement of any measures connected to return orders. When both States concerned are Contracting States to the 1996 Hague Convention, the Central Authority may request a report on the situation of the child under the conditions established in Article 32.

E. PROTECTIVE MEASURES SHOULD BE TAKEN (ALSO) ON THE COURT'S OWN MOTION

37. A second consequence flows from the assumption that protective measures are instrumental to the safety of the child, which in turn is grounded in the principle of the child's best interests. If the child's best interests is the court's paramount consideration and pursuing these interests is within the court's duties, then one should not make such duty dependent on the party's application. Protective measures, if not triggered *ex parte*, should be considered by the court on its own motion, *ex officio*.
38. This might not be the general rule or the most common situation. Both parents may - for opposite reasons - see an advantage in seeking protective measures and in most cases they will actively seek them. The left behind parent is aware that if protection measures are issued, the return will be more swift and more likely. The abducting parent, however, may also have an interest in being granted protective measures, especially at the beginning of the proceedings. As return orders are generally the rule, where there truly is a grave risk of harm, the abducting parent will want to rely on protection measures for his/her or the child's safety. Relying on one or both parties' cooperation will often result in a smoother return for the child.
39. The point is here made, however, that the court should ultimately be able to react to a situation where neither of the parties require the child's protection in the State of habitual residence. Even in adversarial judicial systems, which rely in principle on the parties' action, prioritizing the best interests of the child over procedural rules and parties' judicial strategy should lead to imposing on the court an autonomous discretion to craft and order protection measures.
40. In the EU context, Article 27(5) of the Brussels II-ter Regulation²⁹ has taken a clear stance by not only allowing but, indeed, requiring the court of the State of refuge to take positive

²⁸ Fifth Special Commission (November 2006): "In this context, attention is drawn to the value of safe-return orders (including "mirror" orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention." (Conclusions and Recommendations, para 1.8.2)

²⁹ See above at para 31-32.

action—and responsibility—in order to protect the child from any kind of harm that he or she may suffer upon return. As Recital (46) now puts it:

“Where appropriate, when ordering the return of the child, it should be possible for the court to order any provisional, including protective measures pursuant to this Regulation which it considers necessary to protect the child from the grave risk of physical or psychological harm entailed by the return which would otherwise lead to a refusal of return.”

41. Provisional measures taken by the court *ex officio* may also assure a timelier service of justice. If due to the court’s discretion and hesitation consideration of protective measure is delayed or not taken, the return proceedings may get more complex, the decision challenged and the resolution of the child abduction lengthier.
42. EU national courts have promptly reacted to this new role,³⁰ thus showing how the time is ripe for a more positive action in the field of child protection. National implementing legislation also sometime expressly requires courts to adopt *ex officio* protective measures.³¹ In other States, the request for protective measures may come from the Public Prosecutor, who is a necessary party to proceedings concerning minors.³²

C SHOULD CONSIDERATION OF PROTECTIVE MEASURE REST ON THE COURT’S DISCRETION?

43. An open question remains whether, upon a finding of a child’s grave risk, the court in the State of refuge should be required to consider the possibility of adopting protective measures, or whether considering protective measures should rest on the court’s discretion. While there is no doubt that the *adoption* of protective measures is at the court’s discretion, whether a court should always be required to consider protection measures has given rise to a strong debate in the wake of the *Golan v Saada* case. The question has ultimately come before the US Supreme Court, which, on a textual reading of the 1980 Hague Convention, concluded that the treaty does not require a court to *consider* protective measures. The Hague court however always retains discretion to do so.
44. The question has, however, been strongly debated and – in light of the different constructions offered in the context of the HCCH, as resulting from the *Guide to Good Practice*. Part. VI, released in 2020³³ – may call for further evaluation.
45. The question is somehow linked to the long-debated question concerning the relationship between establishing the existence of a grave risk and the consideration of protective

³⁰ Court of Appel of Barcelona, 7 March 2023 (above at footnote 15) has adopted protective measures *ex officio* on the basis of Article 27(5).

³¹ This is so, for example, in Germany, where Art. 15 IntFamRVG provides that the court may, upon request or on its own motion, impose a measure to remedy the risks threatening the child or to remedy conflicts of interest between the parties, in particular to ensure the child's stay during the proceedings and to prevent the return of the child from being hindered or made more difficult; similarly, in Spain, where Article 778 quater of the Spanish Civil Procedural Law establishes that the court may agree throughout the entire process, *ex officio*, at the request of whoever promotes the procedure or the Public Prosecutor's Office, appropriate precautionary measures and security measures for the child in accordance with articles 773 and 158 of the Civil Code; and in Italy, where Article 473-bis of the Code of Civil Procedure grants the court the power to take any measure, also by way to derogation to the general principle of party disposition, to protect minors.

