



**Report of  
Justice Rajesh Bindal Committee  
to Examine**

**The Civil Aspects of International Child  
Abduction Bill, 2016**

**and**

**The Protection of Children  
(Inter-Country Removal and Retention)  
Bill, 2016**

**Vol. II**

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## CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION<sup>1</sup>

(Concluded 25 October 1980)

The States signatory to the present Convention,  
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,  
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,  
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

### CHAPTER I – SCOPE OF THE CONVENTION

#### Article 1

The objects of the present Convention are –

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

#### Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

#### Article 3

The removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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<sup>1</sup> This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)), under “Conventions” or under the “Child Abduction Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).



## Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

## Article 5

For the purposes of this Convention –

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

## CHAPTER II – CENTRAL AUTHORITIES

## Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

## Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

## CHAPTER III – RETURN OF CHILDREN

## Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

#### Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

#### Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

#### Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

#### Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

#### Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

#### Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

#### Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

#### Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

#### Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

#### Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

#### Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

## Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

## CHAPTER IV – RIGHTS OF ACCESS

## Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

## CHAPTER V – GENERAL PROVISIONS

## Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

## Article 23

No legalisation or similar formality may be required in the context of this Convention.

## Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

## Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

## Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

## Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

## Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

## Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

## Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

## Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

## Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

## Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

## Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

## Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

## Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

## CHAPTER VI – FINAL CLAUSES

## Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

## Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.



The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

#### Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

#### Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

#### Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

#### Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

- (1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
- (2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

#### Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
- (2) the accessions referred to in Article 38;
- (3) the date on which the Convention enters into force in accordance with Article 43;
- (4) the extensions referred to in Article 39;
- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.





**GOVERNMENT OF INDIA**

**LAW  
COMMISSION  
OF  
INDIA**

**Need to accede to the Hague Convention on  
the Civil Aspects of International Child  
Abduction (1980)**

**Report No. 218**

**March 2009**



**LAW COMMISSION OF INDIA  
(REPORT NO. 218)**

**Need to accede to the Hague Convention on the  
Civil Aspects of International Child Abduction  
(1980)**

**Forwarded to the Union Minister for Law and  
Justice, Ministry of Law and Justice, Government of  
India by Dr. Justice AR. Lakshmanan, Chairman,  
Law Commission of India, on the 30th day of  
March, 2009.**

The 18<sup>th</sup> Law Commission was constituted for a period of three years from 1<sup>st</sup> September, 2006 by Order No. A.45012/1/2006-Admn.III (LA) dated the 16<sup>th</sup> October, 2006, issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

The Law Commission consists of the Chairman, the Member-Secretary, one full-time Member and seven part-time Members.

**Chairman**

Hon'ble Dr. Justice AR. Lakshmanan

**Member-Secretary**

Dr. Brahm A. Agrawal

**Full-time Member**

Prof. Dr. Tahir Mahmood

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Dr. K. N. Chandrasekharan Pillai

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Shri Justice I. Venkatanarayana

Shri O.P. Sharma

Dr. (Mrs.) Shyamliha Pappu



The Law Commission is located in ILI Building,  
2<sup>nd</sup> Floor, Bhagwan Das Road,  
New Delhi-110 001

**Law Commission Staff**

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Any enquiries relating to this Report should be addressed to the Member-Secretary and sent either by post to the Law Commission of India, 2<sup>nd</sup> Floor, ILI Building, Bhagwan Das Road, New Delhi-110001, India or by email to [lci-dla@nic.in](mailto:lci-dla@nic.in)

D.O. No. 6(3)/136/2007-LC (LS)

30<sup>th</sup> March, 2009

Dear Dr. Bhardwaj Ji,

Subject: Need to accede to the Hague Convention on  
the Civil Aspects of International Child  
Abduction (1980)

I am forwarding herewith the 218<sup>th</sup> Report of the Law  
Commission of India on the above subject.

Statistics show that the number of divorce cases and custody  
disputes has increased ever since the advent of globalization and  
technological development leading to a very busy life-style and work  
culture. The international parental child abduction/child removal finds  
its root here.

International parental child abduction or removal can be  
defined as the removal of a child by one parent from one country to  
another without the approval of the other parent. Child removal, in  
this context, encompasses an interference with the parental rights or  
right to contact with the removed child. These acts by a parent when  
brought before a court of law have in the past created considerable  
amount of confusion specifically in the area of competence of courts  
with regard to jurisdictional aspects.

The international community acted to solve this crisis by  
adopting on October 25, 1980 an International Convention on the  
Civil Aspects of International Child Abduction which entered into  
force on December 1, 1983.

Many States of the world (81) have become signatory to this Convention. Some States like Australia have brought about amendments in their family law legislations to make the Hague Convention operative in their nation. India, however, is not a signatory to this Convention. The time has come for some international perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India should become a signatory to the Hague Convention and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.

The Commission is of the view that India should keep pace and change according to the changing needs of the society. The Commission, therefore, recommends that the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their homes in India.

With warm regards,

Yours sincerely,

(Dr. AR. Lakshmanan)

Dr. H. R. Bhardwaj,  
Union Minister for Law and Justice,  
Government of India  
Shastri Bhawan,  
New Delhi-110 001.

**Need to accede to the Hague Convention on the  
Civil Aspects of International Child Abduction  
(1980)**

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## I. INTRODUCTION

1.1 Owing to the advent of technology with the establishment of easier and economic forms of travel and communication, national boundaries have increasingly become irrelevant for the purposes of cultural exchanges.<sup>1</sup>

1.2 The globe has shrunk to an extent that cultural taboos do not hold back anybody to go in search of greater achievements. This brings in a package of both desirable and undesirable effects. Every employment opportunity especially the ones established under the modern technological umbrella comes with a lot of responsibility and financial benefits with the aftereffect being increasing independence of individuals and ego inflations, which paves the way for undesirable familial problems.<sup>2</sup>

1.3 Earlier spousal and interparental conflict were simply equated with divorce, or with various measures of marital dissatisfaction, hostile attitudes, and physical aggression. This failure to distinguish among types of conflict has confounded the debate about the extent to which different kinds of divorce conflict are normal and functional. Divorce conflict has at least three important dimensions which should be considered when assessing incidence and its effects on children. First, conflict has a *domain dimension*, which can refer to disagreements over a series of divorce issues such as financial support, property, division, custody, and access to the children, or to

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<sup>1</sup> Dr. Justice AR. Lakshmanan, International Child Abduction - Parental Removal (2008) 48 IJIL 427

<sup>2</sup> Ibid.



values and methods of child-rearing. Second, conflict has a *tactics dimension*, which can refer to the manner in which divorcing couples informally try to resolve disagreements or it can refer to ways in which divorce disputes are formally resolved by the use of attorney negotiation, mediation, litigation, or arbitration by a judge. Third, conflict has an *attitudinal dimension*, referring to the degree of negative emotional feeling or hostility directed by divorcing parties towards each other, which may be covertly or overtly expressed.<sup>3</sup>

1.4 Statistics show that the number of divorce cases and custody disputes has increased ever since the advent of globalization and technological development leading to a very busy life-style and work culture. The international parental child abduction/child removal finds its root here.<sup>4</sup>

1.5 International parental child abduction or removal can be defined as the removal of a child by one parent from one country to another without the approval of the other parent. Child removal, in this context, encompasses an interference with the parental rights or right to contact with the removed child. These acts by a parent when brought before a court of law have in the past created considerable amount of confusion specifically in the area of competence of courts with regard to jurisdictional aspects.<sup>5</sup>

1.6 The international community acted to solve this crisis by adopting on October 25, 1980 an International Convention on the Civil Aspects of

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

International Child Abduction which entered into force on December 1, 1983. This Convention seeks to protect children from harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. The main objects of the Convention are:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.<sup>6</sup>

1.7 Many States of the world (81) have become signatory to this Convention. Some States like Australia have brought about amendments in their family law legislations to make the Hague Convention operative in their nation. India, however, is not a signatory to this Convention.<sup>7</sup>

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<sup>6</sup> The Hague Convention on the Civil Aspects of International Child Abduction (1980), Article 1

<sup>7</sup> Supra note 1

## II. THE HAGUE CONVENTION

2.1 The Hague Convention lays down that, when a court has jurisdiction over a child, the first question to determine is whether the Hague Convention applies to the case. Two conditions must be satisfied before the Convention applies:

- (a) the child must be under 16 years of age; and
- (b) the child must have been habitually resident in a Convention country immediately before any breach of custody or access rights.<sup>8</sup>

2.2 In *Cooper and Casey*<sup>9</sup>, it was held that a child can have only one place of habitual residence which should be determined by focusing on the child's past experience and not on its or its parents' intentions.

2.3 The Hague Convention is expressly intended to enhance the international recognition of rights of custody and access arising in the place of habitual residence, and to ensure that any child wrongfully removed or retained from that place is promptly returned (Article 1). In most cases, therefore, the court's obligation to act in the best interests of the child is displaced as a consideration bearing on who is to have care or control of the child. The Hague Convention

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<sup>8</sup> *Supra* note 6, Article 4

<sup>9</sup> [1995] 18 Fam LR 433

creates central authorities throughout the Convention countries to trace an unlawfully removed child and secure its return. It is important to consider what principles and rules determine whether a child is or is not to be returned to a Convention country. The Convention mandates return of the child only when there has been a wrongful removal or retention of a child from a Convention country (Article 12). In securing rights of access, the following issues should be considered:

- wrongful removal or retention;
- excusable removal or retention; and
- access.<sup>10</sup>

## WRONGFUL REMOVAL OR RETENTION

2.4 Article 3 of the Hague Convention provides that removal or retention of a child is wrongful where it is in breach of rights of custody and at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. Removal occurs when a child is taken out of the place of habitual residence, whereas retention occurs when a child who has, for a limited period, been outside the place of habitual residence is not, on the expiration of the period, returned. It is not the removal or retention of the child from the parent which constitutes a breach of Article 3 but the removal or retention from the place of habitual residence that creates the wrong. It is important to identify the event constituting removal or retention because on an application

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<sup>10</sup> Supra note 1

made within one year of such removal or retention, the court must order the return of the child, whereas if this is done after one year, the court must also order the return of the child unless it is satisfied that the child has settled into its new environment.<sup>11</sup>

## EXCUSABLE REMOVAL OR RETENTION

2.5 There are also some grounds which enable the removal or retention of the child to be excused (*vide* Articles 12, 13 and 20) and these are:

(i) Applicant not exercising custodial rights – The Court can refuse to order the return of the child if the applicant was not actually exercising rights of custody when the child was removed or first retained.

(ii) Consent to or subsequent acquiescence – The order for the return of the child can be refused if the applicant had consented to or subsequently acquiesced in the removal or retention. This consent or acquiescence may be expressed or inferred from conduct in circumstances in which different conduct might be expected if there was no consent or acquiescence.

(iii) Risk to the child – The Court may refuse a return if there is a grave risk that the return of the child to the country in which it habitually resided immediately before the removal or retention would expose the child to

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<sup>11</sup> Ibid.

physical or psychological harm or otherwise place the child in an intolerable situation.

(iv) Child's objection – The Court may refuse to order return if a child, who has obtained an age and degree of maturity at which it is appropriate to take account of the child's views, objects to the return. It should be an emphatic objection and not a mere preference to remain where it is.

(v) Protection of rights and freedoms – The Court may refuse to order return if it would be contrary to the protection of human rights and fundamental freedoms.

(vi) Expiry of one year – The application for return was made more than one year after a wrongful removal or retention and the child settled into its new environment.<sup>12</sup>

## ACCESS

2.6 The Hague Convention does not give rights of access either the importance or attention but it devotes to rights of custody. It defines "rights of access" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence" [*vide* Article 5(b)]. The Hague Convention does not impose any specific duty on a court in a Convention country in relation to rights of access and it, therefore, appears that the

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<sup>12</sup> Ibid.



question of access should therefore be decided with reference to the best interests of the child as a paramount consideration.<sup>13</sup>

2.7 India is not a signatory to the Hague Convention. The Supreme Court has observed in the case of *Sumedha Nagpal v. State of Delhi*<sup>14</sup> as under:

“No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child.”<sup>15</sup>

2.8 A case law study will depict a clear picture in this regard. The Supreme Court in *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*<sup>16</sup> and *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*<sup>17</sup> exercised summary jurisdiction in returning the minor children to the country of their parent. In a later case of *Dhanwanti Joshi v. Madhav Unde*<sup>18</sup>, the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention,

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<sup>13</sup> Ibid.

<sup>14</sup> JT 2000 (7) SC 450

<sup>15</sup> Ibid., page 453

<sup>16</sup> AIR 1984 SC 1224

<sup>17</sup> AIR 1987 SC 3

<sup>18</sup> (1998) 1 SCC 112

the law is that the Court within whose jurisdiction the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance. It was in this case the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning children to its parent and observed that the welfare and best interest of the child or children should be of paramount consideration. This observation by the Supreme Court was followed in a later decision by the Supreme Court in the case of *Sarita Sharma v. Sushil Sharma*<sup>19</sup>. In 2004, the Supreme Court, in the case of *Sahiba Ali v. State of Maharashtra*<sup>20</sup> declined to grant the custody of her children to the mother but at the same time issued directions for visitation rights in the interest and welfare of the minor children. In another case of *Kumar V. Jahgirdar v. Chethana Ramatheertha*<sup>21</sup>, the Supreme Court came to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification in safeguarding interest of the child. Further, in a recent case of *Paul Mohinder Gahun v. State of NCT of Delhi*<sup>22</sup> the Delhi High Court refused to grant custody of the child to the father and observed that the question of conflict of laws and jurisdictions should take a back seat in preference to what lies in the interest of the minor.

2.9 In a recent decision dated March 3, 2006 of the High Court of Bombay, at Goa, the Court declined to issue a writ of *habeas corpus* thereby refusing the custody of a girl child to her mother while

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<sup>19</sup> JT 2000 (2) SC 258

<sup>20</sup> 2004 (1) HLR 212

<sup>21</sup> 2004 (1) HLR 468

<sup>22</sup> 2005 (1) HLR 428

relegating the parties to normal civil proceedings in Goa for a decision on the point of the custody of the child without disturbing the custody with the father in Goa. The High Court clearly declined the return of the child to Ireland in exercise of its writ jurisdiction and held that this question requires analysis of disputed question of facts.<sup>23</sup>

2.10 Indian laws that deal with the principles of custody of children are not too many. To name a few:

- The Hindu Marriage Act, 1955
- The Hindu Minority and Guardianship Act, 1956
- The Guardians and Wards Act, 1890

2.11 Section 26 of the Hindu Marriage Act, 1955, states that a court can pass orders and make such provisions in the decree in any proceedings under the Act with respect to the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible.

2.12 Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines “minor” to mean “a person who has not reached the age 18 years”. And, under the Act, the custody of a child is given to any person, be it the child’s natural parents or guardian (appointed by the court) with the prime importance given to the welfare of the child. A landmark case that decided the same was *Githa Hariharan v. Reserve Bank of India*.<sup>24</sup>

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<sup>23</sup> Mandy Jane Collins v. James Michael Collins, (2006) 2 HLR 446

<sup>24</sup> (1999) 2 SCC 228

2.13 The High Court by way of the writ of *habeas corpus* can order custody of a minor at the behest of a parent applying for the same, with predominant focus placed on the welfare of the child.<sup>25</sup>

2.14 In *Dhanwanti Joshi v. Madhav Unde*<sup>26</sup>, the Supreme Court referred to the Hague Convention on the Civil Aspects of International Child Abduction and observed as follows:

‘32. In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in *McKee v. McKee* unless the Court thinks it fit to exercise summary jurisdiction

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<sup>25</sup> Supra note 1

<sup>26</sup> Supra note 18

in the interests of the child and its prompt return is for its welfare, as explained in *L., Re.* As recently as 1996-1997, it has been held in *P (A minor) (Child Abduction: Non-Convention Country), Re:* by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence -- which was not a party to the Hague Convention, 1980, -- the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also *A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13].* This answers the contention relating to removal of the child from USA.'

2.15 From the above, it can be observed that, the Indian Courts while deciding cases pertaining to minor children have not followed a uniform pattern. There also is an absence of progressive development in the subject. If some matters are decided with prime importance placed on the welfare of the child, some are based on the technicalities of various provisions of law and jurisdictional tiffs. The reason cited for this can be the absence of any law that governs this aspect. This only will affect the condition both physical and emotional of the child, who is caught in the fire of shattered relationships.<sup>27</sup>

2.16 This situation only shows that the time has come for some international perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a

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<sup>27</sup> Supra note 1

foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India should become a signatory to the Hague Convention and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.<sup>28</sup>

### **III RECOMENDATION**

We believe that India should keep pace and change according to the changing needs of the society. The Commission, therefore, recommends that the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their homes in India.

(Dr. Justice AR. Lakshmanan)

Chairman

(Prof. (Dr.) Tahir Mahmood)  
Member

(Dr. Brahm A. Agrawal)  
Member-Secretary

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<sup>28</sup> Ibid.



**THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016**

A

BILL

to secure the prompt return of children wrongfully removed to or retained in any Contracting State, to ensure that the rights of custody and access under the law of one Contracting State are respected in other Contracting States, and to establish a Central Authority and for matters connected therewith or incidental thereto.

WHEREAS the interests of children are of paramount importance in matters relating to their custody;

AND WHEREAS India is a party to the Hague Convention on the Civil Aspects of International Child Abduction;

AND WHEREAS the said Convention entered into force on the 1<sup>st</sup> December, 1983;

And WHEREAS the said Convention has for its main objective, to secure the prompt return of children wrongfully removed or retained in any contracting state, to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states;

AND WHEREAS it is considered necessary to provide for the prompt return of children wrongfully removed or retained in a contracting state, and to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states, and thereby to give effect to the provisions of the said Convention;

Be it enacted by Parliament in the sixty-fifth year of the Republic of India as follows:-



## Chapter I

### Preliminary

1.(1) This Bill may be called the Civil Aspects of International Child Abduction Bill, 2016

(2) It extends to the whole of India (except Jammu and Kashmir)

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. In this Act, unless the context otherwise requires,-

- (a) “Applicant” means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;
- (b) “Central Authority” means the Central Authority established under Section 4;
- (c) “Contracting State” means a state signatory to the Hague Convention on the Civil Aspects of International Child Abduction;
- (d) “Convention” means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25<sup>th</sup> October, 1980, as set out in the First Schedule;
- (e) “Chairperson” means the Chairperson of the Central Authority;
- (f) “Habitual residence” of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred.
- (g) “Member” means a member of the Central Authority and includes the Chairperson, if any;
- (h) “prescribed” means prescribed by rules made under this Act;
- (i) “Right of access” in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;

- (j) “Right of custody” in relation to a child includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.
3. (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered wrongful where –
- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and
  - (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or would have been so exercised, but for the removal or retention.
- (2) The rights of custody mentioned in Sub-section (1) above, may arise in particular:
- (a) by operation of law;
  - (b) by reason of judicial or administrative decision; or
  - (c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.

## **Chapter II**

### **Constitution, Powers and Functions of the Central Authority**

4. (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be appointed by the Central Government for the purposes of this Act, an officer of the Central Government not below the rank of Joint Secretary to the Government of India, to be called as the Central Authority.
- (2) Such Central Authority shall, unless removed from office under Section xx, hold office for a period not exceeding three years or until he attains the age of sixty years, whichever is earlier.
- (3) If a casual vacancy occurs in the office of the Central Authority, whether by reason of his death, termination or otherwise, such vacancy shall be filled within a period of ninety days by making afresh appointment in accordance with the provisions of sub-section (1)

and the person so appointed shall hold office for the remainder of the term of office for which the Central Authority in whose place he is so appointed would have held that office.

5. The Central Authority or any other authority on its behalf shall take all appropriate measures to perform all or any of the following functions, namely:-
  - (a) To discover the whereabouts of a child who has been wrongly removed to, or retained in, India, and where the child's place of residence in India is unknown, the Central Authority may obtain the assistance of the police to locate the child;
  - (b) To prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such provisional measures as may be necessary;
  - (c) To secure the voluntary return of any such child to the country in which such child had his or her habitual residence or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the Contracting State in which such child has his or her habitual residence;
  - (d) To exchange, where desirable, information relating to any such child, with the appropriate authorities of a Contracting State;
  - (e) To provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any Contracting State;
  - (f) To institute judicial proceedings with a view to obtaining the return of any such child to the Contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for organising or securing or to institute judicial proceedings for securing the effective exercise of rights of access to a child who is in India;
  - (g) Where circumstances so require, to facilitate the provision of legal aid or advice;

- (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the Contracting State in which the child has his or her habitual residence;
  - (i) Such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.
6. The Central Authority shall, while inquiring into any matter referred to in Section 5, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular, in respect of the following matters, namely:
- (1) summoning and enforcing the attendance of any person and examining him on oath;
  - (2) discovery and production of any document;
  - (3) receiving evidence on affidavit;
  - (4) requisitioning any public record or copy thereof from any court or office;
  - (5) issuing commissions for the examination of witnesses or documents.

