POAM

Protection Of Abducting Mothers in Return Proceedings:

Intersections between Domestic Violence and Parental Child Abduction

ITALIAN NATIONAL REPORT

by

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INTRODUCTION AND PLAN OF REPORT

The focus of the proposed research project is on the intersection between return decisions in abduction proceedings and the legal instruments for the protection of the abducting mothers who have escaped from a situation of (alleged) domestic violence but have to face a return order to the State of habitual residence. The situation underlying the research investigation is thus one where the child abduction had been triggered by acts of domestic violence from the left-behind father, who at a later stage has filed an application for the return of the child to the State of the child's habitual residence.

The research project proceeds on the assumption that the current legal framework for international abduction of minors – as set by the 1980 Hague Convention on the International Abduction of Children and reinforced by Article 11 of the Brussels IIa Regulation – requires the prompt return of the child. Return, however, should not be ordered mechanically or in an automatic way. On the contrary, in the best interests of the child, the court of the State of refuge shall assess if the situation requires a derogation from such command and refuse return. This may happen, for example (and in regard of what we are mostly concerned with) if following a return order the child would be exposed to a grave risk of physical or psychological harm, or to an intolerable situation.

It should be emphasized, however, that the rationale underpinning the prompt return is so crucial to the whole system, that even where the court finds that there *could* be a risk upon the return, such a finding is deemed not sufficient to refuse return. Indeed, the court should at this point further assess if it is possible to protect the child in a way that allows the same to be returned safely, i.e. so as not to expose him/her to any risk, while obeying the aim of the Convention.

Within this framework, it was suggested that Regulation No 606/2013 on mutual recognition of protection measures in civil matters ('Protection Measures Regulation') and Directive 2011/99/EU on the European Protection Order ('European Protection Order Directive') have the potential to fill the gap in the protection of the abducting mothers who return with their children to the State of the habitual residence – the Regulation in respect of protection measures issued in civil proceedings and the Directive in respect of protection measures issued in criminal proceedings.

One of the crucial questions that arise in this context is how (domestic) violence against the mother impacts upon the child and how such a situation should be qualified in international abduction cases.

While all psychological studies show that violence on the mother always has a disruptive impact on the wellbeing, psychological and emotional balance of the child, the actual framing of the legal rule refers only to the risk of physical harm to the child. It may therefore be seen as reducing the scope of application of domestic violence as a ground for non-return. Actual violence – or the threat of violence – against the mother may then fall within a grey area that deserves more consideration. Legal scholars have highlighted the extreme vulnerability of returning mothers in abductions committed against the background of domestic violence.

During WP2 of the project, two national workshops were organized in order to discuss this topic with 50 specialized practitioners, selected so as to represent different professional backgrounds. The outcome of these two workshops confirmed the fact (which the academic partners had been aware of) that there is barely no application of Regulation No 606/2013, and also a very poor knowledge of this instrument among relevant stakeholders. The situation is only slightly better in regard of the EPO Directive.

After having set out the framework, the present report will focus on the following topics:

I. the general practice of the Italian courts in regard to return proceedings, where a refusal of return is grounded on (alleged) domestic violence and on the grave risk defence pursuant Article 13.1.b of the 1980 Hague Convention;
II. the nature, requisites and effects of protection measures, both civil and criminal, available in the Italian legal system;
III. the main outcome of the two Italian workshops held in May 2019;
IV. a few PIL issues arising from the application of Regulation No 606/2013 on protection measures in civil matters

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I. ITALIAN PRACTICE ON RETURN PROCEEDINGS IN ABDUCTION CASES AND REFUSAL OF RETURN BASED ON DOMESTIC VIOLENCE.

The following part of the local desk report will examine some national decisions in international child abduction cases.

Only the Supreme Court decisions (Corte di Cassazione) have been screened. This choice was made because, in Italy, there is no public or private database available that contains first instance, appellate or Juvenile Court decisions (Juvenile Courts have exclusive competence to hear an application for return under the Hague Convention) and only a few selected decisions is published in legal journals. This means that searching for these decisions is particularly difficult. The only way to get hold of these decisions is through personal contact with specialised lawyers or court judges and, at this stage of the research, it was not possible to undertake this process.

Before investigating some of the decisions that were selected, a few general remarks may be made:

1. Generally speaking, it should be emphasized that return is refused on the ground of Article 13, par. 1, lit b) HC in a comparatively *small* number of cases. Despite the existence of a clear legal basis in order to avoid the child's return to his habitual residence when this would expose him/her to a grave risk of harm, the Italian courts appear to scarcely apply this exception. Indeed, the few cases that are available show that Italian judges tend to pursue strictly- and sometimes even mechanically- the 1980 Hague Convention's aim, namely the child's prompt return to his habitual residence.
2. Strangely enough there is only a handful of cases where *domestic violence* is at the core of the decision. In most cases, the abducting parent's defence is based on multiple grounds, including Art. 13 par. 1(a) and Art. 12, and therefore Article 13, par. 1(b) is only one amongst others. One possible reason for this is that violence (and, in general, grave risk) is an easy ground for the parties to allege, but difficult to prove and the courts refrain from basing decisions on such an unstable ground.
3. Case analysis for example shows that, also in cases of domestic violence, if the child is old enough to have proper consideration given to his/her views, it is easier to refuse return on the basis of opposition of the child (Article 13, par. 2) than on Article 13, par. 1(b).
   This may be explained with the consideration that such a ground is, at a practical level, more 'resistant' to a subsequent legal challenge and therefore a safer mechanism for granting a non-return order.
4. First instance courts (i.e. any of the 24 Juvenile Courts which have exclusive competence to hear an application for return under the Hague Convention) appear to be more open to allowing some room for a defence on the Article 13 para 1(b) ground and, albeit rarely, they sometimes do refuse return on the basis of domestic violence.
   However, when a decision for non-return is challenged before the Supreme Court,[1] the decision is reversed in most cases and the SC orders return.
5. The most common arguments which ground decisions of the Italian Supreme Court of Justice refusing return may be summarised in the following points:
   - A clear distinction between a decision on return and a decision on custody, which leads to the common statement that any assessment on the behaviour of one of the parents, or on the parental ability of one of the two, is out of the scope of return

