

Title	EAPIL - Position Paper on the Need and Role of Protective Measures in Abduction Proceedings
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Related Documents	N/A

POSITION PAPER

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

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.

The paper was drafted by a Working Group consisting of Costanza Honorati (Coordinator - University of Milano-Bicocca, Italy), Sabine Corneloup (Université de Paris-Pantheon, France), Mónica Herranz Ballesteros (UNED, Spain), Katarina Trimmings (University of Aberdeen, Scotland/UK), and Mirela Zupan (University of Osijek, Croatia).

The paper was approved by the Scientific Council of the Association on 10 October 2023.

A. AIM OF THE PRESENT PAPER

1. 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. Notwithstanding this, there still is a need for clarifying the role and promoting the use of protective 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.

3. Through its position paper (to be found at

<https://eapil.org/eapil-activities/position-papers/>,

EAPIL would like to draw the attention on the following points:

- 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]
- 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 Hague court 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. [para. 28]
- VII. There are several ways which can guarantee the enforceability of a protective measure. It is for the Hague court, 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 Hague 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].