### **Chapter III**

#### **Procedure for Applications to Central Authority**

7. (1) The appropriate authority of a Contracting State, or a person, institution or other body claiming that a child has been wrongfully removed to or retained in India in breach of rights of custody, may apply to the Central Authority for assistance in securing the return of such child.
- (2) Every application made under Sub-section (1) shall substantially be in the form prescribed in the rules to this Act.
- (3) The application under Sub-section (1) may be accompanied by -
- (a) A duly authenticated copy of any relevant decision or agreement giving rise to the rights of custody claimed to have been breached;
  - (b) A certificate or affidavit from a Central Authority or other competent authority of the Contracting State in which that child has his or her habitual residence or from a qualified person setting out the law of that Contracting State relating to the rights of custody alleged to have been breached;
  - (c) Any other relevant document.
8. Where, on receipt of an application under Section 6, the Central Authority has reason to believe that the child in respect of whom the application is made is in

another Contracting State, it shall forthwith transmit the application to the appropriate authority of that Contracting State, and shall accordingly inform the appropriate authority or the applicant, as the case may be.

9. Where the Central Authority is requested to provide information relating to a child under Section 5 (d), it may request a police officer to make a report to it in writing with respect to any matter relating to the child that appears to it to be relevant.

#### **Chapter IV**

#### **Refusal by Central Authority to accept Applications**

10. The Central Authority may refuse to accept an application made to it under Section 7 if it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded. On its refusal to accept an application, the Central Authority shall forthwith inform the appropriate authority or person, institution, or other body making the application, the reasons for such refusal.
11. The Central Authority should not reject an application solely on the basis that additional documents or information are needed. Where there is a need for such additional information or documents, the requested Central Authority may ask the applicant to provide these additional documents or information. If the applicant does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.
12. Any party aggrieved by the refusal of the Central Authority to accept an application made under Section 7 may appeal against such refusal to the Secretary, Ministry of Women and Child Development, Government of India. Such appeal shall be made within 14 days from the date of receipt of the decision of the Central Authority.

## Chapter V

### Procedure for Application to High Court

13. Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under Section 6, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the Contracting State in which the child has his or her habitual residence.
14. Where an application is made to a High Court under Section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned, or of securing the child's residence pending the proceedings, or to prevent the child's return for being obstructed, or of otherwise preventing any change in the circumstances relevant to the determination of the application.
15. Where the High Court is satisfied, upon an application made to it under Section 10, that:-
  - (a) The child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of Section 3; and,
  - (b) A period of one year has not yet elapsed between the date of the alleged removal or retention and the date of such application;

It shall forthwith order the return of such child to the Contracting State in which the child had his or her habitual residence;

Provided that the High Court may order the return of a child to the Contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, unless it is satisfied that the child is settled in his or her new environment.

16. (1) Notwithstanding the provisions of Section 15, the High Court is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(2) The High Court may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

(3) The return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

(4) In exercising its powers under this Section, the High Court shall have regard to any information relating to the social background of the child provided by the appropriate authority of the Contracting State in which that child has his or her habitual residence.

(5) The High Court shall not refuse to make an order under this Section for the return of a child to the Contracting State in which that child has his or her habitual residence, on the grounds only that there is in force, a decision of a court in India or a decision entitled to be recognised by a court in India relating to the custody of such a child, but the High Court shall, in making an order under Section 10, take into account the reasons for such decision.

17.(1) The appropriate authority, or a person, institution or other body of a Contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person specified in the application to a child who is in India.

(2) An application made under Sub-section (1) shall be in such form in such manner as may be prescribed.

18.(1) Without prejudice to any other means for securing the exercise of rights of access of any person to a child in India, the Central Authority may apply to the High Court for an order of the Court for securing the effective exercise of those rights.

(2) Where the High Court is satisfied, on an application made to it under Sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, it may make such order as may be necessary to secure the effective exercise of those rights of access, and any conditions to which they are subject.

19.(1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Section 3, the High Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

(2) The High Court may, before making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, request the central Authority to obtain from the relevant authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful under Section 3.

20. Upon making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the High Court may order the person who removed that child to India, or who retained that child in India, to pay the expenses incurred by the Central Authority. These expenses may include costs incurred in locating the child, costs of legal representation of the Central Authority, and costs incurred in returning the child to the Contracting State in which that child has his or her habitual residence.

21. An order made by the High Court under Section 13 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom an order relates.

22. Where an order is made under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements as are necessary to be made in accordance with the order for the return of such child to such Contracting State.



**Chapter VI**  
**Application in respect of child removed from India**

23. (1) A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of custody of such person, institution or other body, may apply to the Central Authority for assistance in securing the return of that child to India.

(2) On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in securing the return of that child to India.

(3) The rights of custody mentioned in Sub-section (1) above, include rights of custody accruing to any person, institution or other body by operation of law;

- (a) by reason of judicial or administrative decision; or
- (b) by reason of an agreement having legal effect under the law of India.

24. The High Court may, on application made by or on behalf of the appropriate authority of the Contracting State, declare that the removal of a child to that Contracting State or the retention of that child in that Contracting State is wrongful within the meaning of Section 3.

**Chapter VII**  
**Rights of Access**

25. A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of access of such person, institution or other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of rights of access.

26. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of Contracting States in the same way as an application for the return of a child.

27. On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in making arrangements to organise or secure the effective exercise of rights of access.

## **Chapter VIII** **Miscellaneous**

28. (1) The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
- (2) If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.
29. The Central Authority shall submit an annual report to the Central Government through the Ministry of Women and Child Development in such form as may be prescribed.
30. No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member thereof or any person acting under the direction of the Central Authority, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.
31. Every member of the Central Authority and every officer appointed in the Central Authority to exercise functions under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.
32. (1) In the discharge of its functions under this Act, the Central Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national purposes, the decision of the Central Government thereon shall be final.

33. The Central Authority shall furnish to the Central Government, such returns or other information with respect to its activities as the Central Government may from time to time require.

34. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained in India

(b) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained outside India

(c) Procedure for appointment of Chairman and Members of Central Authority/ recruitment of staff of Central Authority

(d) Procedure in case of refusal to accept an application by Central Authority under Section 7

(3) Every rule made under this Act (Sub-section (1)) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

35. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty:

Provided that no order shall be made under this Section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this Section shall be laid, as soon as may be after it is made, before each House of Parliament.

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**C.M. No. 14931-CII of 2015**

**Seema Kapoor v. Deepak Kapoor**

**2016 SCC OnLine P&H 1225**

**In the High Court of Punjab and Haryana**

(BEFORE RAJIVE BHALLA, J.)

Seema Kapoor and another

v.

Deepak Kapoor & Ors.

Mr. Anil Malhotra, Advocate, Amicus Curiae.

Mr. Prateek Gupta, Advocate, for the Union of India.

Mr. P.S. Bajwa, Addl. A.G., Punjab.

Mr. S.S. Sandhu, Spl. Prosecutor, CBI.

C.M. No. 14931-CII of 2015 in CR-6449 of 2006

Decided on February 24, 2016

**RAJIVE BHALLA, J.:**— A minor child, removed from the de jure custody of this Court, by misusing an interim order, dated 23.12.2006 and the failure of all attempts to restore custody of the minor to this Court, compels me to forward a reference to the Law Commission of India and the Ministry of Women and Child Development, pointing out the ease with which a child can be removed from India for want of any law on "Child removal". Despite the laudable efforts by the Amicus Curiae and the Central Bureau of Investigation, the minor is untraceable.

**2.** Seema Kapoor and another, filed a revision challenging an order directing them to hand over custody of the minor to the respondents. An interim order, dated 23.12.2006, was passed in favour of the petitioners, allowing them to retain custody of the minor but when Seema Kapoor was directed to produce the minor it transpired that she had fled the country and illegally taken the child to the UK. Mr. Anil Malhotra, Advocate, was appointed as Amicus Curiae to assist the Court, in 2008, and the police was directed to investigate the matter. Thereafter, the investigation was transferred to the Central Bureau of Investigation by this Court. From the replies, filed by the police and the Central Bureau of Investigation, it became apparent that the minor had been spirited away to the United Kingdom on fake passports. The stay order was eventually vacated. An FIR No. 86, dated 12.08.2008 was registered under Sections 363, 193, 209 & 120-B of the Indian Penal Code, at Police Station Dasuya for illegal removal of the minor child and FIR No. 119, dated 30.11.2008 was registered under Sections 420, 467, 468, 120-B and Section 12 of the Passports Act, 1967, also at Police Station Dasuya against Rajesh Kapoor and others for obtaining passports on forged documents. Both FIR's were entrusted to the CBI for investigation by this Court.

**3.** Further directions were issued on 06.11.2008 and the passports of Seema Kapoor and the minor child were impounded. A Special Leave Petition No. 725 of 2009, filed against order dated 14.07.2008 and 06.11.2008, was dismissed on 01.05.2009 by the Supreme Court, but the minor child was not produced. Eventually after various orders were passed by the High Court at London, the minor child was recovered. The witness statement recorded by British Police Constable, Varinder SOOCH 673XB, at



Southall Police Station, UK dated 03.12.2008 records that Seema Kapoor, the minor child and Rajesh Kapoor were apprehended on 03.12.2008, when they were trying to escape. Seema Kapoor and Rajesh Kapoor were held in custody by the British Police till 05.12.2008. The minor child was, however, placed in foster care.

**4.** By an affidavit dated 11.12.2008, filed before the Family Court of Justice, Family Division, London, Rajesh Kapoor asked the High Court at London not to return the minor to India. A report dated 17.03.2009, reads as follows:-

*"76. Rajesh has indicated he will continue to support his sister in caring for Aishley. He supports Seema's account of the past and shares her thoughts on the care of Aishley. However, I am concerned that he has prioritised this over his own wife and son who remain in India, and I am not clear as to his motivation. Nor am I clear about his relationship with the father (his brother) to whom he seemed willing to gift his own child in return for Aishley."*

**5.** Mr. Anil Malhotra, Advocate, Amicus Curiae, had placed on record a report dated 21.03.2009, furnished to the Family Court of Justice, Family Division, London requesting that the minor and Seema Kapoor be returned to India.

**6.** A detailed judgment dated 21.04.2009, passed by the High Court of Justice, Family Division, London, between Deepak Kapoor and Jyoti Kapoor and the defendants i.e. Seema Kapoor, Rajesh Kapoor and Aishley Kapoor, concludes as under:-

*"23. In conclusion, on the facts before me, I cannot order a return of Aishley to Seema's custody. This would not be in Aishley's best interests. I shall order the summary return of Aishley to India. My order will include arrangements for the return of Aishley to India and a preamble of requests by me to the Punjab and Haryana High Court.*

*24. This order is to be attached to this judgment and emailed to the Amicus Curiae with a view to him moving the Punjab and Haryana High Court and placing the order on the record before Aishley is taken out of this jurisdiction. The papers in this case will be sent to the Indian Court."*

**7.** An appeal against the above judgment of 21.04.2009 was lodged with the Court of Appeal at London, which was decided on 23.04.2009.

**8.** However, on 24.04.2009, at around 9.30am, Aishley Kapoor left the school from a play ground in the company of an unidentified Asian male. Thereafter, efforts by the British police and various agencies to trace her have met with abject failure.

**9.** The investigation of the FIRs, which were entrusted to the Central Bureau of Investigation, Chandigarh, has confirmed that Rajesh Kapoor has fraudulently obtained a second passport without disclosing the fact that he already held passport No. A-0544912 on 08.04.1996. The Central Bureau of Investigation has verified that fraudulent passports were prepared with respect to Aishley Kapoor from the Passport Office, Jalandhar, on the basis of a fake parentage and birth certificate and that she was spirited away to London, on 22.12.2007.

**10.** The learned Amicus Curiae and the Central Bureau of Investigation despite their stellar efforts have been thwarted at every step on the way primarily for the reason that India is not a signatory to the Hague Convention on The Civil Aspects of International Child Abduction, 1980. This apart, India does not recognise inter-country child removal as a wrong or an offence, nor is it defined under any specific or particular law. The removal or retention of a child in breach of custody rights is a wrong under the Hague Convention but for want the Union of India acceding to the Hague Convention and or enacting a domestic law, children will continue to be spirited away from and to India, with courts and authorities standing by in despair.

**11.** The reference is, therefore, forwarded to the Law Commission of India, 14<sup>th</sup> Floor, Hindustan Times House, Kasturba Gandhi Marg, New Delhi-110001 and the

Ministry of Women and Child Development, Shastri Bhawan, A Wing, Dr. Rajendra Prasad Road, New Delhi-110001, to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law and for signing the Hague Convention on child abduction.

**12.** A report prepared by Mr. Anil Malhotra, Advocate, Amicus Curiae, appointed by this Court, setting out the law needs to be lauded and forwarded with this reference. I place on record and acknowledge the tireless efforts put in by Mr. Anil Malhotra, Advocate.

**13.** A copy of this order be handed over to Mr. Anil Malhotra, Advocate, Amicus Curiae and counsel for the Union of India, for communication.

**14.** Adjourned to 30.03.2016.

ANNEXURE-A

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

IN C.R. No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

Deepak Kapoor and Another .....Respondents

**REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURIAE**

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DATED: 20 January 2016 (ANIL MALHOTRA) ADVOCATE & AMICUS CURIAE  
 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH  
 IN C.R. No. 6449 OF 2006

Seema Kapoor and Another .....Petitioners

v.

Deepak Kapoor and Another .....Respondents

REPORT BY ANIL MALHOTRA, ADVOCATE, AMICUS CURIAE

RESPECTFULLY SHOWETH:

**THE LAW IN RELATION TO THE CUSTODY OF CHILDREN AND CHILD REMOVAL IN INDIA;**

a. INTRODUCTION

**15.** Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents the return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction, 1980. But what happens to those aggrieved parents whose countries are not a part of this global conglomerate of like-minded nations which honor each other's laws. No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems.

**16.** The world is a far smaller place now than it was a decade ago. Inter country and inter continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos, all have positive traits but are fraught with a new set of risks for the children caught up in such cross border situations. Caught in a cross fire of broken relationships, with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.2 billion Indians, about 30 million are non-resident Indians living across 180 countries, who, by migrating to different jurisdictions, have generated a new crop of spouse related inter parental child removal and international family disputes.

b. DEFINITION OF CHILD REMOVAL

**17.** Families with connections to more than one country, face unique problems if their relationships break down. The human reaction in this already difficult time is often to return to one's family and country of origin, with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another, may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of a person, with whom the child normally lives.

**18.** A broader definition encompasses the removal of a child from his/her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction, signed at the Hague on October 25, 1980 with over 90 contracting countries today as parties from all regions of the globe, however, defines removal or detention wrongful in the following words:

*"Article 3*

*The removal or the retention of a child is to be considered wrongful where:*

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or*



*retention.*

*The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."*

**19.** Child removal does not find any specific definition in any Indian codified law and since India is not a signatory to The Hague Convention, there is no parallel Indian legislation enacted to give the force of law to The Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

#### c. GLOBAL SOLUTIONS AND REMEDIES

**20.** The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and now has about 93 contracting nations to it. The objectives of the Convention are:

- To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. It operates as an effective deterrent, providing real and practical means to restore the status quo prior to the abduction, it also prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both the parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of The Hague Conference on Private International Law, at The Hague, Netherlands, renders a superb service by monitoring and assisting the development of services to support effective implementation and consistent operation of The Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post convention services. In terms of The Hague Convention on Civil Aspects of international Child Abduction, the Secretariat has published in three parts, guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which are all approved by contracting States. The Secretariat thus helps to create an international medium of Consenting States who contract with each other to return children who are wrongfully removed.

#### d. WHY SHOULD INDIA BE INTERESTED IN JOINING THE 1980 CONVENTION.

**21.** The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on the Child protection policies in much of the world. In a civilised society where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems at the family law front are largely unresolved. Times have changed, but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

**22.** *Firstly*, India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of



the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

**23.** *Secondly*, such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of The Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's habitual residence and so would be the Court of that country. In India, determination of rights, as per Indian law, of a foreign child removed to India by an offending parent may often be bitterly contested and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

**24.** *Thirdly*, the fact that India is not a party to The Hague Convention may have a negative influence on a foreign judge, who is deciding whether a child living with his/her parent in a foreign country, should be permitted to spend time in India to enjoy contact with his/her Indian parent and extended family. Without the guarantee afforded by The Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle; membership of The Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 93 States that are parties to the Convention.

**25.** *Fourthly*, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

**26.** It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above. However, till date, India has not signed the Hague Convention on Civil Aspects of International Child Abduction, 1980.

#### e. RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

**27.** As far as the forum for securing the return of the children is concerned, it is important to reiterate that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Article 226 of the Constitution of India, a parent whose child has been abducted can approach the State High Court to issue a writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a Habeas Corpus Petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Article 32 of the Constitution of India.

**28.** In so far relating to the relevant law (religion) could well seek recourse to Guardianship Act, 1956 (hereafter 'HMGA 1956'), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act,

1890 (GWA). The HMGA 1956, like the Hindu Marriage Act 1955 (HMA), has an extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir.

**29.** In so far the law relating to guardianship and custody is concerned, the Guardians and Wards Act, 1890 (GWA) is an Act pertaining to the appointment of guardians and wards, as also for seeking custody of children. It is available to all persons, free of religion or personal laws and can also be invoked by foreigners. The provisions of GWA are independent of personal law and prescribe the procedure, criteria and other details of appointment of guardians as also factors to determine custody issues of children. A guardianship and custody petition under the GWA is also an alternative remedy sought by aggrieved parents in cases of both intra and inter-country parental child removal. This is because there is no other statutory remedy prescribed under the Indian law for seeking sole custody of a child by an aggrieved parent seeking exclusion of the other parent's parental rights. Often, the Supreme Court or the High Court concerned remands the matters to a Guardian Judge or a Family Court or a Trial Court when disputed questions of facts are involved requiring evidence to be led, which is not possible in a writ jurisdiction under Articles 32 or 226 of the Indian Constitution before the Supreme Court or a High Court. Hence, inter-parent, inter-country child custody matters may land up before a Guardian Judge in a Family Court or Trial Court, if the High Court or the Supreme Court in writ jurisdiction is unable to determine the factual aspects requiring evidence to be led by the parties. Therefore, the inter-parental child custody dispute may be remanded to the Guardian Judge in a Family Court or a Trial Court in such a situation, even in cases of inter-country child removal where, despite a foreign court order, summary removal is not directed by the High Court or the Supreme Court.

**30.** However, precedents of Courts in India indicate that the controlling consideration governing the custody of the children is their welfare and not the rights of the parents litigating before the Indian Court in child custody cases.

#### f. INDIA AND THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

**31.** As of now, India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above, in which matters of child custody are agitated in different courts in different proceedings, the principles of The Hague Convention cannot be enforced on Indian Courts. Different recent decisions indicate a trend that Indian Courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign Court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign Court orders of child custody are no longer mechanically enforced and normally the Courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign Court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

**32.** India, not being a signatory to The Hague Convention of 1980 on the Civil Aspects of International Child Abduction, questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

#### g. THE POSITION OF INDIAN LAW ON CHILD ABDUCTION

**33.** India is a vast territorial jurisdiction comprising of 29 States and 7 Union Territories spread over 3.28 million sq. kilometers. Every State in India has an individual High Court which governs the internal District Courts in the particular



territory of that State. The High Court is free to frame its procedural rules regarding practices and rules to be followed within its jurisdiction. Depending on the location of a Family Court or Trial Court i.e. Guardian Judge, the practices in deciding child custody disputes may vary. Hence, the time frame of deciding an inter-parental inter-country child removal may vary as per local rules, practices and procedures.