[1] The only appeal against a decision issued by the Juvenile Court (Tribunale per i minorenni) in return proceedings filed pursuant to Article 3 of the 1980 Hague Convention is to the Supreme Court (Corte di Cassazione). No appeal has been granted before the Appellate Court (Corte di Appello).

proceedings and should be left to the proceeding on custody in the State of habitual residence;

- The common statement that the level of 'grave risk' that is needed to refuse return shall amount to a level of seriousness, which is not reached by the general inconvenience that the child may suffer when being returned;
- A common difficulty in reaching a sufficient level of evidence of the situation of violence.
- It is also often to be found the assumption that, since the Supreme Court is a court judging on the correct application of the law, it shall not review the factual assessment which was made by the lower court, as long as this is supported by adequate reasoning.

6. As cases for domestic violence are extremely difficult to be prove and argue in court, there is subsequently little chance to consider or discuss protection measures for a safe return of the mother.

A few selected cases illustrate the general remarks that have just been made.

Case law has been arranged according to the relevance given to domestic violence. The first group (Heading A.) includes the handful of cases where domestic violence is openly considered, and thus becomes a ground for refusal of return. The second group (Heading B) are those cases where domestic violence emerges from the facts of the case but is referred in the courts reasoning only as an additional ground.

A. Case-law where the existence of domestic violence was actually considered and assessed by the court:

1. Court of Cassation, 5 October 2011 n. 20365

Incoming from Canada – Abducting mother – Grave risk to the child (use of drugs; not a case for domestic violence?) – Juvenile Court Venice refuses return – upheld by SC - No return

Facts: An Italian-Canadian family originally living in Canada. After the applicants' separation, the Court had granted custody rights over the child to both parents. In 2010,the mother abducted the child – a daughter aged 3 years - to Italy. The Juvenile Court of Venice declared that the conditions under art. 13 of the Child Abduction Convention were met, mainly based on three grounds: a) grave risk of physical harm, as traces of a psychiatric drug were found in the child's blood immediately after the child had spent an evening with her father; b) affidavits from different people against the child's father proved his violent behaviour; c) the father had never showed up either before the Court or to meet his daughter.

In his appeal before the Italian Supreme Court, the father submitted that: 1) the first instance court had wrongly interpreted Article 13, since the judge had taken into account the merits of the rights of custody. There had also been a violation of the principles inspiring the Child Abduction Convention, which prevent judges from revising a judgment set in another State; 2) insufficient assessment of evidence with reference to the drugs traces in the child's blood.

Court decision and approach to the grave risk of harm - The Supreme Court regarded the appeal as manifestly unfounded, confirmed the JC's decision and refused the child's return.

This decision departs from the usual pattern of the SC decisions. In fact, while recalling that the 1980 HC does not allow the Hague Court to assess elements that do not reach the level of physical or psychological harm or intolerability, this is one of the very few decisions where the SC recognized that the court may take into account the parent's educational skills, when the lack of these may expose the child to physical or psychological harm.

However, the decision is also based on the sound reasoning and factual explanation of the lower court. In fact, the Supreme Court's makes it clear that only ill-application of law, or ill-founded reasoning may be challenged before its bench. On the contrary, the assessment of evidence made by the judge of the first instance cannot be challenged.

2. Court of Cassation, 26 January 2018 n. 2044

Incoming from Hungary – Abducting mother– Hungarian protective order against the father shows violence - Juvenile Court refuses return based on art. 13 – SC confirms – No return

Facts. The children were born to an Italian-Hungarian family, who lived in Hungary. The Hungarian authority ordered the father's removal from the family house as a protection measure because of his violent behaviour. Notwithstanding such a measure, the mother abducted the children to Italy. When seized with a return application by the father, the Juvenile Court of Venice declared that the conditions under art. 13 were met, finding that the children's return to Hungary would have exposed them to physical and psychological harm.

The applicant father appealed the refusal of a return order of his children to Hungary, arguing that the JC had wrongly interpreted art. 3 of the 1980 Hague Convention, art. 9 of the UNCRC and art. 11 par. 4 *lett.* b) of the Brussels IIa Regulation. The decision lacked sufficient legal basis, since there was no proof of the father's violent behaviour.

Court decision: The Supreme Court regarded the appeal as manifestly unfounded and refused the children's return. The Juvenile Court in Venice had correctly based its decision on the need to grant the children's protection. Indeed, the decision mentions the fact that criminal proceedings were pending against the father in Poland, and there was evidence of ongoing 'threatening behaviour' towards the wife. Furthermore, the mother also suffered from the presence of the father's parents, who were oppressive and overly intrusive into her life. Finally, the SC found that the applicant father had not argued sufficiently why the first instance decision lacked reasoning. Therefore, the SC upheld the JC decision (and refused to order return).

→ Interestingly, the court here considers that the issuance of a protection order by the court of the State of habitual residence – ordering the father not to approach the house – is a proof of his violent attitude and that there is a risk of prejudice grounding the refusal of return. Neither the JC nor the Supreme Court considered the opportunity of using protection measures.

3. Court of Cassation, 11 June 2019 n. 15714

Incoming from Germany– Abducting mother – Juvenile Court Caltanissetta refuses return based on art. 13 – SC reverses decision and refers to a different court

Facts. The child was born to an Italian-German family, who lived in Germany. In August 2017 the mother abducted the child to Italy. The Juvenile Court in Caltanissetta considered the conditions under art. 13 *lett*. b fulfilled, since the father's violent behaviour towards the mother had not only prevented her from ensuring the healthy development of her son but had affected directly the child, having the child repeatedly witnessed the disagreements between his parents and manifested his unease by hiding and screaming on such occasions. (The reasoning of the decision is, however, very short and does not report facts).