³² This is, for example, the case in France, where Article 1210-4 of the Civil Procedure Code provides that the Public Prosecutor can request the competent court to order provisional measures provided for by the law.

³³ See the relevant passage quoted above at para 6, and further on at para 8.

measures. Scholars and courts have discussed at length whether the establishment of grave risk should be separate and prior to the consideration of protective measures; or if the two elements should be assessed together.³⁴

46. While the adoption of protective measures always lies at the discretion of the court, genuine consideration of these measures should be strongly encouraged. Even when reaching the conclusion that such measures are not to be issued, the return court should provide an explanation of the facts, risks and measures that were considered. By doing so, the judgement of the court will gain more credibility. It will show that the best interests of the child have been taken into account and that his/her physical and psychological safety are given thorough consideration. This may have beneficial impact on the further course of the proceedings, as a sound argument can deprive parties of grounds for challenging the refusal to adopt protective measures, and thus a prolongation of the return proceedings.
47. This position, which was made several times by the ECtHR, has recently been reaffirmed in *N.E.R.Á.* where the CRC Committee considered that “the lack of sufficient reasoning in the Supreme Court’s decision does not allow it to confirm that the Court effectively assessed the factors described above.”³⁵
48. If courts are not required to consider the effectiveness of ameliorative measures as part of the “grave risk” assessment, it would be all too easy for a court to refuse to order the child’s return simply on the basis of the abducting parent’s allegations, which would violate the objectives of the Convention.³⁶

D. CONCLUSIONS

49. In the light of the above, the *European Association of Private International Law* would like to draw the attention of the Eighth Special Commission on the following:
 - I. Protective measures amount to a **fundamental tool to achieve compliance** with the Convention’s obligation, **while guaranteeing physical and psychological safety** of the child and thus ensuring respect of the child’s fundamental rights. [paras 6-8]
 - II. The Treaty’s main obligation to return the child is only discharged when such court is convinced that the **return is safe** and that the return shall not cause any harm, either physical or psychological, to the child. [para 13]
 - III. Ensuring the child’s *safe return* must be construed as a **treaty obligation** set on all Contracting States. This requires that all States, i.e. the State of the child’s habitual residence and the State of refuge, shall cooperate one with each other to ensure the physical and psychological safety of the child when implementing the main obligation of returning the child. [paras 11-12]

³⁴ See for example the *Draft Guide to Good Practice on Article 13(1)(b)*, as presented to the Seventh Special Commission (October 2017), Prel. Doc. n. 1, at paras 107-122. The Draft identified two different approaches taken by courts in various jurisdictions when analysing the “grave risk exception”; K. Trimmings, O. 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, 00, 1–19, at 6-9; POAM Best Practice Guide, para 5.1.2 (available at <https://research.abdn.ac.uk/poam/resources/guide-to-good-practice/>)

³⁵ Above, at footnote 12, para. 8.8.

³⁶ *Brief of Amici Curiae*, above at footnote 21, p. 17.

- IV. In the context of abduction proceedings the best interests of the child implies that, when pursuing the aim of returning the abducted child to the place of his/her habitual residence, the court in the State of refuge should pay particular attention to safeguarding the overall physical and psychological safety of the child. [para 16]
- V. A protection measure in the light of the above is **only a court order which is capable of being enforced** in the State of habitual residence. The requirement of enforceability in the State where protection is sought, i.e. in the State of habitual residence, thus becomes a constitutive element of any measure which aims to effectively protect the child's on his or her return. [paras 24-27]
- VI. Even where protective measures are enforceable in the State of habitual residence, caution is needed when determining whether a civil protection order would be appropriate in an individual child abduction case. In the light of concerns over the effectiveness of protective measures, protective measures should not be employed where credible allegations of severe violence have been made and there is a future risk of violence of such severity.
- VII. There are several ways which can guarantee the enforceability of a protective measure. It is for the court in the State of refuge, in cooperation with the court in the State of habitual residence, to choose and implement the most appropriate measures. [paras 28-35]
- VIII. Protective measures, if not triggered *ex parte*, should be considered by **the court on its own motion, ex officio**. [paras 36-41]
- IX. A **genuine consideration** of adopting or requiring protective measures should be strongly encouraged every time the court is satisfied there is a grave risk of harm, and provide an explanation on facts, risks and measures that were considered should be provided. [paras 45-47].