**34.** Even though India has enacted a Family Courts Act, 1984, at the discretion of every Individual State to constitute a Family Court in its Districts in the State, most States in India do not have Family Courts. Hence, majority of the jurisdictions in States in India do not have Family Courts or Specialist Judges trained to handle only Family Court matters. Therefore, a normal Civil Judge in the Trial Court may, in addition to his other duties and judicial functions, also be a Guardian Judge under the Guardian and Wards Act, 1890, upon being so notified and designated by the High Court. Consequently, when a matter is before an ordinary Civil Judge in the Trial Court in his role as a Guardian Judge, the time frame within which he will be able to decide a child custody dispute is impossible to predict since his pre-occupation with other nature of disputes on his board may vary. Therefore, by no stretch of imagination, any time frame can be predicted. Even when the Judge presiding heads a Family Court, a lot may depend on the pre-occupation of the Court with other matters before the Family Court and the workload of the Family Court which again makes it impossible to predict a time frame.

**35.** The High Courts and the Supreme Court of India entertain petitions for issuance of a writ of Habeas Corpus for securing the custody of the minor at the behest of the parent who lands on Indian soil alleging violation of a foreign Court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective speedy solution as a redressal for violation of fundamental rights.

**36.** Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent, seeking to enforce a foreign Court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past over three decades.

**37.** That if the matter is taken up in a Habeas Corpus writ petition in the High Court or the Supreme Court, it is the pure discretion of that Court to hold a summary enquiry or a detailed investigation in that particular case. India follows a procedure of detailed bulky written pleadings followed by hearing arguments at length. Depending on the pre-occupation of a Bench with other matters and the workload of the Court, it may be next to impossible to define a time frame for deciding a child custody dispute. Even at the High Court or the Supreme Court, there are no dedicated Family Judges or any Family Division. Therefore, depending on the entire roster of the Court and its pre-occupation with other matters, every individual Bench will take up an inter-parental child custody dispute depending on other important matters before the Court. This again makes the whole situation unpredictable in point of identifying a time frame.

**38.** That the issue of effectiveness of the procedure is again a very open ended answer. If the petition before the Guardian Judge is favorably decided in a positive decision favoring a foreign aggrieved parent, the matter may not rest there. For enforcing the foreign court order directing return of a child, the aggrieved foreign parent may still have to invoke the writ jurisdiction of the High Court or the Supreme Court seeking a direction for the return of the child. Meanwhile, if the decision of the Guardian Judge is appealed against by the abducting parent, the matter may be further delayed. Ultimately as and when a decision comes by the High Court, the matter may be appealed against in the Supreme Court. This process may take time

and thus the effectiveness of the procedure is open ended till the last appeal is exhausted in the Supreme Court.

#### h. CONCLUSION OF CASE LAW ANALYSIS

**39.** An analysis of the Indian case law reveals that until 1997, Indian Courts whenever approached by an aggrieved parent, invariably exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights. However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance. Thereafter, child removal and custody matters now get decided on merits in India and every individual decision is based on the facts of the case and there is no set pattern of decisions consistently being followed.

**40.** However, a different trend set by some of the recent decisions above indicates that aggrieved parents who invoke the jurisdiction of the High Court in a writ of Habeas Corpus are not non-suited simply for the reason that the determination of the best interest of the child can be done only by an adjudicatory process in the Family Court or before the Guardian Judge. The Habeas Corpus remedy to enforce the child custody order of a foreign court is proving to be effective and result oriented. These recent decisions also indicate a trend in respecting foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of such foreign court decisions.

**41.** Generally, the position varies on the facts and circumstances of each case and no assurance or guarantee can be given that the children will be returned back from India on the strength of a foreign court Order since every matter is determined and decided on its independent merits. This is regardless of the fact that recent Supreme Court decisions have handed down general principles to be observed in inter-parental child removal matters of foreign jurisdictions.

**42.** Since, inter-country inter-parental child removal is not defined by any statute and is not considered an offence under any existing codified law operating in India, the tendency to go into the merits of the case even on jurisdictional issues, tends to cause delay, prejudice the rights of an aggrieved parent and prevent summary return of a child to its home in a foreign jurisdiction.

**43.** Since, there is no statute in India defining, recognising or identifying inter-parental child removal, especially in the international context, the Indian Courts over a passage of time have been adjudicating matters on the basis of individual facts and circumstances to decide as to what relief should be granted to the parties. Hence, there is a variation of decisions and there is no consistent view point. The welfare of the child principle being the paramount consideration, there is a tendency among Indian Courts to digress from a consistent approach and accordingly, precedents may be distinguished or differed depending on the factual matrix and circumstances, which may differ from case to case. Thus, the jurisprudence in child abduction law varies.

#### i. POSITION OF FOREIGN COURT ORDERS IN INDIA

**44.** The principles governing the validity of foreign court orders are laid down in section 13 of the Indian Code of Civil Procedure, 1908 (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in Section 13, CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

**45.** It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the



children being of paramount importance.

**46.** Section 14 of the CPC talks presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

**j. NO PROVISION FOR MIRROR ORDERS IN INDIA**

**47.** In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known to the English law, but not to the Indian legal system. Hence, it is not possible to approach a Court in India for issuing a mirror order on the strength of a foreign Court Order whereby a mechanical return of children can be sought back to the overseas jurisdiction if the foreign court order is violated in India. Accordingly, an independent judicial remedy will have to be invoked in a Court of competent jurisdiction in India for a fresh adjudication and determination on the basis of the principle of the welfare of the child and the best interest rule. The foreign court order granting custody or visitation will form only one consideration before the Indian Court to determine rights of parties. The independent opinion of the children concerned too will be heard in such a process. However, simply seeking return of children on the strength of a foreign court order is not possible. There is no provision in Indian law for mirror orders to be passed.

**48. k. A POSSIBLE SOLUTION**

**49.** With the increasing number of non-resident Indians abroad and multiple problems arising, leading to family conflicts, inter parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to The Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions. It is equally important that to create a uniform policy of law, some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Till such time, India becomes a part of the Hague Convention on Inter-parental Child Removal and enacts an internal legislation to give effect to the Hague Convention by creating a Central Authority or other coordinating body, the inconsistency in judicial decisions will remain. The Indian Courts decide individual matters on the facts and circumstances of every case and are not guided by any statutory or enabling provisions, which interpreted may provide uniformity and consistency. Consequently, issues of custody, removal, inter-parental conflicts and related aspects cannot find any uniform path of judicial interpretation.

**l. GENERAL CONCLUSION**

**50.** With the increasing number of non-resident Indians abroad and multiple problems arising leading to family conflicts, inter parental child removal to and from India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of Courts interacting with each other. Till India does not become a signatory to the Hague Convention, this may not be possible. A time has now come where it is not possible for the Indian Courts to stretch their limits to adapt to different foreign Court Orders arising in different jurisdictions.

It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law is enacted within India by adhering to the principles laid down in The Hague Convention. Divergent views emerging at different times may not be able to cope up to the rising number of such cases, which come up from time to time for interpretation. We in India are thus wanting for an expeditious acceptance and implementation of the International principles of inter-parental child removal which are couched in The Hague Convention. Let us not delay the path to resolution of these disputes. Removed children cannot be allowed to live on a no man's island.

**51.** In the light of the above detailed position of law on inter-parental child removal issues in India, the following two conclusions can be said to emerge. They are identified and stipulated as follows:

1. Firstly, India not being a signatory to the Hague Convention on Civil Aspects of International Child Abduction, Courts in India do not take judicial notice of the definition of "Child Removal" which finds mention in the Hague Convention. Inter-Parental Child Removal is not defined as an offence under any Civil or Criminal law in India. Hence, to establish it as a wrong within the meaning of The Hague Convention is extremely difficult. Consequently, deprivation of parental rights on the strength of a foreign court order from a convention country will not find an easy interpretation. Such parental rights will have to be established and proved afresh to step on the threshold of violations resulting thereupon. Again, these may depend on an independent assessment of the Indian Courts on the best interest and the welfare of the child principle on the basis of evidence before the Court.
2. Secondly, the practical difficulties in seeking implementation of a foreign court order if the children are not returned from India, may vary in different jurisdictions in India. To start with, the choice of the petition (Habeas Corpus under the Constitution of India or a Guardianship petition under the Guardian and Wards Act), the time frame for its decision, delays in hearing of the matter, time to be consumed in establishing evidence, and ultimately remedies of further appeals besides executing the Indian Court order, are all time consuming factors. It may be impossible to lay down any straight jacket formula of prescribing a defined time frame for an expeditious decision in seeking the return of the child from India. Further, if the matter is appealed to a Court of superior jurisdiction in India, it may again set off a final conclusion in the matter. Also, seeking implementation of visitation rights may require frequent visits to India since it will be practically impossible to seek temporary return to the foreign jurisdiction from India as long as the matter remains pending final decision before an Indian Court. The legal battles in India may thus be cumbersome, time consuming and requiring procedural formalities.

**52.** Hence, in the totality of the aforesaid situation, the need for India to have a codified and statutory law on the subject of inter-country, inter-parental child removal is the dire need of the hour. Despite the recommendation of the Law Commission of India in Report no. 218 of March 2009, that India should become a signatory to the Hague Convention to resolve the problem of inter-country child removal, the same has not happened and no domestic law defines or governs this problem till date. The deadlock continues and children suffer in silence in inter-country parental conflicts.

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**GOVERNMENT OF INDIA**

**LAW COMMISSION OF INDIA**

**Report No.263**

**The Protection of Children (Inter-Country  
Removal and Retention) Bill, 2016**

**October 2016**



डा० न्यायमूर्ति बलबीर सिंह चौहान  
 पूर्व न्यायधीश सर्वोच्च न्यायालय  
 अध्यक्ष  
 भारत का विधि आयोग  
 भारत सरकार  
 हिन्दुस्तान टाइम्स हाउस  
 कस्तूरबा गान्धी मार्ग, नई दिल्ली-110 001  
 दूरभाष : 23736758, फ़ैक्स : 23355741



**Dr. Justice B.S. Chauhan**  
 Former Judge Supreme Court of India  
 Chairman  
**Law Commission of India**  
 Government of India  
 Hindustan Times House  
 K.G. Marg, New Delhi-110 001  
 Telephone : 23736758, Fax : 23355741

D.O.No.6(3)292/2016-LC(LS)

17<sup>th</sup> October, 2016

*Sri Ravi Shankar Prasad Ji,*

The protection of children is, nowadays, recognized as a critical issue of national importance. The principle of 'best interest of the child' can be found in the provisions of the Convention on the Rights of the Child, 1989 which came into force on 2<sup>nd</sup> September, 1990 and the Preamble and object of the Hague Convention, 1980. In brief, the desire to protect children must be based upon the true interpretation of their best interests.

The High Court of Punjab and Haryana, in **Seema Kapoor & Anr. v. Deepak Kapoor & Ors.** CR No.6449/2006 vide order dated 24.02.2016, referred the matter to the Law Commission of India "to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on child abduction."

The Law Commission of India examined the issues involved and found that the Commission had already examined the said issues and submitted the 218<sup>th</sup> Report titled "**Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**" on 30<sup>th</sup> March 2009, advising the Government of India to sign the Hague Convention on the Civil Aspects of International Child Abduction, 1980, which came into force on 1<sup>st</sup> December, 1983. While examining these issues, the Law Commission found that the Government of India has already prepared a draft of the "**Civil Aspects of International Child Abduction Bill, 2016**", which attempted to bring the Bill in consonance with the Hague Convention, 1980 and has been put on the website of the Ministry of Women and Child Development.

Appreciating the importance of the matter and the concerns raised from time to time, the Law Commission decided to examine the matter meticulously and examined the various provisions of the said Bill thoroughly. On perusal of the said Bill, the Law Commission is of the opinion that it requires revision keeping in view the Legislative precedents

and practices followed in the drafting of Bills and to suitably harmonize its provisions with the Hague Convention 1980.

The Law Commission of India has prepared a comparative statement showing the provisions of the said Bill, placed on the website of the Ministry of Women and Child Development, and the revised Bill recommended by the Law Commission indicating the changes/modifications made by the Commission. The text of "THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016" as recommended by the Law Commission is attached as Annexure-II. I believe this 263<sup>rd</sup> Report of the Law Commission addresses the concerns relating to children and their parents and makes an attempt to set the stage for India to sign the Hague Convention, 1980.

I am enclosing a copy of the Report number 263<sup>rd</sup> for consideration by the Government.

The Commission acknowledges the contribution made by Ms. Aditi Sawant, Consultant to the Commission in preparation of the Report.

*with warmest regards.*

Yours sincerely,

*B.S. Chauhan*

**(Dr. Justice B.S. Chauhan)**

**Shri Ravi Shankar Prasad**  
Hon'ble Minister for Law & Justice  
Shastri Bhawan,  
New Delhi.

**Report No. 263**

**The Protection of Children (Inter-Country  
Removal and Retention) Bill, 2016**

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## 1. BACKGROUND

1.1 The High Court of Punjab and Haryana, in **Seema Kapoor & Anr. v. Deepak Kapoor & Ors.**, CR No.6449/2006 *vide* order dated 24.02.2016, referred the matter to the Law Commission of India “to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on child abduction.”

1.2 After receiving this reference, the Law Commission examined the issues involved and found that the Law Commission had already examined the said issues and submitted the 218<sup>th</sup> Report titled “**Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**” on 30 March 2009, advising the Government of India to sign the Hague Convention on the Civil Aspects of International Child Abduction, 1980, which came into force on 1<sup>st</sup> December, 1983 (hereinafter referred to as Hague Convention, 1980).

1.3 During the examination of the issues, the Commission also found that the Government of India has already prepared a draft of the “**Civil Aspects of International Child Abduction Bill, 2016**” (hereinafter referred to as the Bill), which is broadly in consonance and conformity with the Hague Convention, 1980. The said Bill has been put on the website of Ministry of Women and Child Development so that stakeholders may file their comments or make suggestions for improving the same.

## 2. INTRODUCTION

2.1 The world has become a global village. There is an increased movement of people from all cultures and backgrounds, due to the globalized job market. Thus, people from different countries and cultural backgrounds have optimistically created family units. More than three crores of Indians live in the foreign countries, having cross border matrimonial relationships. When such a kind of diverse family unit breaks down, children (sometimes babies) suffer, as they are dragged into international legal battle between their parents. Inter-spousal child removal can be termed as most unfortunate as the children are abducted by their own parents to India or to other foreign jurisdiction in violation of the interim/final orders of the *competent* courts or in violation of parental rights of the aggrieved parent. In such an eventuality, the child is taken to a State with a different legal system, culture and language. The child loses contact with the other parent and is transplanted in an entirely different society having different traditions and norms of life.

2.2 The preamble and object of the Hague Convention, 1980 and the International Child Abduction Bill, invokes the principle of 'best interests of the child'. In other words, the object of the aforementioned laws in obtaining the return of the child must be subordinate when considered against the child's interest. The desire to protect children must be based upon a true interpretation of their best interests.

2.3 The principle of 'best interests of the child' can also be found in the provisions of the Convention on the Rights of the Child, 1989, which came into force on 2nd September 1990. India ratified the Convention on 11th December, 1992. The Juvenile Justice (Care and Protection of Children) Act, 2000, (as re-enacted by Act 2 of 2016) defines the term 'best interests of the child' in clause (9) of section 2 as under:

*“best interest of child” means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and*

*needs, identity, social well-being and physical, emotional and intellectual development.'*

### 3. SOME JUDGEMENTS OF THE SUPREME COURT OF INDIA

3.1 In **re: McGrath (Infants)**, [1893] 1 Ch 143 Lindley LJ said:

*“The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”*

3.2 These words are relevant even a century later, and have found place in various Indian judicial pronouncements. The Courts referred to the Convention on the Rights of the Child, 1989 and emphasized the importance of the principle of best interests of the child in **Laxmi Kant Pandey v. Union of India**, AIR 1984 SC 469; **Gaurav Jain V. Union of India**, AIR 1997 SC 2021; and **Nil Ratan Kundu v. Abhijit Kundu**, (2008) 9 SCC 413.

3.3 The Supreme Court in **Dr. V. Ravi Chandran v. Union of India**, (2010) 1 SCC 174; and **Arathi Bandi v. Bandi Jagadrakshaka Rao**, AIR 2014 SC 918, directed to return the respective children to the country of their ‘habitual residence’ on the principle of ‘*comity of courts*’ principle for the determination of their best interests and welfare which is the prime consideration.

3.4 In **Roxann Sharma v. Arun Sharma**, AIR 2015 SC 2232, the Apex Court deprecated the practice of ‘forum shopping’ requiring the entitlement of custody rights of the other spouse to be judicially determined. The Court observed that:

*“...the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child’s welfare which is the focal point for consideration”.*

3.5 In such cases, the Court exercises its *parens patriae* jurisdiction to decide the best interests and welfare of the child. In view thereof, the issue of conflicting interests of the contesting parents remain insignificant. The Court exercise this extraordinary jurisdiction *de hors* the statutory right of the parties.

3.6 In **Ruchi Majoo v. Sanjeev Majoo**, AIR 2011 SC 1952, the Supreme Court emphasised that in case the child is not ‘ordinarily resident’ in the territorial limits of the Court, the Court must examine the matter independently.

3.7 Recently, the Supreme Court succinctly reiterated all principles, the Courts have applied over the course of years to judge cases of international parental abduction, in the case of **Surya Vadan****an v. State of Tamil Nadu**, AIR 2015 SC 2243. The Court stated that:

- principle of ‘comity of courts and nations’ must be respected and the principle of ‘best interest and welfare of the child’ should apply;
- rule of ‘comity of courts’ should not be jettisoned except for compelling special reasons to be recorded in writing by a domestic court;
- interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts; and
- an elaborate or summary enquiry by local courts when there is a pre-existing order of a competent foreign court must be based on reasons and should not be ordered as routine when a local court is seized of a child custody litigation.



3.8 To state it simply, the welfare of the child must have primary importance and secondly, the ‘principle of comity of courts’ – a principle of ‘self –restraint’, must be considered.

3.9 In cases, where the jurisdiction of the foreign court is not in doubt, the “first strike” principle could be applicable, namely, whichever court seized the matter first, ought to have prerogative of jurisdiction in adjudicating the welfare of the child. Further, whenever the matter is pending in a foreign court and interim order has been passed by the said court, the Indian court should not proceed with the matter.

3.10 It has repeatedly been held by the Courts that repatriation of the child to the foreign land should not (a) cause any moral, physical, social, cultural or psychological harm to the child; (b) cause any legal harm to the parent with whom the child is in India; (c) violate the fundamental principles of human rights and freedoms of the receiving country, i.e., where the child is being held and; (d) considering the child welfare principle, due importance must be given to the primary care-giver of the child.

3.11 More so, in such matters, it is of primary importance to decide whether the foreign court has jurisdiction over the child in question if the child is ‘ordinarily resident’ in the foreign court’s territorial jurisdiction, and, then the order of the foreign court must be given due weight and respect. No litigant can be permitted to defy and decline compliance to an interim or final order of a court merely, because one of the parents is of the opinion that the order is incorrect. (*vide* **Surya Vandanan v. State of Tamil Nadu**)

#### 4. JUDGEMENTS OF SUPREME COURTS OF CANADA, UNITED KINGDOM AND UNITED STATES OF AMERICA

4.1 In **Thomson v. Thomson**, (1994) 3 SCR 551, the Supreme Court of Canada while dealing with the issue as what should be the magnitude of physical, moral or cultural harm, which may justify refusal of the order of return of the child to his or her 'habitual residence', explained that harm must be "to a degree that also amounts to intolerable situation". It must be a "weighty" risk of "substantial" psychological harm. "Something greater than that would normally be expected on taking a child away from one parent and passing him to another."

4.2 In **the matter of S (a Child)**, (2012) UKSC 10, the UK Supreme Court referred to its own judgment in **Re E (Children) (Abduction: Custody Appeal)**, (2011) UKSC 27, and observed that a defence under Article 13 (b) of the Hague Convention, 1980 could be founded upon the anxieties of a parent about a return with the child to the state of 'habitual residence', which were not based upon objective risk to her, but nevertheless of such intensity as to be likely to destabilise the parenting of that child to the point at which the child's situation would become intolerable.