The applicant father appealed against the denial of a return order of his son to Germany.

In his appeal before the Italian Supreme Court, the father submitted that: 1) the Juvenile Court of Caltanissetta had breached art. 16, interfering with the merits of the rights of custody; and 2) there had been an insufficient assessment of evidence with reference to the child's grave risk of physical and psychological harm.

Court decision and approach to the grave risk of harm –

While the Juvenile Court of Caltanissetta showed some understanding of the reasons of the abducting mother, the Supreme Court handed down a very strict and harsh decision reversing the JC decision. Firstly, this was considered in violation of Article 16 HC, because the first instance court had taken into account the merits of the rights of custody, declaring that the child appeared more peaceful and well-attended by his mother. Such an assessment is not within the scope of competence of the court seized with a return application, and should be left to the court of habitual residence. Second, the JC decision had been neither justified nor its assessment of evidence sufficient, as it was based only on the social service's report, and this was drafted solely on the basis of the mother's self-statement. Such assessment of self-provided evidence was "against any elementary rule of law" and the Supreme Court considered the whole reasoning 'below the constitutional level'. The decision was reversed, and the case referred to a new court for a new examination.

(Please note the SC referred the case to a different court. It did not decide on return/refusal of return.)

B. Case-law where domestic violence was probably alleged by the abducting party and likely underlines the reasoning, however it does not appear as the primary ground for refusing return

4. Court of Cassation, 15 November 2017 n. 27133

Incoming from Poland – Child retained in Italy by the mother – Father does not exercise effective custody rights – Criminal proceedings for sexual harassment pending in Poland? - Juvenile Court Brescia refuses return based on art. 13 para 1(a) and (b) – SC confirms - No return

Facts: The child was born and lived in Poland. After the applicants' separation, the Polish court granted custody rights over the child to the mother. The mother obstructed contact between the child and the father. A (Polish) court order was issued imposing on the mother a penalty for each time the father could not have contact with the child. The effective time spent by the father with his daughter was around five times in three years. The mother, however, also expressed concern about the father's possibly erotic attitudes towards his daughter and lodged a complaint for sexual abuse before the Polish Court. The first criminal complaint was filed by the mother and closed by the Polish Prosecutor. A second complaint was filed some time later, just before the child was retained by the mother in Italy (where the grandmother was also living).

The Juvenile Court Brescia refused return, finding that the conditions under art. 13 1980 HC were met. The main ground for refusing return is Article 13(1): at the time of the retention the father was not actually exercising his custody rights, since he had too little contact with the daughter. The reasons why this happened are irrelevant. It is also stated that the return of the child would expose her to the risk of physical and physiological harm, because she had never had great contact with the father; finally because of the need to hear the child in the criminal proceedings pending in Poland, the proximity to the father would have certainly undermined her peace and put her in intolerable situation.

The JC did not consider returning the child with protection measures.

In his appeal before the Italian Supreme Court, the father submitted that the first instance decision had violated Articles 3 and 13 of the 1980 HC and art. 6 of the ECHR since the JC had wrongly held that the child's custody rights were exercised only by the mother, disregarding any evidence to the contrary, including the fact that the father had been involved in authorising an application for the child's passport and also her school enrolment. The same violation had occurred with reference to the grave risk of physical and psychological harm.

SC decision and approach to the grave risk of harm -

The Supreme Court upheld the JC decision and refused the child's return on the basis of the reasoning and factual explanation of the lower court.

The SC seems to share the (questionable) opinion of the JC according to which the limited time spent by the father with the child had not reached the level of effective exercise of custody rights, reinforcing such finding with the argument that the Hague Convention aims to protect a factual situation and that the reasons why such situation has arisen are irrelevant (it is thus irrelevant that contact was limited because the mother had prevented the father from seeing his daughter).

→ Interestingly, there is scarcely any reference to the complaint of sexual harassment of the child and the proceedings pending in Poland against the father. It is unclear from the reasoning whether this is because a similar complaint had already been dismissed by the Polish judge and the mother was believed to be not trustworthy.

5. Court of Cassation, 25 May 2016 n. 10817

Incoming from Hungary – Children placed by mother in Hungary – Subsequently retained by the father in Italy – Violent and punitive mother – Juvenile Court refuses return based on art. 13 – Opposition of the child - SC upheld decision – No return

Facts. The children were born to an unmarried Italian-Hungarian couple, who lived in Hungary. After the applicants' separation, the Court granted the rights of custody of the children to both parents, placing them with the mother. During holidays, the father retained the children in Italy. According to the armed forces of the Carabinieri, who tried to remove the children from the father's house, they refused to follow their mother.

The Juvenile Court of Brescia refused to order the return of the children to Hungary, finding that the conditions under art. 13 had been met. Indeed, the children would have been not only forced to attend a school without speaking the local language, but also to live with their mother, whose educational method was perceived as violent and punitive. These circumstances emerged both with the psychologist, social services and during their hearing.

The applicant mother appealed the refusal of a return order of her children to Hungary, submitting that 1) the children's statements had not been preceded by an assessment of their maturity nor by an assessment of the influences they experienced in their environment; 2) there had been an insufficient assessment of evidence with reference to the children's grave risk of physical and psychological harm; 3) there had not been an assessment of grave harm deriving from the children's separation from their youngest brother, placed with the mother.

Court decision and approach to the grave risk of harm –

The Supreme Court regarded the appeal as manifestly unfounded and refused the children's return. The Court upheld the JC's decision, having considered the children's return to Hungary

harmful to their physical and psychological wellbeing, as prescribed in art. 13 and highlighted in the *Neulinger* case.

The JC had correctly attached a specific consideration on the one hand to the mother's violent behaviour, which demonstrated itself through beatings, corporal punishments and inadequate nutrition, and on the other hand to the difficulties brought about by having to return to a different environment. The SC, in turn, seems not to have based the refusal of return only on the minor's statements, rather on all the circumstances which spoke against the children's return. Among them was the aforementioned report of the armed forces of the Carabinieri while trying to remove the children from the father's house.

→ a well-reasoned decision, grounding the final outcome on multiple grounds. No domestic violence in the 'traditional' gender-based meaning. However, there was still an environment of domestic violence within the family.

6. Court of Cassation, 8 February 2016 n. 2417

Incoming from Hungary – Abducting mother – Mother was a prostitute, later exploited by the father - Juvenile Court Naples refuses return on Article 13.1.b; - SC upholds decision – No return

Facts: The child was born and lived in Hungary until the mother removed her to Italy in 2014. According to the mother her action had been triggered by the child father's behaviour, in particular because he had induced her into prostitution and to carry on this activity in the family home. Once she left the house, the father had exploited the mother's sister as well. The Juvenile Court of Naples declared the child's removal unlawful and refused return under on the basis of art. 13 *lett*. b of 1980 Hague Convention, finding that on return the child would be exposed to a grave and concrete psychological harm.

The applicant father appealed the decision on the following grounds: 1) art. 13(1)(b) had been wrongfully applied, since the risk of a grave harm had not been proved; 2) the first instance court had failed to take into account both the fact that the mother had spontaneously worked for two years in an erotic club and the positive report of the Hungarian social services on the child's living conditions in the country of her habitual residence.

Court's decision and approach to the grave risk of harm –

The Supreme Court confirmed the JC's decision and dismissed the claim.

The child's personal views were taken into account, as she was afraid to be brought back to her State of origin by the father. The child also highlighted the lack of a bond to Hungary, having forgotten her mother tongue and being more familiar with the Italian language. The first instance decision had been correctly based not only on the mother's statements, but also on the photographic evidence, showing the child's house as a set for pornographic performances. Therefore, the first instance court had correctly stated that the return of the child to Hungary and to her father would expose her to relevant harm or to the risk of finding herself in an intolerable family situation. Such factual assessment is not to be reviewed by the Supreme Court when supported by adequate reasoning.

7. Court of Cassation, 22 August 2018 n. 20951

Incoming from Australia – Abducting mother– Father alcohol addicted – Mother drug addicted - Juvenile Court Bolzano orders the return of the child – SC confirms – Child returned

Facts. The children were born to an Italian-Australian family, who lived in Australia. After the applicants' separation, an Australian Court granted the rights of custody to both parties. In 2016, the mother abducted the children to Italy and commenced divorce proceedings there.

In 2017, the Juvenile Court of Bolzano ordered the return of the children to Australia and the family's monitoring due to the parents' mutual accusations of drug and alcohol addiction. The Juvenile Court's decision was based on the following facts: 1) the children's habitual residence was in Australia, where they used to live before the abduction; 2) both parents were actually exercising their custody rights at the time of the removal; 3) the father

had consented to the journey but not to the relocation to Italy; 4) there was no evidence that the return would expose the children to physical or psychological harm considering, in addition, that the father had attached a declaration of his employer, stating that he was undergoing periodic checks of his blood alcohol level. Furthermore, the mother was not in a position to secure more guarantees, being accused of consuming drugs and anti-depressants; and 5) the children's permanency in Italy could not be based on the judgment of the Court of Bolzano.

The applicant mother appealed the return order of her children to Australia.

In her appeal before the Italian Supreme Court, the mother submitted that: 1) the Juvenile Court of Bolzano had breached art. 3, 13 and 17 of the 1980 Hague Convention as the father had consented to the relocation of the children to Italy; 2) no consideration had been given to either the father's alcohol addiction, or to the children's statements, who were willing to stay in Italy.

Court decision and approach to the grave risk of harm.- The Supreme Court shared the opinion of the JC, and did not give weight to any accusation of the father's alcohol addiction (considering, on the contrary, the employer's statement as sufficient), nor assessed the possibility of a protection measure. Return was ordered.

→ Neither the JC's nor the Supreme Court's reasoning gives weight to the alleged accusations of drug /alcohol addiction. However, the decision, when taken as a whole, seems to be the correct one.

II. NATURE, REQUISITES AND EFFECTS OF PROTECTION MEASURES OF CIVIL AND CRIMINAL NATURE AVAILABLE IN THE ITALIAN LEGAL SYSTEM

As demonstrated above, the use of protection measures in regard of international abduction cases is quite rare. It is nonetheless interesting to give an overview of the protection measures that are available in the Italian legal system.

The Italian legal system provides for protection measures both of civil (A.) and criminal (B.) nature.

This section of the report will focus on orders for "the removal from the family house" and for a "ban of approaching the protected person" since these are the typical measures considered by Regulation No 606/2013 and by Directive No 99/2011

As the application of one instrument or the other (Regulation/Directive) depends on the nature (civil or criminal) of the protection measure, the differences between the two instruments will be examined and highlighted.

→ It should be stressed that civil and criminal measures are overlapping in terms of their content: the removal of the person causing the risk from the family house and the prohibition of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means. The differences between the two thus relate to the

procedures that must be followed, to the court which actually takes the decision and to the consequences of violating such a measure.

A. <u>Civil protection measures</u> for the "removal from the family house" and for the "ban of approaching the protected person" are governed by Article 342-*bis* and 342-*ter* of the Civil Code and by Article737-*bis* of the Code of Civil Procedure.

The proceedings for protection measures of civil nature are as follows:

- May be applied by the victim in person, or through his/her lawyer;
- Application is lodged at the Court of the place of residence of the victim. The Court decides sitting as a single judge.
- If the matter is urgent – as it normally is – the protection order can be adopted immediately and without hearing from the other party (*inaudita altera parte*). In this case, however the defendant is subsequently summoned in a hearing where the measure will be confirmed or revoked.
- The decision will normally have effect for one year, but such period can exceptionally be extended if the person to be protected is still at risk.
- The court may consider whether to refer one (or both) parties to the social services.
- When a protection measure of civil nature is violated, there is no automatic "aggravation of the tort" (as for criminal measures, see below); it is for the protected woman to file a complaint for the crime under Article 388 of the Criminal Code (violation of a court order and contempt of the court). Such crime may be prosecuted only on the party's action.