4.3 The United States Supreme Court in **Lozano v. Montoya Alvarez**, 34 S.Ct. 1224 (2014), a Hague Convention, 1980, case in US, relating to domestic violence, recognized the impact of domestic violence on the child, observing:

*"the return of the child may be refused if doing so would contravene fundamental principles ..... relating to the protection of human rights and fundamental freedom."*

## 5. DOMESTIC VIOLENCE IMPACTING CHILDREN

5.1 In case, a woman suffers from domestic violence and runs away along with the child from the place of 'habitual residence', though violence may not be against the child, it may have very serious impact and repercussions on the child. Thus, in such a case, the Court has to consider whether repatriation of the child would cause any moral, physical, social, cultural or psychological harm to the child or any other legal harm to the mother, with whom the child is in India or violates fundamental rights or human rights, as provided in the Hague Convention, 1980, itself.

5.2 Unfortunately, women involved in cross-jurisdictional divorces, 'holiday marriages' or 'limping marriages' have to face additional challenges in the custody battle, which also relate to jurisdiction, access to judicial recourse and resources. This may be viewed as a bias against the interests of women. The woman must not be put in a situation where she has to make the impossible choice between her children and putting up with abusive relationship in a foreign country. This kind of discord between the husband and wife also creates apprehension as to risk to the lives of the wife and her family members at the hands of the husband or others, and many a times, the party seeks police protection and the help of civil society/social workers.

5.3 Interestingly, the statistics, of particular import to the developing countries, where the conditions of women battling for divorce is deplorable, shows that globally, 68 per cent of the taking parents were mothers; 85 per cent of these respondent mothers were the primary caregivers of their children and 54 per cent had gone home to a country in which they held citizenship-even if that was not their 'habitual residence'.

## 6. SALIENT FEATURES OF THE HAGUE CONVENTION, 1980

6.1 Essentially, the Hague Convention, 1980 seeks to achieve two objectives namely—to protect a child from the harmful effect of such removal; and to secure prompt return and re-integration of the child in an environment of his or her ‘habitual residence’; and both these objectives correspond to the specific idea as to what constitutes the ‘best interest of the child’.

6.2 Salient features of the Hague Convention, 1980 are:

- It ensures rapid procedure for the return of the child wrongly removed to or retained in contracting party to its country of ‘habitual residence’;
- It ensures that rights of custody and of access under the law of one of the Contracting States are effectively respected in another Contracting State;
- It re-establishes *status quo ante* by returning the child to the country of ‘habitual residence’;
- A return order is not a final determination of the issue of custody, rather, it provides for return of the child to the jurisdiction which is most appropriate to determine the issues of custody and access; and
- Each country that has signed the Convention must have established a Central Authority, which processes such applications. The Convention lays down certain roles and functions of the Central Authority. This Authority must, *inter alia*, help locate children; encourage amicable solutions and; help process requests for return of children.

## 7. INITIATIVES OF THE GOVERNMENT OF INDIA

7.1 The recently drafted Indian Bill on International Parental Abduction is broadly in conformity with the Hague Convention, 1980 and mirrors its provisions. India is currently not a signatory to the Hague Convention, 1980. The Bill is an attempt to set the stage for India to sign the Convention.

- The Bill provides for the constitution of a Central Authority.
- A decision under the Hague Convention, 1980 concerning the return of the child is not a final determination on merits of the issue of custody.
- It outlines the role of the Central authorities with regard to a child, who is removed *to India, and from India to another Contracting State* of the Hague Convention, 1980.
- It lays down procedure for securing the return of a child and provides for the Central Authority to apply to the High Court for restoring custody of the child.
- It empowers the Court to deny custody on certain grounds. It allows the Courts in India to recognise decisions of State of the 'habitual residence' of the child. It also states that the Indian Court that wants to disregard the interim/final order of the foreign court must record reasons for the same.

7.2 The Bill empowers Indian Courts to seek a decision from Central Authorities of the Contracting State from which the child was removed.

7.3 So far as the Indian law as reflected in the provision of the Guardians and Wards Act, 1890 (8 of 1890) are concerned, the issue of custody of a child, remains always open and does not attain finality as it is always being considered to be temporary order made in existing circumstances. With the changed conditions and circumstances,

including the passage of time, the Court may vary such an order, if, it is so necessary in the interests and welfare of the child. The doctrines of '*estoppel*' and '*res judicata*' have no application in such a case (vide **Rosy Jacob v. Jacob A. Chakramakkal**, AIR 1973 SC 2090; and **Dr. Ashish Ranjan v. Dr. Anupama Tandon**, (2010) 14 SCC 274;)

## 8. CHILD ABDUCTION DISTINGUISHED FROM INTER-COUNTRY REMOVAL OF CHILDREN

8.1 Child abduction is dealt with stringently by most countries; but 'abduction' of the child across borders by his or her own parent is governed by a rather arcane corpus of laws. The heterogeneity of rules applicable to cases traditionally qualified as "child abduction cases" at both the national and the supranational level, add to the complexity of the legal treatment of "parental child abductions".

8.2 'Abduction' is explained under section 362 of the Indian Penal Code, 1860 as an act compelling or taking away a person by deceitful means inducing him to go from any place. Abduction as such, is not simply an offence rather is an auxiliary act not punishable in itself, but when it is accompanied by an intention to commit another offence, it *per se* becomes punishable as an offence. In the case of 'parental abduction', these so-called 'abductors', are most of the times, loving parents. The child is taken away by a parent to any other place because of the fear of losing his/her custody i.e. such an abduction, as stated earlier, is out of overwhelming love and affection and not to harm the child or achieve any other ulterior purpose. Therefore, the Hague Convention, 1980, although uses the word 'abduction', it is not intended as in an ordinary case of abduction under criminal jurisprudence. As such, the word 'abduction' within the Hague Convention, 1980, is to be considered as short hand for a more appropriate terminology, "wrongful removal or retention" which appears throughout in the text of the Hague Convention, 1980. Hence, at the outset, the Law Commission is of the Opinion that the word 'abduction' in the current Bill, be dispensed with.

8.3 Be that as it may, wrongful removal and retention not only causes serious prejudice to the other parent, but may have a serious impact on the over-all development of the child. More so, such wrongful removal and retention may be in utter disregard or in violation of the

order of the competent court regarding custody of the child. In this backdrop, many countries have made such wrongful removal and retention a punishable offence. In United Kingdom, the **Child Abduction Act, 1984** has very stringent provisions making such wrongful removal and retention, as an offence punishable with the imprisonment up to seven years.



## 9. RECOMMENDATIONS

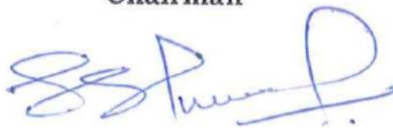
9.1 As the Law Commission of India has already submitted the Report and the Ministry of Women and Child Development has also drafted the Bill, we are of the considered opinion that submission of detailed report would not serve any purpose. However, on perusal of the draft Bill, the Law Commission is of the opinion that it requires revision keeping in view the foregoing discussions, the legislative precedents and practices followed in the drafting of Bills, and to suitably harmonise its provisions with the Hague Convention, 1980. A Comparative Statement showing the provisions of the draft Bill placed on the website of the Ministry of Women and Child Development and the Revised Bill recommended by the Law Commission of India indicating the changes/modifications made by the Law Commission is attached as **Annexure-I**. The text of the Protection of Children (Inter-Country Removal and Retention) Bill, 2016 as recommended by the Law Commission of India, is attached as **Annexure-II**.



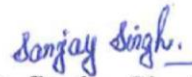
[Justice Dr. B.S. Chauhan]  
Chairman



[Justice Ravi R. Tripathi]  
Member



[Prof. (Dr.) S. Sivakumar]  
Member



[Dr. Sanjay Singh]  
Member-Secretary



[Dr. Suresh Chandra]  
Ex-officio Member



[Dr. G. Narayana Raju]  
Ex-officio Member

Annexure-I

**Comparative Statement showing the provisions of the draft Bill placed on the website of Ministry of Women and Child Development (WCD) and the Revised Bill recommended by the Law Commission of India**

Bill prepared by WCD	Revised Bill
<p align="center"><b>THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016</b></p> <p align="center">A BILL</p> <p>to secure the prompt return of children wrongfully removed to or retained in any Contracting State, to ensure that the rights of custody and access under the law of one Contracting State are respected in other Contracting States, and to establish a Central Authority and for matters connected therewith or incidental thereto.</p> <p>WHEREAS the interests of children are of paramount importance in matters relating to their custody;</p> <p>AND WHEREAS India is a party to the Hague Convention on the Civil Aspects of International Child Abduction;</p> <p>AND WHEREAS the said Convention entered into force on the 1<sup>st</sup> December, 1983;</p> <p>And WHEREAS the said Convention has for its main objective, to secure the prompt return of children wrongfully removed or retained in any contracting state, to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states;</p> <p>AND WHEREAS it is considered necessary to provide for the prompt return of children wrongfully removed or retained in a contracting</p>	<p align="center"><b>THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016</b></p> <p align="center">A BILL</p> <p>to ensure the prompt return of children wrongfully removed to, or retained in any Contracting State, to ensure that the rights of custody and access under the law of one of the Contracting States are <b>effectively</b> respected in <b>another</b> Contracting States, and to establish a Central Authority, <b>inter alia</b>, <b>for the purposes of providing assistance to help locate such children, encourage amicable solutions and help process of requests for return of children</b> and for matters connected therewith or incidental thereto.</p> <p>WHEREAS the <b>best</b> interests of children are of paramount importance in matters relating to their custody <b>in view of the Convention on the Rights of the Child, 1989</b> which came into force on 2<sup>nd</sup> September, 1990;</p> <p>AND WHEREAS the Hague Convention on the Civil Aspects of International Child Abduction, 1980, <b>came into force on the 1<sup>st</sup> December, 1983;</b></p> <p>AND WHEREAS it would be necessary to implement the said Convention in <b>so far as they relate to an expeditious return of a child who has been wrongfully removed or retained in contracting party to its country of his or her habitual residence in violation of the custody rights or access rights;</b></p>

state, and to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states, and thereby to give effect to the provisions of the said Convention;

Be it enacted by Parliament in the sixty-fifth year of the Republic of India as follows:-

**Chapter I  
Preliminary**

1. (1) This Bill may be called the Civil Aspects of International Child Abduction Bill, 2016
- (2) It extends to the whole of India (except Jammu and Kashmir)
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. In this Act, unless the context otherwise requires, -

- (a) "Applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;
- (b) "Central Authority" means the Central Authority established under Section 4;
- (c) "Contracting State" means a state signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

Be it enacted by Parliament in the ( ) year of the Republic of India as follows:-

**CHAPTER I  
Preliminary**

**1. Short title, extent, application and commencement.**

- (1) This Act may be called the **Protection of Children (Inter-Country Removal and Retention) Act, 2016**.
- (2) It extends to the whole of India except the **State of Jammu and Kashmir**.
- (3) **The provisions of this Act shall apply to every child who has not completed sixteenth year of age and has either wrongfully removed to, or retained in India, irrespective of his or her nationality, religion, or status in India.**
- (4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

**2. Definitions**

In this Act, unless the context otherwise requires,—

- (a) "applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other **State** party to the Convention for the return of a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing the effective exercise of rights of access pursuant to the **said** Convention;
- (b) "Central Authority" means the Central Authority **constituted under section 4**;
- (c) "Contracting State" means a State signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

<p>(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25<sup>th</sup> October, 1980, as set out in the First Schedule;</p> <p>(e) "Chairperson" means the Chairperson of the Central Authority;</p> <p>(f) "Habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred.</p> <p>(g) "Member" means a member of the Central Authority and includes the Chairperson, if any;</p> <p>(h) "prescribed" means prescribed by rules made under this Act;</p> <p>(i) "Right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;</p> <p>(j) "Right of custody" in relation to a child includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.</p> <p>3. (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered wrongful where –</p> <p>(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and</p> <p>(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or would have been so exercised, but for the removal or retention.</p> <p>(2) The rights of custody mentioned in Sub-section (1) above, may arise in particular:</p>	<p>(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on <b>the</b> 25<sup>th</sup> October, 1980, as set out in the Schedule;</p> <p>(e) "Chairperson" means the Chairperson of the Central Authority;</p> <p>(f) "habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one <b>of the</b> parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, <b>whichever occurred last</b>.</p> <p>(g) "member" means a member of the Central Authority and includes the Chairperson;</p> <p>(h) "prescribed" means prescribed by rules made under this Act;</p> <p>(i) "right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;</p> <p>(j) "right of custody" in relation to a child includes the <b>right to take care of the person of the child, to make long-term decisions about child's development and well-being and</b>, in particular, to determine the child's place of residence.</p> <p><b>3. Wrongful removal or retention</b></p> <p>(1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered a wrongful act where –</p> <p>(a) <b>such an act</b> is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and</p> <p>(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or <b>shall</b> have been so exercised, but for the removal or retention.</p> <p>(2) The rights of custody <b>specified</b> in the <b>Act</b>, may arise in particular—</p>
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<p>(a) by operation of law;</p> <p>(b) by reason of judicial or administrative decision; or</p> <p>(c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.</p> <p style="text-align: center;"><b>Chapter II</b></p> <p><b>Constitution, Powers and Functions of the Central Authority</b></p> <p>4. (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be appointed by the Central Government for the purposes of this Act, an officer of the Central Government not below the rank of Joint Secretary to the Government of India, to be called as the Central Authority.</p> <p>(2) Such Central Authority shall, unless removed from office under Section xx, hold office for a period not exceeding three years or until he attains the age of sixty years, whichever is earlier.</p> <p>(3) If a casual vacancy occurs in the office of the Central Authority, whether by reason of his death, termination or otherwise, such vacancy shall be filled within a period of ninety days by making afresh appointment in accordance with the provisions of sub-section (1) and the person so appointed shall hold office for the remainder of the term of office for which the Central Authority in whose place he is so appointed would have held that office.</p>	<p>(a)by operation of law; <b>or</b></p> <p>(b)by reason of judicial or administrative decision; or</p> <p>(c)by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.</p> <p style="text-align: center;"><b>CHAPTER II</b></p> <p><b>Constitution, Powers and Functions of Central Authority</b></p> <p><b>4. Constitution of Central Authority.</b></p> <p>(1) The Central Government may, by notification in the Official Gazette, constitute an Authority to be called as the Central Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act.</p> <p>(2) The Central Authority shall consist of , -</p> <p>(a) a <u>Chairperson</u>, who is an officer not below the rank of Joint Secretary to the Government of India, and</p> <p>(b) two members out of which at least one shall be an advocate with ten years of practicing experience and another member having such qualification, experience and expertise in matters related to inter-country removal or retention of child and child welfare as may be prescribed,</p> <p>to be appointed by the Central Government.</p> <p>(3) The tenure of the Chairperson or any member of the Central Authority shall be three years from the date on which he assumes office as such or till the age of his superannuation, whichever is earlier.</p> <p>(4) If a casual vacancy occurs in the office of the Chairperson or a member in the Central Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled within a period of ninety days by making a fresh appointment in accordance with the provisions of sub-section (2) and the person so appointed shall hold the office for the remainder of the term</p>
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<p>(5 - No such section proposed by WCD)</p> <p>5. The Central Authority or any other authority on its behalf shall take all appropriate measures to perform all or any of the following functions, namely:-</p> <p>(a) To discover the whereabouts of a child who has been wrongly removed to, or retained in, India, and where the child's place of residence in India is unknown, the Central Authority may obtain the assistance of the police to locate the child;</p> <p>(b) To prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such provisional measures as may be necessary;</p> <p>(c) To secure the voluntary return of any such child to the country in which such child had his or her habitual residence or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the Contracting State in which such child has his or her habitual residence;</p> <p>(d) To exchange, where desirable, information relating to any such child, with the appropriate authorities of a Contracting State;</p> <p>(e) To provide, on request, information of a general character, as</p>	<p>of office of the person in whose place he is appointed.</p> <p>(5) <b>The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed.</b></p> <p><b>5. Appointment of officers and other staff of Central Authority:-</b></p> <p>(1) <b>The Central Government may provide to the Central Authority, such officers and other staff as it considers necessary, for its efficient discharge of functions under this Act.</b></p> <p>(2) <b>The salary and allowances payable to and other terms and conditions of service of the officers and other staff of the Central Authority shall be such as may be prescribed.</b></p> <p><b>6. Functions of Central Authority.</b></p> <p>The Central Authority or any other officer authorized by the Central Authority in this behalf, shall take all appropriate measures while performing all or any of the following functions, namely—</p> <p>(a) to discover the whereabouts of a child who has been wrongfully removed to, or retained in, India, or outside India, and in case where the child's place of residence in India is not known, the Central Authority may obtain the assistance of the police to locate the child;</p> <p>(b) to prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such measures as may be <b>considered</b> necessary;</p> <p>(c) to secure the voluntary return of any such child to the country in which the child had his or her habitual residence, or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the contracting State in which the child has his or her habitual residence;</p> <p>(d) to exchange, where desirable, information relating to any such child, with the appropriate authorities of a contracting State.</p>
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to the law of India in connection with the implementation of the Convention in any Contracting State;

- (f) To institute judicial proceedings with a view to obtaining the return of any such child to the Contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for organising or securing or to institute judicial proceedings for securing the effective exercise of rights of access to a child who is in India;
- (g) Where circumstances so require, to facilitate the provision of legal aid or advice;
- (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the Contracting State in which the child has his or her habitual residence;
- (i) Such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

6. The Central Authority shall, while inquiring into any matter referred to in Section 5, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular, in respect of the following matters, namely:

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) discovery and production of any document;
- (3) receiving evidence on affidavit;
- (4) requisitioning any public record or copy thereof from any court or office;
- (5) issuing commissions for the examination of witnesses or documents.

- (e) to provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any Contracting State;

- (f) to institute judicial proceedings with a view to **secure** the return of any such child to the Contracting State in which that child has his or her habitual residence, and in appropriate cases, **to** make arrangements for instituting judicial proceedings for securing the effective exercise of rights of access to a child who is in India;

- (g) where circumstances so require, **to** facilitate **providing** legal aid or advice;

- (h) **to make** such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the Contracting State in which the child has his or her habitual residence;

- (i) such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

**7. Powers of Central Authority.**

The Central Authority shall, **have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court** under the Code of Civil Procedure, 1908 **(5 of 1908)** while trying a suit, in respect of the following matters, namely:-

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) **requiring** the discovery and production of documents;
- (3) receiving evidence on affidavits;
- (4) **subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872),** requisitioning any public record or **document or a copy of such record or document,** from any office;
- (5) issuing commissions for the examination of witnesses or documents.