Applying for a civil measure of protection is in generally easier and more acceptable to the woman, as this does not imply filing a criminal complaint against the father of her children. Nonetheless, and quite surprisingly, although it is generally felt that protection measures of civil nature could be more effective, the number of protection measures applied for and actually granted by courts is extremely low.

Research shows that, in a twelve-month time period from 1.10.2017 to 30.9.2018, the Court of Milan granted only 30 protection orders. Only one order was issued by the Civil Court of Pavia, one from Como and one from Busto Arsizio (also in the Northern region of Lombardia).

B. <u>Criminal protection measures</u> are governed by Articles 282-*bis* and 282-*ter* of the Code of Criminal Procedure.

In regard of the necessary proceedings, they are:

- Requested by the Public Prosecutor in the course of criminal proceedings, which are the result of a formal complaint made by the woman. No protection measure of criminal nature can be granted if criminal proceedings have not been formally instituted.
- In order to grant a criminal protection measure, the Court will need some evidence of a crime (punished with more than 3 years of imprisonment) and of one of the following risks:
    - danger to the integrity of the evidence;

    - a risk of escape;
    - a risk of committing serious crimes.
- Criminal protection measures are always granted after the accused has been heard. Such measures cannot be granted *inaudita altera parte*.
- The duration of the protection measure that will be granted varies and will depend on the sanction provided for the crime that the woman has denounced.
- The criminal court may also impose a civil measure if it is proved that there is a serious injury to the physical or moral integrity or to the freedom of the woman.
- The court may also order a periodic payment to the victim who, as a result of the measure, has remained without appropriate economic means.
- Notice of a criminal measure is automatically transmitted to the social services.
- Where a criminal measure is violated, the Judge will immediately order the aggravation of the measure. Subsequently, criminal proceedings for the crime under art. 387-*bis* criminal code (introduced by law n. 69 of 2019, punished with the imprisonment from six months to three years, prosecutable *ex officio*) will be instituted.

C. Application of Regulation No 606/2013 and Directive 99/2012 in Italy**.**

Regulation No 606/2013 in Italy is almost unknown and has never been used.

Directive No 99/2011 on the protection order has been implemented by the legislative decree n. 9/2015. Also the European Protection Order (EPO) is poorly requested and enforced. The data collected by the European Parliamentary Research Service, released in September 2017, show only four protection orders issued by Spain, two by the United Kingdom and one by Italy (towards Romania, in a case of domestic sexual abuse and violence).

The survey also revealed language problems: Italy, Germany and Greece accept the protection order only if it has been translated into their language.

III. THE MAIN OUTCOME OF THE ITALIAN WORKSHOPS OF MAY 2019

On the 8th and 24th May 2019 two workshops were held in Milan to gain better knowledge of the practical application of protection measures in abduction cases. Approximately 24 people participated in each workshop, giving a total of approximately 50 people.

In view of the poor application of protection measures in the context of abduction proceedings, the organizers decided to broaden the range of possible candidates, so as to include, in addition to legal professionals who work on abduction cases (lawyers, judges and central authority), also specialists who daily manage the area of violence domestic, and who are at the front line to support the victims of domestic violence. Participants were thus selected from the following professional figures: (i) social workers and operators with consultants and hospitals; (ii) lawyers and volunteers at anti-violence centers and specialized in international abduction of children and (iii) judges specialized in family and child law.

Participants were selected so as to have all stakeholders around the table in both sessions. However, the first round saw a majority of social services employees (non-legal experts), and a minority of lawyers with a specialization in international abduction proceedings, in order to leave more room for factual dynamics; in the second round, the proportion was reversed and there were was a larger number of lawyers specialized in abduction proceedings, including a strong delegation (including the President and the Vice-president) of ICALI (Italian Child Abduction Lawyers). This choice allowed the organizers to gain a very wide and cross-cutting overlook of the difficulties in how to achieve the protection of mothers' who are victims of domestic violence.

→ It was also shown that views generally held by the community of international abduction lawyers, judges and central authorities are rarely shared by lawyers, social services and legal experts working at the forefront of women protection. Indeed, often the underlying rationales do not meet.

In the two afternoon sessions two draft model cases were circulated in order to foster the discussion on the relevant issues. The discussion, once again, showed a general perception of the poor effectiveness of the protection of victims in international abduction cases within the current legal framework.

1. Describing the general scenario for domestic violence.

Both workshops first emphasised the social and economic context in which domestic violence takes place. Reference was made to general cases of domestic violence, not only to abduction cases.

While each case is different, some features are common:

- often women find themselves in financial difficulties: they often do not have a job and they are/feel alone; their families of origin may be in a different State;
- women normally feel uncomfortable about reporting domestic violence and tend not to do so; they do so only when the situation becomes extremely serious (for example, when they end up in hospital);
- the overall conditions are often bad and women suffer from personal/social/ economic distress. Consequently, without external help, it is difficult to make sensible and rational decisions. Escaping (with the child) seems the most effective self-protection measure;
- battered women often escape towards their country of origin, where they can find refuge and support from their own family; this is especially so when they do not have family or work relationships in the place of residence.

A key point that repeatedly arose from the discussion is that typical protection measures (such as a no-contact or no-access order) are not considered to be capable of providing women with real protection, especially when circumstances become serious (see further).

Problems with proper and effective means of enforcement of such measures was also reported. Some social services reported that sometime the concrete means for implementing a protection measure are not clearly stated in the decision and this creates additional difficulties. This kind of problems could be solved by improving communication among courts.

Finally, after having reported domestic violence to a public service (social services/center against gender violence /municipal services of various nature), these services can provide for sheltering of the woman and her child in a community that welcomes mothers and children and where the woman is protected. However, this can also be felt inappropriate as it means that it is the woman/victim who is kept "under observation", instead of the man/perpetrator of violence.

2. Applying for protection measures

The organizers asked the floor how to characterize a protection measure as being of civil or criminal nature; attention was drawn on the fact that the nature of the measure determines the kind of EU measure (Regulation/Directive) to be applied.

No clear solution emerged. The floor seemed quite happy with the idea that criminal courts adopt criminal measures in the frame of criminal proceedings; and civil law courts may adopt civil law measures when required to do so.

→ It is however doubtful that this criterion is in line with the interpretation to be given under the Regulation, given that the nature of the court should not come into consideration. All of the 'typical' protection measures considered by Regulation No 606 are also eligible as criminal law measures under the EPO Directive. It seems therefore to be a choice of the to-be-protected party to choose the nature of the court where to apply for protection measures.

This is quite relevant given that, under Italian law, criminal courts are also allowed to adopt civil law measures.

It is felt that guiding criteria to differentiate one from the other would be useful for a more convenient application.

When recognizing foreign measures, it should be remembered that measures circulated through Regulation No 606/2013 can only be implemented through civil law measures; while measures circulating in Italy under the EPO directive can be recognised through any instrument of national law, both civil and criminal.

2.1. Protection measures of *civil* nature.

Both groups of participants agreed that protection measures of a civil nature may turn out to be more effective and more useful than criminal ones.

Applying for a civil measure is felt more acceptable to a woman, as this does not imply a criminal charge against the father of her children. These measures are can be adopted more quickly than criminal measures (they can be adopted *inaudita altera parte*, although the defendant is subsequently summoned by the court before the measure is confirmed) and legal assistance is not necessary (no lawyer). The floor of both meetings agreed that these measures could be really effective in cases of less serious violence.

However, in case of violation of such measure, there is no aggravation of the tort (as for criminal measures) but the woman can only denounce the man for the crime under Art. 388 criminal code "mancata esecuzione dolosa di un provvedimento del giudice" (willing non-enforcement of an order of the court), which is an offence that can be prosecuted only on the complaint of the injured party.

Surprisingly, although it is considered that civil law protection measures could be more effective, the number of protection measures asked for and adopted in courts is really very low, also with regard to purely internal domestic violence cases. Judges and lawyers are themselves quite disappointed with the low numbers. A few years ago, the Milan Court of Appeal ran a data collection exercise on all protection measures adopted in that forum. In 2017, (the highest year reported) they were 48; and in year 2018, less than 30 measures. Reasons for such low numbers could include:

- the difficulty in proving the domestic violence or the risk of violence (mere allegation of the violence is not enough. It has to be 'proved');
- they are rarely granted *inaudita altera parte*;
- the time line differs from region to region. In some jurisdictions it is very fast (in Milan, the orders are given in 48 hours, but in other parts of Italy it takes much longer).

A participant reported that in Rome protection measures are more common than what was recorded in Milan.

One participant asked the floor if it was possible to include in the range of protection measures considered by Regulation No 606 the **"warning" made by the quaestor** (the chief of the police). This is a new non-judicial measure, that was created to prosecute the crime of stalking, but that could be extended to domestic violence cases. It is a very streamline tool; a formal complaint is not necessary; it is an administrative measure (not a criminal procedure) but the violation of such warning is criminally sanctioned.

The floor discussed if this measure could fall within the scope of Regulation No 606, reaching opposite conclusions. A further analysis will be required to answer the question. It will be necessary to understand what the requirements for this warning are (as Regulation No 606 applies only to typical measures) and what its purpose is (protection of the mother, or re-socialization of the violent man?).

The Juvenile Court may also order **measures to protect the child** and, albeit indirectly, the mother. These are non-typical measures and they are unstructured; they offer a wide margin of discretion and allow maximum flexibility. The court can decide on a wide range of content: it can grant protection to the mother, to the child, allow for economic support, for the payment of rent, for the payment of airfare tickets etc.

They are often given also *inaudita altera parte* when the requirements are met. As with civil law measures, their violation does not amount to an aggravation but may lead to the offence of "*mancata esecuzione dolosa di un provvedimento del giudice*", which can be pursued *ex parte*.

As the jurisdiction of Juvenile Courts is limited to the protection of the child, the question was raised if the Juvenile Court can **issue a measure to order a specific path to the violent parent**. Is it possible to prescribe a path of re-education, or a psychological support and redress for violent spouse/companion? An older decision of the Court of Cassation gave a negative answer, because of the constitutional limit of the right to health. However, judges in the meeting said it was certainly possible for the Court to *recommend* psychological support to the parent and the fact that the parent is willing to attend the treatment, and actually does so, can be taken into consideration when taking the decision on parental responsibility.

Juvenile courts have no jurisdiction on **maintenance obligation** towards children. However, the President of the Juvenile Court of Bari shared the practice he started in his own court, where he does sometime order maintenance obligation, as based on Articles 315 and 316 of the Italian Civil Code. Indeed, Article 315 identifies the obligation of maintenance for both parents, since the child has the right to be maintained. At the same time, Article 316 imposes the sharing of the duty of maintenance between the parents. Based on these rules, the Court can order a payment in favour of a parent when the latter does not have the financial means to ensure the subsistence of the child and there is a need to avoid prejudice to the child.

2.2. Protection measures of *criminal* nature. These measures are more difficult to obtain as they require pending criminal proceedings, well-founded evidence of guilt and the existence of a risk.

In order to obtain **an E.P.O**., the commission of a crime within a certain frame prescribed by law, a complaint, the effective application within the criminal proceedings for one of the measures of art. 282-*bis* and 282-*ter* c.p.p., and a specific request for an E.P.O are necessary.

2.3. Finally, with reference to criminal law, mention should be made of the brand new Law No 69/2019 of 19 July 2019 for the Protection of Victims of Gender Violence (so called **law on the "Red Code"**). This act will be considered to a larger extent in the forthcoming months. At this stage it is interesting to note that the "Red Code" is a priority mark that implies a fast track procedure for all operators involved (police, social services, courts etc). Once a woman reports a case of domestic violence, she must be heard within 3 days; on the other side, the timeframe she has to report domestic violence has been extended to 12 months (from the current 6). The law also qualifies forced marriage as a crime, also when committed abroad or against a non-Italian national, as long as such person is resident in Italy.