<p style="text-align: center;"><b>Chapter III</b> <b>Procedure for Applications to Central Authority</b></p> <p>7. (1) The appropriate authority of a Contracting State, or a person, institution or other body claiming that a child has been wrongfully removed to or retained in India in breach of rights of custody, may apply to the Central Authority for assistance in securing the return of such child.</p> <p>(2) Every application made under Sub-section (1) shall substantially be in the form prescribed in the rules to this Act.</p> <p>(3) The application under Sub-section (1) may be accompanied by -</p> <p>(a) A duly authenticated copy of any relevant decision or agreement giving rise to the rights of custody claimed to have been breached;</p> <p>(b) A certificate or affidavit from a Central Authority or other competent authority of the Contracting State in which that child has his or her habitual residence or from a qualified person setting out the law of that Contracting State relating to the rights of custody alleged to have been breached;</p> <p>(c) Any other relevant document.</p> <p>8. Where, on receipt of an application under Section 6, the Central Authority has reason to believe that the child in respect of whom the application is made is in another Contracting State, it shall forthwith transmit the application to the appropriate authority of that Contracting State, and shall accordingly inform the appropriate authority or the applicant, as the case may be.</p> <p>9. Where the Central Authority is requested to provide information relating to a child under Section 5 (d), it may request a police officer to make a report to it in writing with respect to any matter relating to the child that appears to it to be relevant.</p>	<p style="text-align: center;"><b>Chapter III</b> <b>Procedure for Application to Central Authority</b></p> <p><b>8. Procedure for making application to Central Authority.</b></p> <p>(1) The appropriate authority of a contracting State, or a person, institution or any other body claiming that a child has been wrongfully removed to, or retained in India in breach of the rights of custody, may apply to the Central Authority for assistance in securing the return of the child.</p> <p>(2) Every application made under sub-section (1) <b>shall be in such form as may be</b> prescribed.</p> <p>(3) The application under sub-section (1) <b>shall</b> be accompanied by—</p> <p>(a) a duly authenticated copy of relevant decision or agreement giving rise to the rights of custody claimed to have been breached;</p> <p>(b) a certificate or affidavit from a Central Authority or <b>any</b> other competent authority of the contracting State in which that child has his or her habitual residence or from <b>an attorney or</b> a qualified person setting out the law of that contracting State relating to the rights of custody alleged to have been breached;</p> <p>(c) any other relevant document.</p> <p><b>9. Transfer of applications to contracting State.</b> Where, on receipt of an application under <b>section 8</b>, the Central Authority has reason to believe that the child in respect of whom the application <b>has been made</b> is in another contracting State, it shall forthwith transmit the application to the appropriate authority of that contracting State, and shall accordingly inform the appropriate authority or <b>as the case may be, the applicant referred to in sub-section(1) of section 8.</b></p>
<p><b>10. Calling Report from Police.</b></p>	



<p style="text-align: center;"><b>Chapter IV</b> <b>Refusal by Central Authority to accept Applications</b></p> <p>10. The Central Authority may refuse to accept an application made to it under Section 7 if it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded. On its refusal to accept an application, the Central Authority shall forthwith inform the appropriate authority or person, institution, or other body making the application, the reasons for such refusal.</p> <p>11. The Central Authority should not reject an application solely on the basis that additional documents or information are needed. Where there is a need for such additional information or documents, the requested Central Authority may ask the applicant to provide these additional documents or information. If the applicant does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.</p> <p>12. Any party aggrieved by the refusal of the Central Authority to accept an application made under Section 7 may appeal against such refusal to the Secretary, Ministry of Women and Child Development, Government of India. Such appeal shall be made within 14 days from the date of receipt of the decision of the Central Authority.</p>	<p>Where the Central Authority is requested to provide information relating to a child under clauses (a) and (d) of section 6, it may call for a report from the police in writing with respect to any matter relating to the child that appears to the Central Authority to be relevant.</p> <p style="text-align: center;"><b>CHAPTER IV</b> <b>Refusal by Central Authority to accept Applications</b></p> <p><b>11. Refusal by Central Authority to accept Applications.</b></p> <p>(1) The Central Authority may refuse to accept an application made to it under section 8, if it is manifest that the requirements of the Convention are not fulfilled or that the application is <b>otherwise not complete.</b></p> <p>(2) The Central Authority <b>on its refusal to accept an application</b>, shall forthwith inform the appropriate authority or person, institution, or <b>any</b> other body making the application, the reasons for such refusal.</p> <p><b>12. Additional Information.</b></p> <p>(1) The Central Authority <b>shall</b> not reject an application solely on the <b>ground</b> that additional documents or information are needed.</p> <p>(2) The Central Authority may, <b>where there is a need for such additional information or documents</b>, ask the applicant to provide these additional documents or information, <b>and</b> if the applicant does not do so within a reasonable period specified by the Central Authority, <b>it may decide not to</b> process the application.</p> <p><b>13. Appeal to Central Government.</b></p> <p>(1) Any party aggrieved by the refusal of the Central Authority to accept an application made under section 8, may appeal against such refusal <b>to the Central Government in such manner as may be prescribed.</b></p> <p>(2) Such an appeal shall be made within a <b>period of fourteen days</b> from the date of receipt of the decision of the Central Authority; <b>and the appeal shall be disposed off as early as possible but not later than six weeks from the date of receiving of the appeal.</b></p>
<p style="text-align: center;"><b>Chapter V</b> <b>Procedure for Application to High Court</b></p> <p>13. Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under Section 6, the Central Authority may apply to the High Court within whose</p>	<p style="text-align: center;"><b>CHAPTER V</b></p>

<p>territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the Contracting State in which the child has his or her habitual residence.</p> <p>14. Where an application is made to a High Court under Section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned, or of securing the child's residence pending the proceedings, or to prevent the child's return for being obstructed, or of otherwise preventing any change in the circumstances relevant to the determination of the application.</p> <p>15. Where the High Court is satisfied, upon an application made to it under Section 10, that:-</p> <p>(a) The child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of Section 3; and,</p> <p>(b) A period of one year has not yet elapsed between the date of the alleged removal or retention and the date of such application;</p> <p>It shall forthwith order the return of such child to the Contracting State in which the child had his or her habitual residence;</p> <p>Provided that the High Court may order the return of a child to the Contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, unless it is satisfied that the child is settled in his or her new environment.</p> <p>16. (1) Notwithstanding the provisions of Section 15, the High Court is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:</p> <p>(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;</p>	<p style="text-align: center;"><b>Procedure for Application to High Courts</b></p> <p><b>14. Power of Central Authority to apply to the High Court.</b> Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under <b>section 8</b>, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the contracting State in which the child has his or her habitual residence.</p> <p><b>15. Interim Order by High Courts.</b> Where an application is made to the High Court under section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for purpose of securing the welfare of the child concerned, <b>or for making such provisions for the child</b>, pending the proceedings, or to prevent the child's return, <b>or for otherwise</b> preventing any change in the circumstances relevant to the determination of the application.</p> <p><b>16. Power of High Courts to return child to contracting State.</b> Where the High Court is satisfied, upon an application made to it under <b>section 14</b>, that—</p> <p>(a) the child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of section 3; and,</p> <p>(b) a period of one year has not elapsed between the date of the alleged removal or retention and the date of such application;</p> <p>it may order the return of such child to the contracting State in which the child has his or her habitual residence:</p> <p><i>Provided</i> that the High Court may order the return of a child to the contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, <b>if the High Court</b> is satisfied that the child is not settled in his or her new environment.</p> <p><b>17. Possible exceptions to the return of the child</b></p>
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<p>or</p> <p>(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.</p> <p>(2) The High Court may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.</p> <p>(3) The return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.</p> <p>(4) In exercising its powers under this Section, the High Court shall have regard to any information relating to the social background of the child provided by the appropriate authority of the Contracting State in which that child has his or her habitual residence.</p> <p>(5) The High Court shall not refuse to make an order under this Section for the return of a child to the Contracting State in which that child has his or her habitual residence, on the grounds only that there is in force, a decision of a court in India or a decision entitled to be recognised by a court in India relating to the custody of such a child, but the High Court shall, in making an order under Section 10, take into account the reasons for such decision.</p> <p>17. (1) The appropriate authority, or a person, institution or other body of a Contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person specified in the application to a child who is in India.</p> <p>(2) An application made under Sub-section (1) shall be in such form in such manner as may be prescribed.</p>	<p>(1) Notwithstanding <b>anything contained in section 16</b>, the High Court may not pass the order of return of the child if the person, institution or <b>any other body, opposing the return</b>, establishes that-</p> <p>(a) the person, institution or <b>any other body</b> having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or</p> <p>(b) there is a grave risk that <b>the return of the child</b> would expose the child to physical or psychological harm or otherwise place the child in a <b>non-conducive</b> situation.</p> <p>(c) <b>the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).</b></p> <p>(2) The High Court may refuse to order the return of the child if -</p> <p>(a) <b>the court</b> finds that the child objects to being returned and has attained an age <b>and level</b> of maturity at which it is appropriate to take <b>into account of his or her views</b>;</p> <p>(b) the return is not permitted <b>under</b> the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms;</p> <p>(c) <b>the High Court, while</b> exercising powers under this section, <b>considers</b> any information relating to the social background of the child provided by the appropriate authority of the contracting State in which that child has his or her habitual residence, <b>as inappropriate</b>;</p> <p>(3) The High Court may not refuse to make an order under this section for the return of a child to the contracting State in which that child has his or her habitual residence, on the grounds only-</p> <p>(i) that there is in force, a decision of a court in India or,</p> <p>(ii) a decision entitled to be recognised by a court in India relating to the custody of such child:</p> <p><b>Provided that</b> the High Court shall record reasons while passing such orders relating to the return of a child.</p>
<p><b>18. Rights of access of person, institution or any other body to a child in India.</b></p>	

<p>18. (1) Without prejudice to any other means for securing the exercise of rights of access of any person to a child in India, the Central Authority may apply to the High Court for an order of the Court for securing the effective exercise of those rights.</p> <p>(2) Where the High Court is satisfied, on an application made to it under Sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, it may make such order as may be necessary to secure the effective exercise of those rights of access, and any conditions to which they are subject.</p> <p>19. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Section 3, the High Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.</p> <p>(2) The High Court may, before making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, request the central Authority to obtain from the relevant authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful under Section 3.</p> <p>20. Upon making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the High Court may order the person who removed that child to India, or who retained that child in India, to pay the expenses incurred by the Central Authority. These expenses may include costs incurred in locating the child, costs of legal representation of the Central Authority, and costs incurred in returning the child to the Contracting State in which that child has his or her habitual residence.</p>	<p>(1) The appropriate authority, or a person, institution or <b>any</b> other body of a contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India.</p> <p>(2) An application made under sub-section (1) shall be in such form and in such manner as may be prescribed.</p> <p><b>19. Application to the High Court for exercise of rights of access of any person to a child in India.</b></p> <p>(1) Without prejudice to any other means for securing the exercise of rights of access of any person, institution or <b>any other</b> body of the contracting State to a child in India, the Central Authority may apply to the High Court, for an order of the Court, for securing the effective exercise of those rights.</p> <p>(2) Where the High Court is satisfied, on an application made to it under sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, <b>the court may, subject to such conditions as may be considered necessary, make an order to secure the effective exercise of those rights of access.</b></p> <p><b>20. Relaxation of requirements of proof of foreign law.</b></p> <p>(1) <b>The High Court, while</b> ascertaining whether there has been a wrongful removal or retention within the meaning of section 3, <b>may take notice of the law of,</b> and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.</p> <p>(2) The High Court may, before making an order under <b>section 15</b> for the return of a child to the Contracting State in which that child has his or her habitual residence; <b>direct the Central Authority,</b> to obtain from the <b>concerned</b> authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful <b>within the meaning of</b> section 3.</p> <p><b>21. Costs.</b></p>
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state, and to ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states, and thereby to give effect to the provisions of the said Convention;

Be it enacted by Parliament in the sixty-fifth year of the Republic of India as follows:-

### Chapter I Preliminary

1. (1) This Bill may be called the Civil Aspects of International Child Abduction Bill, 2016
- (2) It extends to the whole of India (except Jammu and Kashmir)
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. In this Act, unless the context otherwise requires, -

- (a) "Applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;
- (b) "Central Authority" means the Central Authority established under Section 4;
- (c) "Contracting State" means a state signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

Be it enacted by Parliament in the ( ) year of the Republic of India as follows:-

### CHAPTER I Preliminary

#### 1. Short title, extent, application and commencement.

- (1) This Act may be called the **Protection of Children (Inter-Country Removal and Retention) Act, 2016**.
- (2) It extends to the whole of India except the **State of Jammu and Kashmir**.
- (3) **The provisions of this Act shall apply to every child who has not completed sixteenth year of age and has either wrongfully removed to, or retained in India, irrespective of his or her nationality, religion, or status in India.**
- (4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the **commencement** of that provision.

#### 2. Definitions

In this Act, unless the context otherwise requires,—

- (a) "applicant" means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other **State** party to the Convention for the return of a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing the effective exercise of rights of access pursuant to the **said** Convention;
- (b) "Central Authority" means the Central Authority **constituted under section 4**;
- (c) "Contracting State" means a State signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

<p>(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25<sup>th</sup> October, 1980, as set out in the First Schedule;</p> <p>(e) "Chairperson" means the Chairperson of the Central Authority;</p> <p>(f) "Habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred.</p> <p>(g) "Member" means a member of the Central Authority and includes the Chairperson, if any;</p> <p>(h) "prescribed" means prescribed by rules made under this Act;</p> <p>(i) "Right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;</p> <p>(j) "Right of custody" in relation to a child includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.</p> <p>3. (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered wrongful where –</p> <p>(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and</p> <p>(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or would have been so exercised, but for the removal or retention.</p> <p>(2) The rights of custody mentioned in Sub-section (1) above, may arise in particular:</p>	<p>(d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on <b>the</b> 25<sup>th</sup> October, 1980, as set out in the Schedule;</p> <p>(e) "Chairperson" means the Chairperson of the Central Authority;</p> <p>(f) "habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one <b>of the</b> parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, <b>whichever occurred last</b>.</p> <p>(g) "member" means a member of the Central Authority and includes the Chairperson;</p> <p>(h) "prescribed" means prescribed by rules made under this Act;</p> <p>(i) "right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;</p> <p>(j) "right of custody" in relation to a child includes the <b>right to take care of the person of the child, to make long-term decisions about child's development and well-being and</b>, in particular, to determine the child's place of residence.</p> <p><b>3. Wrongful removal or retention</b></p> <p>(1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered a wrongful act where –</p> <p>(a) <b>such an act</b> is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and</p> <p>(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or <b>shall</b> have been so exercised, but for the removal or retention.</p> <p>(2) The rights of custody <b>specified</b> in the <b>Act</b>, may arise in particular—</p>
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<p>(a) by operation of law;</p> <p>(b) by reason of judicial or administrative decision; or</p> <p>(c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.</p> <p style="text-align: center;"><b>Chapter II</b></p> <p><b>Constitution, Powers and Functions of the Central Authority</b></p> <p>4. (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be appointed by the Central Government for the purposes of this Act, an officer of the Central Government not below the rank of Joint Secretary to the Government of India, to be called as the Central Authority.</p> <p>(2) Such Central Authority shall, unless removed from office under Section xx, hold office for a period not exceeding three years or until he attains the age of sixty years, whichever is earlier.</p> <p>(3) If a casual vacancy occurs in the office of the Central Authority, whether by reason of his death, termination or otherwise, such vacancy shall be filled within a period of ninety days by making afresh appointment in accordance with the provisions of sub-section (1) and the person so appointed shall hold office for the remainder of the term of office for which the Central Authority in whose place he is so appointed would have held that office.</p>	<p>(a)by operation of law; <b>or</b></p> <p>(b)by reason of judicial or administrative decision; or</p> <p>(c)by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.</p> <p style="text-align: center;"><b>CHAPTER II</b></p> <p><b>Constitution, Powers and Functions of Central Authority</b></p> <p><b>4. Constitution of Central Authority.</b></p> <p>(1) The Central Government may, by notification in the Official Gazette, constitute an Authority to be called as the Central Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act.</p> <p>(2) The Central Authority shall consist of , -</p> <p>(a) a <u>Chairperson</u>, who is an officer not below the rank of Joint Secretary to the Government of India, and</p> <p>(b) two members out of which at least one shall be an advocate with ten years of practicing experience and another member having such qualification, experience and expertise in matters related to inter-country removal or retention of child and child welfare as may be prescribed,</p> <p>to be appointed by the Central Government.</p> <p>(3) The tenure of the Chairperson or any member of the Central Authority shall be three years from the date on which he assumes office as such or till the age of his superannuation, whichever is earlier.</p> <p>(4) If a casual vacancy occurs in the office of the Chairperson or a member in the Central Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled within a period of ninety days by making a fresh appointment in accordance with the provisions of sub-section (2) and the person so appointed shall hold the office for the remainder of the term</p>
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<p>(5 - No such section proposed by WCD)</p> <p>5. The Central Authority or any other authority on its behalf shall take all appropriate measures to perform all or any of the following functions, namely:-</p> <p>(a) To discover the whereabouts of a child who has been wrongly removed to, or retained in, India, and where the child's place of residence in India is unknown, the Central Authority may obtain the assistance of the police to locate the child;</p> <p>(b) To prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such provisional measures as may be necessary;</p> <p>(c) To secure the voluntary return of any such child to the country in which such child had his or her habitual residence or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the Contracting State in which such child has his or her habitual residence;</p> <p>(d) To exchange, where desirable, information relating to any such child, with the appropriate authorities of a Contracting State;</p> <p>(e) To provide, on request, information of a general character, as</p>	<p>of office of the person in whose place he is appointed.</p> <p>(5) <b>The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed.</b></p> <p><b>5. Appointment of officers and other staff of Central Authority:-</b></p> <p>(1) <b>The Central Government may provide to the Central Authority, such officers and other staff as it considers necessary, for its efficient discharge of functions under this Act.</b></p> <p>(2) <b>The salary and allowances payable to and other terms and conditions of service of the officers and other staff of the Central Authority shall be such as may be prescribed.</b></p> <p><b>6. Functions of Central Authority.</b></p> <p>The Central Authority or any other officer authorized by the Central Authority in this behalf, shall take all appropriate measures while performing all or any of the following functions, namely—</p> <p>(a) to discover the whereabouts of a child who has been wrongfully removed to, or retained in, India, or outside India, and in case where the child's place of residence in India is not known, the Central Authority may obtain the assistance of the police to locate the child;</p> <p>(b) to prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such measures as may be <b>considered</b> necessary;</p> <p>(c) to secure the voluntary return of any such child to the country in which the child had his or her habitual residence, or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the contracting State in which the child has his or her habitual residence;</p> <p>(d) to exchange, where desirable, information relating to any such child, with the appropriate authorities of a contracting State.</p>
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to the law of India in connection with the implementation of the Convention in any Contracting State;

- (f) To institute judicial proceedings with a view to obtaining the return of any such child to the Contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for organising or securing or to institute judicial proceedings for securing the effective exercise of rights of access to a child who is in India;
- (g) Where circumstances so require, to facilitate the provision of legal aid or advice;
- (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the Contracting State in which the child has his or her habitual residence;
- (i) Such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

6. The Central Authority shall, while inquiring into any matter referred to in Section 5, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular, in respect of the following matters, namely:

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) discovery and production of any document;
- (3) receiving evidence on affidavit;
- (4) requisitioning any public record or copy thereof from any court or office;
- (5) issuing commissions for the examination of witnesses or documents.

- (e) to provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any contracting State;

- (f) to institute judicial proceedings with a view to **secure** the return of any such child to the contracting State in which that child has his or her habitual residence, and in appropriate cases, **to** make arrangements for instituting judicial proceedings for securing the effective exercise of rights of access to a child who is in India;

- (g) where circumstances so require, **to** facilitate **providing** legal aid or advice;

- (h) **to make** such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the contracting State in which the child has his or her habitual residence;

- (i) such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

**7. Powers of Central Authority.**

The Central Authority shall, **have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court** under the Code of Civil Procedure, 1908 **(5 of 1908)** while trying a suit, in respect of the following matters, namely:-

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) **requiring** the discovery and production of documents;
- (3) receiving evidence on affidavits;
- (4) **subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872),** requisitioning any public record or **document or a copy of such record or document,** from any office;
- (5) issuing commissions for the examination of witnesses or documents.

<p style="text-align: center;"><b>Chapter III</b> <b>Procedure for Applications to Central Authority</b></p> <p>7. (1) The appropriate authority of a Contracting State, or a person, institution or other body claiming that a child has been wrongfully removed to or retained in India in breach of rights of custody, may apply to the Central Authority for assistance in securing the return of such child.</p> <p>(2) Every application made under Sub-section (1) shall substantially be in the form prescribed in the rules to this Act.</p> <p>(3) The application under Sub-section (1) may be accompanied by -</p> <p>(a) A duly authenticated copy of any relevant decision or agreement giving rise to the rights of custody claimed to have been breached;</p> <p>(b) A certificate or affidavit from a Central Authority or other competent authority of the Contracting State in which that child has his or her habitual residence or from a qualified person setting out the law of that Contracting State relating to the rights of custody alleged to have been breached;</p> <p>(c) Any other relevant document.</p> <p>8. Where, on receipt of an application under Section 6, the Central Authority has reason to believe that the child in respect of whom the application is made is in another Contracting State, it shall forthwith transmit the application to the appropriate authority of that Contracting State, and shall accordingly inform the appropriate authority or the applicant, as the case may be.</p> <p>9. Where the Central Authority is requested to provide information relating to a child under Section 5 (d), it may request a police officer to make a report to it in writing with respect to any matter relating to the child that appears to it to be relevant.</p>	<p style="text-align: center;"><b>Chapter III</b> <b>Procedure for Application to Central Authority</b></p> <p><b>8. Procedure for making application to Central Authority.</b></p> <p>(1) The appropriate authority of a contracting State, or a person, institution or any other body claiming that a child has been wrongfully removed to, or retained in India in breach of the rights of custody, may apply to the Central Authority for assistance in securing the return of the child.</p> <p>(2) Every application made under sub-section (1) shall be in such form as may be prescribed.</p> <p>(3) The application under sub-section (1) shall be accompanied by—</p> <p>(a) a duly authenticated copy of relevant decision or agreement giving rise to the rights of custody claimed to have been breached;</p> <p>(b) a certificate or affidavit from a Central Authority or any other competent authority of the contracting State in which that child has his or her habitual residence or from an attorney or a qualified person setting out the law of that contracting State relating to the rights of custody alleged to have been breached;</p> <p>(c) any other relevant document.</p> <p><b>9. Transfer of applications to contracting State.</b></p> <p>Where, on receipt of an application under section 8, the Central Authority has reason to believe that the child in respect of whom the application has been made is in another contracting State, it shall forthwith transmit the application to the appropriate authority of that contracting State, and shall accordingly inform the appropriate authority or as the case may be, the applicant referred to in sub-section(1) of section 8.</p>
	<p><b>10. Calling Report from Police.</b></p>

<p style="text-align: center;"><b>Chapter IV</b> <b>Refusal by Central Authority to accept Applications</b></p> <p>10. The Central Authority may refuse to accept an application made to it under Section 7 if it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded. On its refusal to accept an application, the Central Authority shall forthwith inform the appropriate authority or person, institution, or other body making the application, the reasons for such refusal.</p> <p>11. The Central Authority should not reject an application solely on the basis that additional documents or information are needed. Where there is a need for such additional information or documents, the requested Central Authority may ask the applicant to provide these additional documents or information. If the applicant does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.</p> <p>12. Any party aggrieved by the refusal of the Central Authority to accept an application made under Section 7 may appeal against such refusal to the Secretary, Ministry of Women and Child Development, Government of India. Such appeal shall be made within 14 days from the date of receipt of the decision of the Central Authority.</p> <p style="text-align: center;"><b>Chapter V</b> <b>Procedure for Application to High Court</b></p> <p>13. Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under Section 6, the Central Authority may apply to the High Court within whose</p>	<p>Where the Central Authority is requested to provide information relating to a child under clauses (a) and (d) of section 6, it may call for a report from the police in writing with respect to any matter relating to the child that appears to the Central Authority to be relevant.</p> <p style="text-align: center;"><b>CHAPTER IV</b> <b>Refusal by Central Authority to accept Applications</b></p> <p><b>11. Refusal by Central Authority to accept Applications.</b></p> <p>(1) The Central Authority may refuse to accept an application made to it under section 8, if it is manifest that the requirements of the Convention are not fulfilled or that the application is <b>otherwise not complete.</b></p> <p>(2) The Central Authority <b>on its refusal to accept an application</b>, shall forthwith inform the appropriate authority or person, institution, or <b>any</b> other body making the application, the reasons for such refusal.</p> <p><b>12. Additional Information.</b></p> <p>(1) The Central Authority <b>shall</b> not reject an application solely on the <b>ground</b> that additional documents or information are needed.</p> <p>(2) The Central Authority may, <b>where there is a need for such additional information or documents</b>, ask the applicant to provide these additional documents or information, <b>and</b> if the applicant does not do so within a reasonable period specified by the Central Authority, <b>it may decide not to</b> process the application.</p> <p><b>13. Appeal to Central Government.</b></p> <p>(1) Any party aggrieved by the refusal of the Central Authority to accept an application made under section 8, may appeal against such refusal <b>to the Central Government in such manner as may be prescribed.</b></p> <p>(2) Such an appeal shall be made within a <b>period of fourteen days</b> from the date of receipt of the decision of the Central Authority; <b>and the appeal shall be disposed off as early as possible but not later than six weeks from the date of receiving of the appeal.</b></p> <p style="text-align: center;"><b>CHAPTER V</b></p>
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<p>territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the Contracting State in which the child has his or her habitual residence.</p> <p>14. Where an application is made to a High Court under Section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned, or of securing the child's residence pending the proceedings, or to prevent the child's return for being obstructed, or of otherwise preventing any change in the circumstances relevant to the determination of the application.</p> <p>15. Where the High Court is satisfied, upon an application made to it under Section 10, that:-</p> <p>(a) The child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of Section 3; and,</p> <p>(b) A period of one year has not yet elapsed between the date of the alleged removal or retention and the date of such application;</p> <p>It shall forthwith order the return of such child to the Contracting State in which the child had his or her habitual residence;</p> <p>Provided that the High Court may order the return of a child to the Contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, unless it is satisfied that the child is settled in his or her new environment.</p> <p>16. (1) Notwithstanding the provisions of Section 15, the High Court is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:</p> <p>(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;</p>	<p style="text-align: center;"><b>Procedure for Application to High Courts</b></p> <p><b>14. Power of Central Authority to apply to the High Court.</b> Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under <b>section 8</b>, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the contracting State in which the child has his or her habitual residence.</p> <p><b>15. Interim Order by High Courts.</b> Where an application is made to the High Court under section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for purpose of securing the welfare of the child concerned, <b>or for making such provisions for the child</b>, pending the proceedings, or to prevent the child's return, <b>or for otherwise</b> preventing any change in the circumstances relevant to the determination of the application.</p> <p><b>16. Power of High Courts to return child to contracting State.</b> Where the High Court is satisfied, upon an application made to it under <b>section 14</b>, that—</p> <p>(a) the child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of section 3; and,</p> <p>(b) a period of one year has not elapsed between the date of the alleged removal or retention and the date of such application;</p> <p>it may order the return of such child to the contracting State in which the child has his or her habitual residence:</p> <p><i>Provided</i> that the High Court may order the return of a child to the contracting State in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention and the date of such application, <b>if the High Court</b> is satisfied that the child is not settled in his or her new environment.</p> <p><b>17. Possible exceptions to the return of the child</b></p>
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<p>or</p> <p>(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.</p> <p>(2) The High Court may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.</p> <p>(3) The return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.</p> <p>(4) In exercising its powers under this Section, the High Court shall have regard to any information relating to the social background of the child provided by the appropriate authority of the Contracting State in which that child has his or her habitual residence.</p> <p>(5) The High Court shall not refuse to make an order under this Section for the return of a child to the Contracting State in which that child has his or her habitual residence, on the grounds only that there is in force, a decision of a court in India or a decision entitled to be recognised by a court in India relating to the custody of such a child, but the High Court shall, in making an order under Section 10, take into account the reasons for such decision.</p> <p>17. (1) The appropriate authority, or a person, institution or other body of a Contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person specified in the application to a child who is in India.</p> <p>(2) An application made under Sub-section (1) shall be in such form in such manner as may be prescribed.</p>	<p>(1) Notwithstanding <b>anything contained in section 16</b>, the High Court may not pass the order of return of the child if the person, institution or <b>any other body, opposing the return</b>, establishes that-</p> <p>(a) the person, institution or <b>any other body</b> having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or</p> <p>(b) there is a grave risk that <b>the return of the child</b> would expose the child to physical or psychological harm or otherwise place the child in a <b>non-conducive</b> situation.</p> <p>(c) <b>the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).</b></p> <p>(2) The High Court may refuse to order the return of the child if -</p> <p>(a) <b>the court</b> finds that the child objects to being returned and has attained an age <b>and level</b> of maturity at which it is appropriate to take <b>into account of his or her views</b>;</p> <p>(b) the return is not permitted <b>under</b> the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms;</p> <p>(c) <b>the High Court, while</b> exercising powers under this section, <b>considers</b> any information relating to the social background of the child provided by the appropriate authority of the contracting State in which that child has his or her habitual residence, <b>as inappropriate</b>;</p> <p>(3) The High Court may not refuse to make an order under this section for the return of a child to the contracting State in which that child has his or her habitual residence, on the grounds only-</p> <p>(i) that there is in force, a decision of a court in India or,</p> <p>(ii) a decision entitled to be recognised by a court in India relating to the custody of such child:</p> <p><b>Provided that</b> the High Court shall record reasons while passing such orders relating to the return of a child.</p>
<p><b>18. Rights of access of person, institution or any other body to a child in India.</b></p>	

<p>18. (1) Without prejudice to any other means for securing the exercise of rights of access of any person to a child in India, the Central Authority may apply to the High Court for an order of the Court for securing the effective exercise of those rights.</p> <p>(2) Where the High Court is satisfied, on an application made to it under Sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, it may make such order as may be necessary to secure the effective exercise of those rights of access, and any conditions to which they are subject.</p> <p>19. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Section 3, the High Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.</p> <p>(2) The High Court may, before making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, request the central Authority to obtain from the relevant authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful under Section 3.</p> <p>20. Upon making an order under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the High Court may order the person who removed that child to India, or who retained that child in India, to pay the expenses incurred by the Central Authority. These expenses may include costs incurred in locating the child, costs of legal representation of the Central Authority, and costs incurred in returning the child to the Contracting State in which that child has his or her habitual residence.</p>	<p>(1) The appropriate authority, or a person, institution or <b>any</b> other body of a contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India.</p> <p>(2) An application made under sub-section (1) shall be in such form and in such manner as may be prescribed.</p> <p><b>19. Application to the High Court for exercise of rights of access of any person to a child in India.</b></p> <p>(1) Without prejudice to any other means for securing the exercise of rights of access of any person, institution or <b>any other</b> body of the contracting State to a child in India, the Central Authority may apply to the High Court, for an order of the Court, for securing the effective exercise of those rights.</p> <p>(2) Where the High Court is satisfied, on an application made to it under sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, <b>the court may, subject to such conditions as may be considered necessary, make an order to secure the effective exercise of those rights of access.</b></p> <p><b>20. Relaxation of requirements of proof of foreign law.</b></p> <p>(1) <b>The High Court, while</b> ascertaining whether there has been a wrongful removal or retention within the meaning of section 3, <b>may take notice of the law of,</b> and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.</p> <p>(2) The High Court may, before making an order under <b>section 15</b> for the return of a child to the Contracting State in which that child has his or her habitual residence; <b>direct the Central Authority,</b> to obtain from the <b>concerned</b> authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful <b>within the meaning of</b> section 3.</p> <p><b>21. Costs.</b></p>
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<p>21. An order made by the High Court under Section 13 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom an order relates.</p> <p>22. Where an order is made under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements as are necessary to be made in accordance with the order for the return of such child to such Contracting State.</p> <p style="text-align: center;"><b>Chapter VI</b> <b>Application in respect of child removed from India</b></p> <p>23. (1) A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of custody of such person, institution or other body, may apply to the Central Authority for assistance in securing the return of that child to India.</p> <p>(2) On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in securing the return of that child to India.</p> <p>(3) The rights of custody mentioned in Sub-section (1) above, include rights of custody accruing to any person, institution or other body by operation of law;</p> <p>(a) by reason of judicial or administrative decision; or</p> <p>(b) by reason of an agreement having legal effect under the law of India.</p> <p>24. The High Court may, on application made by or on behalf of the appropriate authority of the Contracting State, declare that the removal of a child to that Contracting State or the retention of that</p>	<p>(1) <b>The High Court may, while making an order under section 15 for the return of a child to the contracting State in which that child has his or her habitual residence, order the person who removed that child to India, or who retained the child in India, to pay the expenses incurred by the Central Authority.</b></p> <p>(2) <b>The expenses referred to in sub-section (1), may include costs incurred in locating the child, costs of legal proceedings incurred by the Central Authority, and costs incurred in returning the child to the contracting State in which that child has his or her habitual residence.</b></p> <p><b>22. Adjudication not to cover determination of custody rights of parent.</b> An order made by the High Court under section 16 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom the order relates.</p> <p><b>23. Arrangements to return a child to Contracting State.</b> Where an order is made under section 16 for the return of a child to the contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements, as are necessary, to be made in accordance with the order for the return of the child to such contracting State <b>within a period of sixty days from the date of such order.</b></p> <p style="text-align: center;"><b>CHAPTER VI</b> <b>Application in respect of child removed from India</b></p> <p><b>24. Application to Central Authority for return of child to India.</b></p> <p>(1) A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of rights of custody of such person, institution or any other body, may apply to the Central Authority for assistance in securing the return of that child to India.</p> <p>(2) <b>Every application made under sub-section (1) shall be made in such form as may be prescribed.</b></p> <p>(3) On receipt of an application under sub-section (1), the Central Authority shall <b>forthwith</b> apply to the appropriate authority, <b>in the manner, if any, specified in the contracting State to which the child is alleged to have been removed or retained, for assistance in securing the return of that child to India.</b></p>
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<p>child in that Contracting State is wrongful within the meaning of Section 3.</p> <p style="text-align: center;"><b>Chapter VII Rights of Access</b></p> <p>25. A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of access of such person, institution or other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of rights of access.</p> <p>26. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of Contracting States in the same way as an application for the return of a child.</p> <p>27. On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in making arrangements to organise or secure the effective exercise of rights of access.</p> <p>(28. No such provision made by WCDD)</p>	<p>(Provision relating to Declaratory Powers of High Court not necessary in view of clause 16)</p> <p style="text-align: center;"><b>CHAPTER VII Rights of Access</b></p> <p><b>25. Rights of access of person, institution or body in India.</b> A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of the rights of access of such person, institution or any other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of the rights of access, in such form as may be prescribed.</p> <p><b>26. Application to Central Authority of Contracting State to exercise rights of access of any person, institution or body in India.</b> An application to make arrangements for organising or securing the effective exercise of rights of access under section 25 shall be presented forthwith to the Central Authority of the Contracting State in the same manner as an application for the return of a child under section 24.</p> <p><b>27. Coordination between Central Authorities to secure rights of access.</b> On receipt of an application under section 26, the Central Authority shall forthwith apply to the appropriate authority, in the manner if any, specified, in the Contracting State to which the child is alleged to have been wrongfully removed, or retained, for assistance in making arrangements to secure, or organise the effective exercise of rights of access.</p> <p style="text-align: center;"><b>CHAPTER VIII</b></p>
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<p>21. An order made by the High Court under Section 13 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom an order relates.</p> <p>22. Where an order is made under Section 13 for the return of a child to the Contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements as are necessary to be made in accordance with the order for the return of such child to such Contracting State.</p> <p style="text-align: center;"><b>Chapter VI</b> <b>Application in respect of child removed from India</b></p> <p>23. (1) A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of custody of such person, institution or other body, may apply to the Central Authority for assistance in securing the return of that child to India.</p> <p>(2) On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in securing the return of that child to India.</p> <p>(3) The rights of custody mentioned in Sub-section (1) above, include rights of custody accruing to any person, institution or other body by operation of law;</p> <p style="padding-left: 2em;">(a) by reason of judicial or administrative decision; or</p> <p style="padding-left: 2em;">(b) by reason of an agreement having legal effect under the law of India.</p> <p>24. The High Court may, on application made by or on behalf of the appropriate authority of the Contracting State, declare that the removal of a child to that Contracting State or the retention of that</p>	<p>(1) <b>The High Court may, while making an order under section 15 for the return of a child to the contracting State in which that child has his or her habitual residence, order the person who removed that child to India, or who retained the child in India, to pay the expenses incurred by the Central Authority.</b></p> <p>(2) <b>The expenses referred to in sub-section (1), may include costs incurred in locating the child, costs of legal proceedings incurred by the Central Authority, and costs incurred in returning the child to the contracting State in which that child has his or her habitual residence.</b></p> <p><b>22. Adjudication not to cover determination of custody rights of parent.</b> An order made by the High Court under section 16 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom the order relates.</p> <p><b>23. Arrangements to return a child to Contracting State.</b> Where an order is made under section 16 for the return of a child to the contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements, as are necessary, to be made in accordance with the order for the return of the child to such contracting State <b>within a period of sixty days from the date of such order.</b></p> <p style="text-align: center;"><b>CHAPTER VI</b> <b>Application in respect of child removed from India</b></p> <p><b>24. Application to Central Authority for return of child to India.</b></p> <p>(1) A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of rights of custody of such person, institution or any other body, may apply to the Central Authority for assistance in securing the return of that child to India.</p> <p>(2) <b>Every application made under sub-section (1) shall be made in such form as may be prescribed.</b></p> <p>(3) On receipt of an application under sub-section (1), the Central Authority shall <b>forthwith</b> apply to the appropriate authority, <b>in the manner, if any, specified in the contracting State to which the child is alleged to have been removed or retained, for assistance in securing the return of that child to India.</b></p>
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child in that Contracting State is wrongful within the meaning of Section 3.

**Chapter VII  
Rights of Access**

25. A person, institution or other body in India claiming that a child has been wrongfully removed to a Contracting State or is being wrongfully retained in a Contracting State in breach of rights of access of such person, institution or other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of rights of access.

26. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of Contracting States in the same way as an application for the return of a child.

27. On receipt of an application under Sub-section (1), the Central Authority shall apply in the appropriate manner to the appropriate authority in the Contracting State to which such child is alleged to have been removed or in which such child is alleged to be retained, for assistance in making arrangements to organise or secure the effective exercise of rights of access.

(28. No such provision made by WCDD)

(Provision relating to Declaratory Powers of High Court not necessary in view of clause 16)

**CHAPTER VII  
Rights of Access**

**25. Rights of access of person, institution or body in India.**

A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of the rights of access of such person, institution or any other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of the rights of access, in such form as may be prescribed.

**26. Application to Central Authority of Contracting State to exercise rights of access of any person, institution or body in India.**

An application to make arrangements for organising or securing the effective exercise of rights of access under section 25 shall be presented forthwith to the Central Authority of the Contracting State in the same manner as an application for the return of a child under section 24.

**27. Coordination between Central Authorities to secure rights of access.**

On receipt of an application under section 26, the Central Authority shall forthwith apply to the appropriate authority, in the manner if any, specified, in the Contracting State to which the child is alleged to have been wrongfully removed, or retained, for assistance in making arrangements to secure, or organise the effective exercise of rights of access.

**CHAPTER VIII**

<p>(29. No such provision made by WCD)</p>	<p style="text-align: center;"><b>Offences and Penalties</b></p> <p><b>28. Punishment for wrongful removal or retention.</b> Whoever wrongfully removes or retains a child either himself or through other person from the custody of a parent in terms of sub-section (2) of section 3 of this Act, is said to commit the offence of wrongful removal or retention, and shall, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both.</p> <p><b>29. Punishment for willful misrepresentation or concealment of fact.</b> Whoever, by willful misrepresentation, or by concealment of a material fact, which he is bound to disclose, related to the location or information of the child under clause (a) of section 6, voluntarily causes to prevent the safe return of the child in pursuance to an order made under section 15 or section 16 of this Act shall be guilty of an offence punishable with imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both.</p> <p style="text-align: center;"><b>CHAPTER IX Miscellaneous</b></p> <p><b>30. Expeditious process.</b> (1) The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children. (2) If the judicial or administrative authority concerned has not reached a decision within a <b>period of six weeks</b> from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own <b>motion</b> or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for delay. (3) If <b>any information</b> or reply is received by the Central Authority of the requested State, that Authority shall transmit the <b>same</b> to the Central Authority of the requesting State, or to the applicant, as the case may be.</p> <p><b>31. Reports and returns</b> (1) The Central Authority shall submit an annual report giving full account of its activities under this Act to the Central Government <b>in such</b> form as may be</p>
<p>(29. No such provision made by WCD)</p>	<p style="text-align: center;"><b>Chapter VIII Miscellaneous</b></p> <p>28. (1) The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. (2) If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.</p> <p>29. The Central Authority shall submit an annual report to the Central Government through the Ministry of Women and Child Development in such form as may be prescribed.</p> <p>(clauses 29 &amp; 33 made by WCD – has been merged in clause 31 prepared by the Commission)</p>

<p>(32. No such provision made by WCDD)</p> <p>30. No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member thereof or any person acting under the direction of the Central Authority, in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.</p> <p>31. Every member of the Central Authority and every officer appointed in the Central Authority to exercise functions under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.</p> <p>32. (1) In the discharge of its functions under this Act, the Central</p>	<p>prescribed.</p> <p>(2) The Central Authority shall in addition to the report under sub-section (1) furnish such returns or other relevant information with respect to its activities as the Central Government may from time to time require.</p> <p>(3) The report submitted under sub-section (1) shall contain a full account of -</p> <ul style="list-style-type: none"> <li>(a) a brief record of applications for the return of children submitted by applicants to the Central Authority.</li> <li>(b) detailed information on applications for the return of children that remain pending for more than one year after the date of filing and information on the current status of such children and specific actions taken by the Central Authority to resolve such cases.</li> <li>(c) A list of countries to which the children mentioned in clause (b) have been wrongfully removed to or retained in, countries which have failed to comply with their obligations set out in the Convention with respect to, return of children, access to children by applicants in India.</li> </ul> <p>(4) The Central Authority shall inform to the parent, who has requested assistance regarding a wrongfully removed or retained child, once in every six months, except where the case has been closed by the Central Authority and the reason for the same has been conveyed to the person, institution or body seeking such assistance.</p> <p><b>32. Maintenance of Records.</b> The Central Authority shall maintain detailed and updated records concerning the applications, and, or cases brought to its notice under this Act in such manner as may be prescribed.</p> <p><b>33. Protection of action taken in good faith.</b> No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member or officer thereof or any officer acting under the authorization of the Central Authority in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.</p>
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Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national purposes, the decision of the Central Government thereon shall be final.