3. Protection measures in child abduction cases

The discussion on abduction proceedings showed a clear demarcation between legal experts in this domain, and experts in the field of domestic violence. The trend of the Italian Courts in this domain is felt to be too rigid: courts order the return quite often, probably sometimes almost mechanically. Some participants were very sceptical about ordering the return of the child when there was a case of domestic violence. Protection measures are considered to be insufficient, and in all cases the abducting mother would not be in the position to support herself if she does not have adequate financial means.

It was also recalled that The Hague Convention was adopted having in view a very **different context,** where abduction was committed by the non-custodial parent having only access to the child (usually the father); now the context has changed, as a large majority of cases are committed by the custodial parent (usually mothers) to protect the child from the other parent. Some participants raised the question if it was time to change the Hague Convention.

A general finding was that escape (and abduction of the child) is often a measure of self-protection for a woman who suffers violence. As a result, it is difficult for such a person to 'escape' with a protection measure.

The Central Authority reports that, when the abducting woman has left because of precarious financial situation in the State of residence, the left-behind parent is often asked to adopt some

undertakings. In particular, the left-behind parent (who has requested the return of the child) is asked to grant a secure lodging and financial means for the length of the proceedings on custody. If the conditions offered are good, the court includes them in the return order. Under the current Regulation, and furthermore under the future one, the State of refuge can encourage/suggest/ formally ask the adoption of protection and economic measures as well.

This can be done via direct judicial cooperation, or via Central Authorities, through Article 55 Brussels II-bis. According to the Head of the CA, within the EU, the cooperation on these matters works smoothly with most EU Member States. Outside of the scope of the Regulation, Article 11 of the 1996 Hague Convention may be used to impose protection measures in the return order.

When Italy is the State of residence, the appropriate ground for adopting these measures is Article 11(4). The organizers asked the floor at the workshops if this rule was an adequate ground for enacting a measure to protect only the mother (and not the child).

The workshop participants were unanimous in considering that measures for the protection of a battered or abused mother are **also measures for the protection of the child**. It does not need to be a case of 'assisted' violence (i.e. the child being physically present during the act of violence towards the mother). The mere fact of being under the same roof and seeing their mother in distress, is a violence towards the child that calls for protection under Article 13(1)(b).

However, when return proceedings are held, in the State of refuge the only ground for jurisdiction could be Article 20, which, as it is well-known according to the *Purrucker I* decision, have limited territorial effects. It was then suggested that Reg. 606/2013, that does not provide for grounds of jurisdiction, could complement measures taken on such basis and grant extraterritorial effects and the possibility to circulate the protection measure. The Regulation on Protection Measures is seen as a Regulation in a special matter (the protection against domestic violence) that derogates the Brussels IIa. However, a counter argument is seen in Article 2(3) excluding from the scope of Reg. 606/2013 all protection measures that fall within Brussels IIa. If this were the case, however, such Regulation would be deprived of most of its effects. The question remains unsolved and calls for future analysis.

The most delicate issue that was raised by the participants is the one regarding **evidence of violence**, especially (but not only) in return proceedings. The mere complaint is not deemed sufficient and, in several cases, it is perceived as instrumental. Strangely enough, the female judges who attended the meetings appeared stricter than their male colleagues, and reported that women do sometimes allege false violence or exaggerate what was 'normal' communication within the relationship.

Nonetheless, this approach has counterproductive consequences: it is a general experience that women in general do not report domestic violence (also because they fear that they will not be believed), and when they do report, they are not believed. Examples were given where women were not believed and suffered major prejudice.

On the other side, judges gave some examples of a very focused approach where they have construed the notion of grave risk pursuant to Article 13 Hague Convention in the light of the highest protection of the child. The result was for example to include environmental violence within Article 13(1)(b) (see cases in Report 24 May, § 8). In no case, however, was considered the issuance of a protection measure to be recognized abroad.

A lawyer drew attention to applications for **relocation**, recalling that this is the only lawful alternative to child abduction. Italian courts are highly protective and follow strictly the criterion of the child's settlement and his/her right to live a daily life with both parents. It was suggested a more flexible approach and making a wider use of remote communication tools.

In this context, could the request/issuance of a protection measure for a case of violence facilitate a favourable decision on the relocation?

Lawyers who were present had a negative feeling about such an outcome. Some lawyers shared their practical experience of relocation having been refused, or having been awarded after so much time that it was no longer useful. Italian courts rarely allow relocation of the mother with the child. Obtaining a protection measure does increase the possibility of obtaining the relocation. However, on the contrary, such a measure could be used in the opposite direction (As you are protected, you can stay here and we shall see what the father does).

IV. PIL ISSUES ARISING FROM THE APPLICATION OF REGULATION NO 606/2013 ON PROTECTION MEASURES IN CIVIL MATTERS

Given the non-use of Regulation No 606/2013 in court proceedings, this report fills in the gaps with some speculative research highlighting some issues that may arise, in particular when looking at the intersection between protection measures and international abduction return proceedings.

1. Jurisdiction to issue protection measures

The Regulation does not contain direct or indirect rules on jurisdiction of a MS to issue protection measures (NB - such jurisdiction must not be confused with the jurisdiction to impose sanctions on violations of that measure).

Does the lack of direct jurisdictional rules in the Regulation mean that jurisdiction to issue 'civil law' protection measures is governed by:

a) national rules;
b) the Brussels Ia Regulation
c) the Brussels IIa Regulation

1.1. Jurisdiction pursuing Brussels I Regulation

The application of Brussels Ia to determine the jurisdiction to adopt protection measures might be based on the following reasons:

- Such protection measures are not excluded from the scope of Brussels Ia Regulation – see Article 1;
- Article 67 of Brussels Ia Regulation gives priority to other EU provisions governing jurisdiction, recognition and enforcement in 'specific matters', however, the Protection Measures Regulation contains no rules on jurisdiction and therefore the jurisdictional rules of Brussels Ia remain applicable.
- The general rule of the defendant's domicile would apply also in regard of protection measures.