33. The Central Authority shall furnish to the Central Government, such returns or other information with respect to its activities as the Central Government may from time to time require.

34. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained in India

(b) Form of application to Central Authority for assistance in securing the return of a child that has been wrongfully removed to or retained outside India

(c) Procedure for appointment of Chairman and Members of Central Authority/recruitment of staff of Central Authority

(d) Procedure in case of refusal to accept an application by Central Authority under Section 7

**34. Members and officers of Central Authority to be public servants**

Every member and officer of the Central Authority and the officer authorized by the Authority to perform functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860 (45 of 1860).

**35. Power to give directions.**

(1) In the discharge of its functions under this Act, the Central Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national interests, the decision of the Central Government thereon shall be final.

**36. Power of Central Government to make rules.**

(1) The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) qualifications and experience for appointment of Members of Central Authority under clause (b) of sub-section (2) of section 4 ;

(b) the salary and allowances and terms and conditions of service of Chairperson and Members under sub-section (5) of section 4;

(c) the salary and allowances and terms and conditions of service of officers and staff of the Central Authority under sub-section (2) of section 5;

(d) form of application to Central Authority for assistance in securing return of child wrongfully removed or retained in India, under sub-section (2) of section 8;

(e) procedure for making appeal to the Central Government in case of refusal to accept the application by the Central Authority under sub-

<p>(3) Every rule made under this Act (Sub-section (1)) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.</p> <p>35. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty.</p> <p>Provided that no order shall be made under this Section after the expiry of a period of two years from the commencement of this Act.</p> <p>(2) Every order made under this Section shall be laid, as soon as may be after it is made, before each House of Parliament.</p>	<p>section (1) of section 13;  <b>(f) form of application to Central Authority for assistance in securing exercise of rights of access to a child in India, under sub-section (2) of section 18;</b>  <b>(g) form of application to Central Authority for assistance in securing return of child wrongfully removed to or retained in the Contracting State under sub-section (2) of section 24;</b>  <b>(h) the form of application for assistance in organizing or securing the rights of access to a child wrongfully removed to or retained in a Contracting State under section 25; and</b>  <b>(i) the form in which annual report shall be prepared under sub-section(1) of section 31;</b></p> <p>(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.</p> <p><b>37. Power to remove difficulties.</b></p> <p>(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty.</p> <p><i>Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.</i></p> <p>(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.</p>
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**ANNEXURE-II****THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION)  
BILL, 2016**A  
Bill

to ensure the prompt return of children wrongfully removed to, or retained in any Contracting State, to ensure that the rights of custody and access under the law of one of the Contracting States are effectively respected in another Contracting States, and to establish a Central Authority, inter alia, for the purposes of providing assistance to help locate such children, encourage amicable solutions and help process of requests for return of children and for matters connected therewith or incidental thereto.

*WHEREAS* the best interests of children are of paramount importance in matters relating to their custody in view of the Convention on the Rights of the Child, 1989 which came into force on 2<sup>nd</sup> September, 1990;

*AND WHEREAS* the Hague Convention on the Civil Aspects of International Child Abduction, 1980, came into force on the 1<sup>st</sup> December, 1983;

*AND WHEREAS* it would be necessary to implement the said Convention in so far as they relate to an expeditious return of a child who has been wrongfully removed or retained in contracting party to its country of his or her habitual residence in violation of the custody rights or access rights;

Be it enacted by Parliament in the (\_\_\_\_\_) year of the Republic of India as follows:-

**CHAPTER I  
Preliminary****2. Short title, extent, application and commencement.**

- (1) This Act may be called the Protection of Children (Inter-Country Removal and Retention) Act, 2016.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) The provisions of this Act shall apply to every child who has not completed sixteenth year of age and has either wrongfully removed to, or retained in India, irrespective of his or her nationality, religion, or status in India.
- (4) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

*Provided* that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

**2. Definitions**

In this Act, unless the context otherwise requires,—

- (a) “applicant” means any person who, pursuant to the Convention, files an application with the Central Authority or a Central Authority of any other State party to the Convention for the return of a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing the effective exercise of rights of access pursuant to the said Convention;
- (b) “Central Authority” means the Central Authority constituted under section 4;
- (c) “Contracting State” means a State signatory to the Hague Convention on the Civil Aspects of International Child Abduction;

- (d) "Convention" means the Hague Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on the 25<sup>th</sup> October, 1980, as set out in the Schedule;
- (e) "Chairperson" means the Chairperson of the Central Authority;
- (f) "habitual residence" of a child is the place where the child resided with both parents; or, if the parents are living separately and apart, with one of the parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever occurred last.
- (g) "member" means a member of the Central Authority and includes the Chairperson;
- (h) "prescribed" means prescribed by rules made under this Act;
- (i) "right of access" in relation to a child includes the right to take a child for a limited period of time to a place other than the child's habitual residence;
- (j) "right of custody" in relation to a child includes the right to take care of the person of the child, to make long-term decisions about child's development and well-being and, in particular, to determine the child's place of residence.

### 3. Wrongful removal or retention

- (1) For the purposes of this Act, the removal to or the retention in India of a child is to be considered a wrongful act where –
  - (a) such an act is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention; and
  - (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, by a person, an institution or any other body, or shall have been so exercised, but for the removal or retention.
- (2) The rights of custody specified in the Act, may arise in particular—
  - (a) by operation of law; or
  - (b) by reason of judicial or administrative decision; or
  - (c) by reason of an agreement having legal effect under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention.

## CHAPTER II

### Constitution, Powers and Functions of Central Authority

#### 4. Constitution of Central Authority.

- (1) The Central Government may, by notification in the Official Gazette, constitute an Authority to be called as the Central Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act.
- (2) The Central Authority shall consist of , -
  - (a) a Chairperson, who is an officer not below the rank of Joint Secretary to the Government of India, and
  - (b) two members out of which at least one shall be an advocate with ten years of practicing experience and another member having such qualification, experience and expertise in matters related to inter-country removal or retention of child and child welfare as may be prescribed, to be appointed by the Central Government.
- (3) The tenure of the Chairperson or any member of the Central Authority shall be three years from the date on which he assumes office as such or till the age of his superannuation, whichever is earlier.



- (4) If a casual vacancy occurs in the office of the Chairperson or a member in the Central Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled within a period of ninety days by making a fresh appointment in accordance with the provisions of sub-section (2) and the person so appointed shall hold the office for the remainder of the term of office of the person in whose place he is appointed.
- (5) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed.

#### **5. Appointment of officers and other staff of Central Authority.**

- (1) The Central Government may provide to the Central Authority, such officers and other staff as it considers necessary, for its efficient discharge of functions under this Act.
- (2) The salary and allowances payable to and other terms and conditions of service of the officers and other staff of the Central Authority shall be such as may be prescribed.

#### **6. Functions of Central Authority.**

The Central Authority or any other officer authorized by the Central Authority in this behalf, shall take all appropriate measures while performing all or any of the following functions, namely—

- (a) to discover the whereabouts of a child who has been wrongfully removed to, or retained in, India, or outside India, and in case where the child's place of residence in India is not known, the Central Authority may obtain the assistance of the police to locate the child;
- (b) to prevent further harm to any such child or prejudice to any other interested parties, by taking or causing to be taken, such measures as may be considered necessary;
- (c) to secure the voluntary return of any such child to the country in which the child had his or her habitual residence, or to bring about an amicable resolution of the differences between the person claiming that such child has been wrongfully removed to, or retained in, India, and the person opposing the return of such child to the contracting State in which the child has his or her habitual residence;
- (d) to exchange, where desirable, information relating to any such child, with the appropriate authorities of a contracting State.
- (e) to provide, on request, information of a general character, as to the law of India in connection with the implementation of the Convention in any contracting State;
- (f) to institute judicial proceedings with a view to secure the return of any such child to the contracting State in which that child has his or her habitual residence, and in appropriate cases, to make arrangements for instituting judicial proceedings for securing the effective exercise of rights of access to a child who is in India;
- (g) where circumstances so require, to facilitate providing legal aid or advice;
- (h) to make such administrative arrangements as may be necessary and appropriate to secure the safe return of any such child to the contracting State in which the child has his or her habitual residence;
- (i) such other functions as may be necessary to ensure the discharge of India's obligations under the Convention.

#### **7. Powers of Central Authority.**

The Central Authority shall, have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-

- (1) summoning and enforcing the attendance of any person and examining him on oath;
- (2) requiring the discovery and production of documents;
- (3) receiving evidence on affidavits;
- (4) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office;
- (5) issuing commissions for the examination of witnesses or documents.

### **Chapter III Procedure for Application to Central Authority**

#### **8. Procedure for making application to Central Authority.**

- (1) The appropriate authority of a contracting State, or a person, institution or any other body claiming that a child has been wrongfully removed to, or retained in India in breach of the rights of custody, may apply to the Central Authority for assistance in securing the return of the child.
- (2) Every application made under sub-section (1) shall be in such form as may be prescribed.
- (3) The application under sub-section (1) shall be accompanied by—
  - (a) a duly authenticated copy of relevant decision or agreement giving rise to the rights of custody claimed to have been breached;
  - (b) a certificate or affidavit from a Central Authority or any other competent authority of the contracting State in which that child has his or her habitual residence or from an attorney or a qualified person setting out the law of that contracting State relating to the rights of custody alleged to have been breached;
  - (c) any other relevant document.

#### **9. Transfer of applications to contracting State.**

Where, on receipt of an application under section 8, the Central Authority has reason to believe that the child in respect of whom the application has been made is in another contracting State, it shall forthwith transmit the application to the appropriate authority of that contracting State, and shall accordingly inform the appropriate authority or as the case may be, the applicant referred to in sub-section(1) of section 8.

#### **10. Calling Report from Police.**

Where the Central Authority is requested to provide information relating to a child under clauses (a) and (d) of section 6, it may call for a report from the police in writing with respect to any matter relating to the child that appears to the Central Authority to be relevant.

### **CHAPTER IV**

#### **Refusal by Central Authority to accept Applications**

#### **11. Refusal by Central Authority to accept Applications.**

- (1) The Central Authority may refuse to accept an application made to it under section 8, if

it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not complete.

- (2) The Central Authority on its refusal to accept an application, shall forthwith inform the appropriate authority or person, institution, or any other body making the application, the reasons for such refusal.

#### **12. Additional Information.**

- (1) The Central Authority shall not reject an application solely on the ground that additional documents or information are needed.
- (2) The Central Authority may, where there is a need for such additional information or documents, ask the applicant to provide these additional documents or information, and if the applicant does not do so within a reasonable period specified by the Central Authority, it may decide not to process the application.

#### **13. Appeal to Central Government.**

- (1) Any party aggrieved by the refusal of the Central Authority to accept an application made under section 8, may appeal against such refusal to the Central Government in such manner as may be prescribed.
- (2) Such an appeal shall be made within a period of fourteen days from the date of receipt of the decision of the Central Authority; and the appeal shall be disposed off as early as possible but not later than six weeks from the date of receiving of the appeal.

### **CHAPTER V**

#### **Procedure for Application to High Courts**

#### **14. Power of Central Authority to apply to the High Court.**

Without prejudice to any other means for securing the return of a child in respect of whom an application has been made under section 8, the Central Authority may apply to the High Court within whose territorial jurisdiction the child is physically present or was last known to be present for an order directing the return of such child to the contracting State in which the child has his or her habitual residence.

#### **15. Interim Order by High Courts.**

Where an application is made to the High Court under section 14, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for purpose of securing the welfare of the child concerned, or for making such provisions for the child, pending the proceedings, or to prevent the child's return, or for otherwise preventing any change in the circumstances relevant to the determination of the application.

#### **16. Power of High Courts to return child to contracting State.**

Where the High Court is satisfied, upon an application made to it under section 14, that—

- (a) the child in respect of whom the application has been made has been wrongfully removed to or retained in India within the meaning of section 3; and,
- (b) a period of one year has not elapsed between the date of the alleged removal or retention and the date of such application;

it may order the return of such child to the contracting State in which the child has his or her habitual residence:

*Provided* that the High Court may order the return of a child to the contracting State in which that child has his or her habitual residence even in a case where more than one

year has elapsed between the date of the alleged removal or retention and the date of such application, if the High Court is satisfied that the child is not settled in his or her new environment.

#### **17. Possible exceptions to the return of the child**

- (1) Notwithstanding anything contained in section 16, the High Court may not pass the order of return of the child if the person, institution or any other body, opposing the return, establishes that-
  - (a) the person, institution or any other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention; or
  - (b) there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in a non-conducive situation.
  - (c) the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).
- (2) The High Court may refuse to order the return of the child if -
  - (a) the court finds that the child objects to being returned and has attained an age and level of maturity at which it is appropriate to take into account of his or her views;
  - (b) the return is not permitted under the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms;
  - (c) the High Court, while exercising powers under this section, considers any information relating to the social background of the child provided by the appropriate authority of the contracting State in which that child has his or her habitual residence, as inappropriate;
- (3) The High Court may not refuse to make an order under this section for the return of a child to the contracting State in which that child has his or her habitual residence, on the grounds only-
  - (i) that there is in force, a decision of a court in India or,
  - (ii) a decision entitled to be recognised by a court in India relating to the custody of such child:

Provided that the High Court shall record reasons while passing such orders relating to the return of a child.

#### **18. Rights of access of person, institution or any other body to a child in India.**

- (1) The appropriate authority, or a person, institution or any other body of a contracting State, may make an application to the Central Authority for assistance in securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India.
- (2) An application made under sub-section (1) shall be in such form and in such manner as may be prescribed.

#### **19. Application to the High Court for exercise of rights of access of any person to a child in India.**

- (1) Without prejudice to any other means for securing the exercise of rights of access of any person, institution or any other body of the contracting State to a child in India, the Central Authority may apply to the High Court, for an order of the Court, for securing the effective exercise of those rights.

- (2) Where the High Court is satisfied, on an application made to it under sub-section (1), that the person who, or on whose behalf, such application is made has rights of access to the child specified in the application, the court may, subject to such conditions as may be considered necessary, make an order to secure the effective exercise of those rights of access.

#### **20. Relaxation of requirements of proof of foreign law.**

- (1) The High Court, while ascertaining whether there has been a wrongful removal or retention within the meaning of section 3, may take notice of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.
- (2) The High Court may, before making an order under section 15 for the return of a child to the Contracting State in which that child has his or her habitual residence; direct the Central Authority, to obtain from the concerned authorities of the Contracting State in which that child has his or her habitual residence, a decision or determination as to whether the removal to, or retention in, India, of that child, is wrongful within the meaning of section 3.

#### **21. Costs.**

- (1) The High Court may, while making an order under section 15 for the return of a child to the contracting State in which that child has his or her habitual residence, order the person who removed that child to India, or who retained the child in India, to pay the expenses incurred by the Central Authority.
- (2) The expenses referred to in sub-section (1), may include costs incurred in locating the child, costs of legal proceedings incurred by the Central Authority, and costs incurred in returning the child to the contracting State in which that child has his or her habitual residence.

#### **22. Adjudication not to cover determination of custody rights of parent.**

An order made by the High Court under section 16 shall not be regarded as a decision or determination on the merits of any question relating to the custody of the child to whom the order relates.

#### **23. Arrangements to return a child to Contracting State.**

Where an order is made under section 16 for the return of a child to the contracting State in which that child has his or her habitual residence, the Central Authority shall cause such administrative arrangements, as are necessary, to be made in accordance with the order for the return of the child to such contracting State within a period of sixty days from the date of such order.

### **CHAPTER VI**

#### **Application in respect of child removed from India**

#### **24. Application to Central Authority for return of child to India.**

- (1) A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of rights of custody of such person, institution or any other body, may apply to the Central Authority for

- assistance in securing the return of that child to India.
- (2) Every application made under sub-section (1) shall be made in such form as may be prescribed.
  - (3) On receipt of an application under sub-section (1), the Central Authority shall forthwith apply to the appropriate authority, in the manner, if any, specified in the contracting State to which the child is alleged to have been removed or retained, for assistance in securing the return of that child to India.

## CHAPTER VII

### Rights of Access

#### **25. Rights of access of person, institution or body in India.**

A person, institution or any other body in India claiming that a child has been wrongfully removed to, or is being retained in, a Contracting State in breach of the rights of access of such person, institution or any other body, may apply to the Central Authority for assistance in organising or securing the effective exercise of the rights of access, in such form as may be prescribed.

#### **26. Application to Central Authority of Contracting State to exercise rights of access of any person, institution or body in India.**

An application to make arrangements for organising or securing the effective exercise of rights of access under section 25 shall be presented forthwith to the Central Authority of the Contracting State in the same manner as an application for the return of a child under section 24.

#### **27. Coordination between Central Authorities to secure rights of access.**

On receipt of an application under section 26, the Central Authority shall forthwith apply to the appropriate authority, in the manner if any, specified, in the Contracting State to which the child is alleged to have been wrongfully removed, or retained, for assistance in making arrangements to secure, or organise the effective exercise of rights of access.

## CHAPTER VIII

### Offences and Penalties

#### **28. Punishment for wrongful removal or retention.**

Whoever wrongfully removes or retains a child either himself or through other person from the custody of a parent in terms of sub-section (2) of section 3 of this Act, is said to commit the offence of wrongful removal or retention, and shall, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both.

#### **29. Punishment for wilful misrepresentation or concealment of fact.**

Whoever, by wilful misrepresentation, or by concealment of a material fact, which he is bound to disclose, related to the location or information of the child under clause (a) of section 6, voluntarily causes to prevent the safe return of the child in pursuance to an order made under section 15 or section 16 of this Act shall be guilty of an offence punishable with imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both.

**CHAPTER IX****Miscellaneous****30. Expeditious process.**

- (1) The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children.
- (2) If the judicial or administrative authority concerned has not reached a decision within a period of six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own motion or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for delay.
- (3) If any information or reply is received by the Central Authority of the requested State, that Authority shall transmit the same to the Central Authority of the requesting State, or to the applicant, as the case may be.

**31. Reports and returns**

- (1) The Central Authority shall submit an annual report giving full account of its activities under this Act to the Central Government in such form as may be prescribed.
- (2) The Central Authority shall in addition to the report under sub-section (1) furnish such returns or other relevant information with respect to its activities as the Central Government may from time to time require.
- (3) The report submitted under sub-section (1) shall contain a full account of -
  - (a) a brief record of applications for the return of children submitted by applicants to the Central Authority.
  - (b) detailed information on applications for the return of children that remain pending for more than one year after the date of filing and information on the current status of such children and specific actions taken by the Central Authority to resolve such cases.
  - (c) A list of countries to which the children mentioned in clause (b) have been wrongfully removed to or retained in, countries which have failed to comply with their obligations set out in the Convention with respect to, return of children, access to children by applicants in India.
- (4) The Central Authority shall inform to the parent, who has requested assistance regarding a wrongfully removed or retained child, once in every six months, except where the case has been closed by the Central Authority and the reason for the same has been conveyed to the person, institution or body seeking such assistance.

**32. Maintenance of Records.**

The Central Authority shall maintain detailed and updated records concerning the applications, and, or cases brought to its notice under this Act in such manner as may be prescribed.