- Under Regulation n 606/2013, jurisdiction to take protective measures by one MS must not be reviewed by the executing MS, with the possible exception of public policy according to Article 13(1)(a).

  Normally, no control of jurisdiction comes with uniform rules on jurisdiction. Mutual trust does not mean accepting whatever can be adopted under any national forum (so-called exorbitant fora). The only explanation is that it was implicitly assumed that jurisdiction to issue 'civil law' protection measures is governed by the Brussels Ia Regulation.

The original Commission proposal contained a jurisdictional rule: 'The authorities of the Member State where the person's physical and/or psychological integrity or liberty is at risk shall have jurisdiction.' (see Article 3 of the 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).

In an abduction case scenario, however, the application of Brussels I and its general rule (domicile of the defendant) would have the side-effect of vesting jurisdiction with the State of habitual residence of the father and a protection measure could not be asked for in the State of refuge, where the mother and child had found refuge.

1.2. Jurisdiction pursuing Brussels IIa Regulation

Alternatively, jurisdiction could be based on Brussels IIa Regulation, especially when this is connected to matrimonial matters or parental responsibility matters.

- Coordination with Brussels IIa Regulation firstly requires expanding on the preliminary question of the scope of application of the two Regulation.

Article 2.3 of Reg 606/2013 makes it clear that this **is not applicable** whenever Reg 2201/2003 is applicable. This principle should however be **limited to the rules on recognition and enforcement** as set forth in Brussels IIa and should not be read as including the rules on jurisdiction. Such an interpretation is confirmed by Recital 11, which explains that Regulation 606/2013 'should not interfere with the functioning 'of the Brussels IIa Regulation' and 'Decisions taken under the Brussels IIa Regulation should continue to be recognised and enforced under that Regulation.'

This means that rules on jurisdiction provided by the Brussels IIa Regulation may be used also for granting a protection measure that shall then circulate under Regulation No 606.

- It should further be examined what falls within the material scope of Brussels IIa

In regard of divorce or separation proceedings, for example, this could lead to the exclusion of protection measures. In fact, as it is well known, Brussels IIa covers only the dissolution of ties under 'divorce, legal separation and marriage annulment' – Recital 8 of Brussels IIa states that '[…] this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage **or any other ancillary measures**.' (emphasis added).

A protection measures such as an exclusion order suspending the occupancy rights of the abusive spouse in a matrimonial home (pending divorce proceedings) would probably be regarded as 'other ancillary measures' (thus excluded from the scope of Brussels IIa). It could however also be considered as a 'provisional/protective measures' under Article 20 of Brussels IIa. (such measures are, however, not enforceable in other MSs and therefore have effect only on the territory of the MS where they were made).

In a similar way a domestic violence protection order or a non-molestation order prohibiting the abuser from contacting the victim, when issued in proceedings relating to divorce, legal separation or marriage annulment would probably be also classified as 'other ancillary matters' and therefore outside of the scope of Brussels IIa (hence within the scope of the Protection Measures Regulation).

Conclusions could however be opposite in regard of measures for the protection of children. As it is well known, the scope of application of Brussels IIa has been extended by the CJEU so as to include all measures for the protection of children.

For example, when in custody proceedings over a child who is a son of an aggressive father, the court decides to give sole custody rights to the mother in order to protect the child and subsequently also takes a no-contact protection measure, one would assume that such court shall also have jurisdiction over the protection order following the Brussels IIa Regulation.

The fact that such a protection measure is taken some time after the decision on custody, maybe in separate and different proceedings should not lead to a different outcome.

- Coming now to abduction proceedings, the most delicate issue in respect of domestic violence is whether the Regulation provides a jurisdictional basis for **protecting the mother from violence**.

It is a general assumption that a measure protecting the mother from violence will also serve the purpose of protecting the child from a grave risk of psychological harm in light of Article 13.1.b HC. Article 11.4 asks the court to make sure adequate arrangements for the protection of the child are established.

However, it is uncertain if under the current text it would be possible to consider using such a ground to adopt measures for the protection of the mother. While clearly Article 11(4) was not meant as a general jurisdictional basis for all return-related protection measures, 'adequate arrangements' should however be linked to guaranteeing a 'safe return' of the child in light of the grave risk envisaged by Article 13(1)(b). As long as in a given case the court finds that a grave risk (of psychological harm) is also present when domestic violence affects the mother, one should conclude that a measure protecting the mother also falls within the scope of application of Article 11(4) as it – albeit indirectly – aims to protect the child.

- Finally, one could also consider jurisdiction for protection and provisional measures under Article 20 Reg. Brussels IIa.

As it is well known, measures taken on this ground are effective only on the territory on the MS where they were taken and cannot circulate.

When such measures are adopted to protect the mother against domestic violence and some conditions are met, Regulation no 606/2013 may overcome such shortages and complement Regulation No 2201/2003. Both Regulations would then come into consideration: Brussels IIa granting jurisdiction and Regulation No 606 allowing the decision to be recognized and enforced, both implementing the common aim of protecting the mother and the child against domestic violence.

2. Recognition and enforcement

A second set of issues arise in connection to the recognition/enforcement of a protection measure.

Could such a measure, for example a no-contact order, be refused because it is irreconcilable with a measure given or recognised in the requested State, such as an access order or a custody order?

This is a very common case in abduction proceedings.

Take, for example, a situation where a baby is abducted to the UK by the mother, on the basis of grave risk of domestic violence. The left-behind father goes to court in the State of habitual residence and asks for sole custody and placement of the child. The court provisionally orders this. The State of refuge then orders return but, on the basis of Reg. 606/2013, also orders a protection measure ordering the father not to access the child and/or the mother.

Are these two decisions irreconcilable? Can the father stop enforcement of the protection order assuming this is irreconcilable with the decision giving him the custody of the child?