**33. Protection of action taken in good faith.**



No suit, prosecution or other legal proceeding shall lie against the Central Government, Central Authority or any member or officer thereof or any officer acting under the authorization of the Central Authority in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

#### **34. Members and officers of Central Authority to be public servants**

Every member and officer of the Central Authority and the officer authorized by the Authority to perform functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860 (45 of 1860).

#### **35. Power to give directions.**

- (1) In the discharge of its functions under this Act, the Central Authority shall be guided by such directions on question of policy relating to national interest, as may be given to it by the Central Government.
- (2) If any dispute arises between the Central Government and the Central Authority as to whether a question is or is not a question of policy relating to national interests, the decision of the Central Government thereon shall be final.

#### **36. Power of Central Government to make rules.**

- (1) The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-
  - (a) qualifications and experience for appointment of Members of Central Authority under clause (b) of sub-section (2) of section 4 ;
  - (b) the salary and allowances and terms and conditions of service of Chairperson and Members under sub-section (5) of section 4;
  - (c) the salary and allowances and terms and conditions of service of officers and staff of the Central Authority under sub-section (2) of section 5;
  - (d) form of application to Central Authority for assistance in securing return of child wrongfully removed or retained in India, under sub-section (2) of section 8;
  - (e) procedure for making appeal to the Central Government in case of refusal to accept the application by the Central Authority under sub-section (1) of section 13;
  - (f) form of application to Central Authority for assistance in securing exercise of rights of access to a child in India, under sub-section (2) of section 18;
  - (g) form of application to Central Authority for assistance in securing return of child wrongfully removed to or retained in the Contracting State under sub-section (2) of section 24;
  - (h) the form of application for assistance in organizing or securing the rights of access to a child wrongfully removed to or retained in a Contracting State under section 25; and
  - (i) the form in which annual report shall be prepared under sub-section(1) of section 31;
- (3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

**37. Power to remove difficulties.**

- (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty.

*Provided* that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

- (2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

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**Minutes of National Consultation on Hague Convention  
Civil Services Officer's Institute (CSOI)  
Vinay Marg, Chanakyapuri, New Delhi  
3rd February 2017**

The Ministry organized a national consultation with various stakeholders including the Judicial Officers from High Courts of Delhi and Punjab, Law and Punjab NRI Commission, NHRC, representatives from the Ministries of external affairs, Law and Justice, Home Affairs and affected parents on the Hague Convention on the Civil aspects of International Child Abduction. This consultation aimed to discuss the objectives of the Hague convention and its impact on children and women of India, if the Government signs it. The list of Participants is annexed.

**Inaugural Session:**

The Consultation was inaugurated by Smt. Maneka Sanjay Gandhi, Union Minister, Women and Child development, who also welcomed the dignitaries on the dais and the participants. She set the tone of discussion by suggesting that the Hague Convention should be seen in the context of the realities and legal framework of India.

**Technical Sessions:**

Smt. Rashmi Saxena Sahni, Joint Secretary, MWCD made a brief presentation on the provisions of Hague Convention, draft of the Civil Aspects of International Child Abduction Bill, 2016 which has been prepared by this Ministry

as well as comments received for and against from Civil Society organisation. It is in line with the recommendations of the Hague convention. The draft bill has specified that a decision under the Hague Convention to return a child would not be final, and courts would have the power to deny custody if the person caring for the child was putting the child at grave risk of physical or psychological harm or was not actually exercising the custody rights.

Shri Ravi R. Tripathi, Member, Law Commission shared the views of the Law Commission on the MWCD's Bill and discussed the importance of constituting an independent Central Authority for the implementation of the Bill. He also highlighted the changes suggested by Law commission vis- a vis MWCD bill which includes renaming as Protection of children (Inter Country removal and retention) Bill, 2016. He further elaborated the roles and responsibility of the Central Authority along with the prescribed procedures for applying, appeal and its decision to refuse the return of the child.

Representatives from Ministry of External Affairs shared that they work in consultation with the local government that maintains confidentiality about the whereabouts of the spouse of the aggrieved person and do not share it with them. MWCD suggested that MEA develops a mechanism to trace such spouses by the Indian Embassies as the dignitaries on the dais shared several legal cases where they have not received much breakthrough in cases of "abduction" under domestic violence act. They requested the MEA to consider bilateral dialogue strongly.

**Open Discussion:** The participants deliberated upon and raised the following issues.

1. Nature of this Central authority- being an administrative body or a Quasi Judicial Body; with preference given for having judicial powers to it
2. Differentiate between the flight to safety in cases of domestic violence faced by women living abroad and abduction; the term "Abduction" was misleading as no parent will abduct his/her own child.
3. Maternal welfare and prosperity is an integral part of child welfare and well being;
4. West does not honor Indian arrest warrants and the Hindu Marriage Act;
5. Article 16 under Hague needs to be relooked as it prohibits the Central Authority from going into the facts of the case. Legitimate cases of abuse will result in the protective parent getting jailed;
6. Why there is not a single case of so called abduction where either of the parents involved is a American or foreigner found in India;
7. Difference in number of days required under the "habitual residence". It is 365 days in India whereas it is only 180 days in US/UK;
8. The Bill in its present form needs reformation/suggestions and circulation amongst the stakeholders;
9. Age of 16 is not acceptable as a child under the Indian law is defined as a person under 18 years of age.
10. Need for Habitual Residence to be redefined as last



abode may not always be in the best interest of the child.

11. Need to amend keeping Indian realities before signing it was also highlighted.

### **Way Forward:**

1. The Union Minister, MWCD suggested that said that a model legislation to safeguard not only the interests of the child but also of the parents, especially women, must be developed, irrespective of whether India signs the convention or not.
2. The Punjab Judicial Academy, Law Commission and NRI Commission of Punjab will examine in detail the legal issues involved by taking all viewpoints into account, including those of the suffering women as several cases were highlighted during the consultation. So a multimember Committee will be set up to be headed by the head of Judicial Academy of Chandigarh. The members of the Said Committee to include members from Law Commission/ NRI Commission/MEA/MHA/MWCD/NCW/Delhi High Court.
3. The Committee shall submit their report within four months.
4. This report will also provide recommendations as to how the problems of parents and children involved in such situations can be addressed.
5. This group will also study the draft civil aspects of international child abduction Bill, 2016 prepared by the Ministry and Law Commission.
6. This Committee shall also develop a mechanism needed to address the difficulties being faced by the affected

parent as a large number of women married to Indians abroad are compelled to return to India with their children when they undergo violence in their marriages.

7. A model legislation to safeguard the interests of parents and children, will be drafted by the Committee.
8. The same will be put up for public comments before being finalized.

### **Conclusion**

The Ministry of Women and Child Development, at the said consultation decided that any possibility of an agreement to sign the Hague Convention will follow only after "necessary safeguards" including a legislation to ensure the welfare of affected women and children is prepared as above and is found suitable.



**F.No. CW-I-31/59/2016-CW-I**  
**Government of India**  
**Ministry of Women & Child Development**  
**(CW-I Section)**

**Shastri Bhawan, New Delhi**  
**Dated: 18.05.2017**

To

Mrs. Meenaxee Raj (HCS),  
Deputy Secretary,  
Raj Bhawan, Haryana, Sarovar Path,  
Sector-6, Chandigarh-160001.

**Sub: The Civil Aspects of International Child Abduction Bill, 2016 - reg.**

Madam,

An O.M of even no. dated 10.04.2017 was issued in context of constitution of a Committee to examine the issue related to Hague Convention Civil Aspects of International Child Abduction under Chairmanship of Hon'ble Justice Shri Rajesh Bindal. At that time, nominations were not received from certain Ministries/Departments. Also, the details of the three members co-opted by the Chairman of the committee were not received by 10.04.2017. Now, all the nomination except from M/o Law and Justice have been received and accordingly, the earlier O.M. dated 10.04.2017 is superseded by the corrigendum dated 18.05.2017, enclosed herewith.

2. As informed by you, Hon'ble Justice Sh. Rajesh Bindal being the Chairperson of the Committee is competent to incur the expenditure on functioning of this committee, hence no need of reimbursement from Ministry of Women and Child Development and the Academy is funded by Government of Punjab and Haryana both and hence there is no need to take their consent as Hon'ble Justice Sh. Rajesh Bindal is Chairperson of the Academy himself.

3. As requested by you, a clause is incorporated in the OM (Corrigendum) enclosed herewith to this effect that "Chandigarh Judicial Academy will bear all the expenses on functioning of this committee." You are requested to ensure that all expenditure be incurred as per extant Rules & Regulations.

Yours faithfully,

**Encls: As above.**

  
(Anand Prakash)

Deputy Secretary to the Govt. of India  
Tel: 011-23381857

Copy to:

PS to Hon'ble Justice Sh. Rajesh Bindal,  
President, Board of Governors Judicial  
Academy of Chandigarh,  
Judge High Court of Punjab & Haryana,  
Capitol Complex, Sector-1, Chandigarh-160001.

**F.No. CW-I-31/59/2016-CW-I**  
**Government of India**  
**Ministry of Women & Child Development**  
**(CW-I Section)**

**Shastri Bhawan, New Delhi**  
**Dated: 18.05.2017**

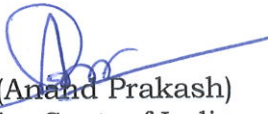
**CORRINGENDUM**

**Sub: The Civil Aspects of International Child Abduction Bill, 2016 - reg.**

In supersession of para 1 of this Ministry's OM of even no. dated 10.04.2017 (copy enclosed) on the subject mentioned above, the undersigned is directed to say that a Committee has been constituted with the following composition:

- |       |   |   |                  |
|-------|---|---|------------------|
| i.    | Hon'ble Justice Sh. Rajesh Bindal                 | : | Chairperson      |
| ii.   | Hon'ble Justice Shri Rakesh Kumar Garg(Retd)      | : | Member           |
| iii.  | Sh.A.K. Upadhyay                                  | : | Member           |
| iv.   | Ms. Sushma Sahu                                   | : | Member           |
| v.    | Hon'ble Justice Ms. Mukta Gupta                   | : | Member           |
| vi.   | Hon'ble Justice Ms. Anita Chaudhry                | : | Member           |
| vii.  | Sh. Sudhir Kumar Gupta                            | : | Member           |
| viii. | Ms. Uma Sekhar                                    | : | Member           |
| ix.   | M/o Law & Justice (Representative)                | : | Member           |
| x.    | Joint Secretary, Child Welfare, MWCD (Ex officio) | : | Member           |
| xi.   | Dr. Balram K. Gupta                               | : | Member           |
| xii.  | Shri Anil Malhotra                                | : | Member           |
| xiii. | Ms. Meenaxee Raj(HCS)                             | : | Member Secretary |
2. Nomination is not yet received from M/o Law and Justice. Terms of Reference as mentioned in the para 2 of the OM dated 10.04.2017 remains the same.
3. It is further added that "Chandigarh Judicial Academy will bear all the expenses on functioning of the Committee".

**Encls: As above.**

  
 (Anand Prakash)  
 Deputy Secretary to the Govt. of India  
 Ph: 011-23381857

To

- i. Hon'ble Justice Sh. Rajesh Bindal,  
 President, Board of Governors Judicial  
 Academy of Chandigarh,  
 Judge High Court of Punjab & Haryana,  
 Capitol Complex, Sector-1, Chandigarh-160001.
- ii. Justice Sh. Rakesh Kr. Garg (Retd.),  
 Chairman,  
 Punjab State NRI Commission,  
 Block-A, Room No-6,  
 Punjab Civil Secretariat, Sector-9, Chandigarh.



- iii. Sh. A.K. Upadhyay, Addl. Law Officer,  
Chairman of Law Commission,  
Law Commission of India, 14<sup>th</sup> Floor,  
Hindustan Times House, Kasturba Gandhi Marg,  
New Delhi.
- iv. Ms. Sushma Sahu,  
Member of NCW,  
National Commission for Women,  
Plot No. 21, FC33, Jasola Institutional Area,  
New Delhi-110025.
- v. Hon'ble Ms. Justice Mukta Gupta,  
Registrar Delhi High Court,  
Registrar General, Delhi High Court,  
Sher Shah Road, New Delhi-110503.
- vi. Hon'ble Ms. Justice Anita Chaudhry,  
Punjab & Haryana High Court,  
Sector-1, Chandigarh.
- vii. Sh. Sudhir Kumar Gupta,  
Deputy Secretary,  
Ministry of Home Affairs,  
CS-Division, NDCC-II Building,  
North Block, New Delhi.
- viii. Ms. Uma Sekhar, Joint Secretary (L&T),  
Ministry of External Affairs,  
North Block, New Delhi.
- ix. Ministry of Law and Justice,  
Department of Legal Affairs,  
Secretary,  
Shastri Bhawan, New Delhi (with a request to nominate a Member not below  
the rank of Director, at the earliest).
- x. Ministry of Women and Child Development,  
Joint Secretary, Child Welfare (Ex-Officio),  
Shastri Bhawan, New Delhi.
- xi. Dr. Balram K. Gupta,  
Director (Academics),  
Chandigarh Judicial Academy,  
Sector-43 D, Chandigarh-160022.
- xii. Sh. Anil Malhotra,  
Advocate, Punjab & Haryana High Court,  
584, Sector-15 D, Chandigarh-160015.
- xiii. Ms. Meenaxee Raj (HCS),  
Deputy Secretary,  
Raj Bhawan, Haryana, Sarovar Path,  
Sector-6, Chandigarh-160001.

**F.No. CW-I-31/59/2016-CW-I**  
**Government of India**  
**Ministry of Women & Child Development**  
**(CW-I Section)**

Shastri Bhawan, New Delhi

Dated: 10.04.2017

**Office Memorandum**

**Sub: The Civil Aspects of International Child Abduction Bill, 2016 - reg.**

In pursuance of the discussion held on 03.02.2017 at CSOI, Chanakyapuri, New Delhi on the above mentioned subject, all concerned stakeholders were requested earlier to nominate a senior officer to represent their organization in the proposed committee. However, nominations are still awaited. Therefore to expedite the matter the undersigned is directed to say that a committee is being constituted with the following composition:

i.	Justice Rajesh Bindal	-	Chairperson
ii.	Punjab State NRI Commission (Representative)	-	Member
iii.	Law Commission of India (Representative)	-	Member
iv.	National Commission for Women (Representative)	-	Member
v.	High Court of Delhi (Representative)	-	Member
vi.	High Court of Punjab & Haryana (Representative)	-	Member
vii.	M/o Home Affairs (Representative)*	-	Member
viii.	Ms. Uma Sekhar, Joint Secretary, MEA	-	Member
ix.	M/o Law & Justice (Representative)*	-	Member
x.	Joint Secretary, Child Welfare, MWCD	-	Member

**\*not below the rank of Director**

2. Terms of References:

(i). The Committee will examine in detail the legal issues involved by taking all viewpoints into account, including those of the suffering women as several cases were highlighted during the consultation.

(ii). The Committee shall submit their report within four months.

(iii). The Committee report will also provide recommendations as to how the problems of parents and children involved in such situations can be addressed.

(iv). The Committee will also study the draft civil aspects of international child abduction Bill, 2016 prepared by the Ministry and Law Commission.

(v). The Committee shall also develop a mechanism needed to address the difficulties being faced by the affected parent as a large number of women married to Indians abroad are compelled to return to India with their children when they undergo violence in their marriages.



Receipt No : 126620/2017/CW-I

(vi). A model legislation to safeguard the interests of parents and children, will be drafted by the Committee and the same will be put up for public comments before being finalized.

3. Chairperson of the committee is requested to kindly convene a meeting of the committee at the earliest. A copy of draft Bill, Law Commission Report No. 263 and Hague Convention signed by Japan are enclosed for reference.

**Encls: As above.**

  
(Satish Kumar)

Under Secretary to the Govt. of India

Ph: 011-23381857

To

1. Hon'ble Justice Sh. Rajesh Bindal,  
President, Board of Governors Judicial Academy of Chandigarh,  
Judge High Court of Punjab & Haryana,  
Capitol Complex, Sector-1,  
Chandigarh-160001.
2. Justice Sh. Rakesh Kr. Garg (Retd.),  
Chairman,  
Punjab State NRI Commission,  
Block-A, Room No-6,  
Punjab Civil Secretariat, Sector-9, Chandigarh.
3. Justice Dr. B.S. Chauhan,  
Chairman of Law Commission,  
Law Commission of India, 14<sup>th</sup> Floor,  
Hindustan Times House, Kasturba Gandhi Marg,  
New Delhi.
4. Ms. Lalitha Kumar Manglam,  
Chairperson of NCW,  
National Commission for Women,  
Plot No. 21, FC33, Jasola Institutional Area,  
New Delhi-110025.
5. Sh. Girish Kathpalia (Registrar General),  
Registrar Delhi High Court,  
Registrar General, Delhi High Court,  
Sher Shah Road, New Delhi-110503.
6. Sh. Gurvinder Singh Gill (Registrar General),  
Registrar Punjab & Haryana High Court,  
Sector-1, Chandigarh.

Receipt No : 126620/2017/CW-I

7. Ministry of Home Affairs,  
Sh. Jaideep Govind, Additional Secretary,  
North Block, New Delhi-110001.
8. Ministry of Legal Affairs,  
Department of Legal Affairs,  
Sh. Inder Kumar, Additional Secretary,  
Shastri Bhawan, New Delhi-110001.
9. Ministry of External Affairs,  
Ms. Uma Sekhar, JS (L&T)-II,  
Room No. 0141, Jawaharlal Nehru Bhawan,  
New Delhi-110001.
10. Ministry of Women and Child Development,  
Ms. Rashmi Saxena Sahni, Joint Secretary,  
Shastri Bhawan, New Delhi-110001.

**Guide to Good Practice**  
*under the Hague*  
*Convention of*  
*25 October 1980 on*  
*the Civil Aspects of*  
*International Child*  
*Abduction*

# Mediation

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# Mediation

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Fax: +31 70 360 4867  
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# Terminology

The following terms are presented by thematic content rather than in alphabetic order.

## Mediation

For the purposes of this Guide it is important to distinguish between ‘mediation’ and similar methods of facilitating an agreed resolution of disputes.

The definitions of ‘mediation’ that can be found in legal texts and publications vary significantly and often reflect certain minimum requirements regarding the mediation process and the person of the mediator in the relevant jurisdictions. Drawing together the common features in these various definitions, mediation can be defined as a voluntary, structured process whereby a ‘mediator’<sup>1</sup> facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.<sup>2</sup> This Guide refers to ‘mediation’ in this broad sense, without prejudice to the model and method applied. Other commonly required but not uniformly applied principles that are sometimes incorporated in the definition of mediation, such as confidentiality, neutrality or impartiality, will be dealt with in Chapter 6 of the Guide.

## Mediator

Many definitions of the term ‘mediator’ in national or regional instruments mirror the necessary (legal) requirements a person has to fulfil to be a ‘mediator’ and the manner in which mediation has to be conducted. Concentrating again on the common features, a ‘mediator’ will be understood in this Guide as an impartial third party, who is conducting the mediation. The term is used, unless mentioned otherwise, without prejudice to the professional background of the mediator and specific requirements a person may have to fulfil to be able to call him- or herself ‘mediator’ in a given legal system.

The term ‘mediator’ is used in this Guide without prejudice to whether mediation is conducted as co-mediation or as single mediation, *i.e.*, unless stated otherwise, any use in this Guide of the term ‘mediator’ in the singular is also meant to refer to mediation conducted by more than one mediator.

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<sup>1</sup> Mediation can also be conducted by more than one mediator, see also the definition of the term ‘mediator’ below as well as section 6.2.2 dealing with co-mediation.

<sup>2</sup> For a concise comparative overview of mediation definitions used in different countries, see K.J. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, Mohr Siebeck, Tübingen, 2008, pp. 12 *et seq.*

## Conciliation

Mediation and conciliation are sometimes used as synonyms,<sup>3</sup> which may be a cause of confusion. Today, conciliation is generally characterised as a more directive process than that of mediation. Conciliation will therefore be understood for the purposes of this Guide as a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute. Mediation can be proactive, but cannot be directive. For mediation, emphasis has to be placed on the fact that the mediator him- or herself is not in a position to make a decision for the parties, but only assists the parties in finding their own solution. Conversely, the conciliator can direct the parties towards a concrete solution.<sup>4</sup> This can be illustrated by the following example. A judge with mediator training may conduct mediation, but only in a dispute where he / she is not the judge seised and where the judge refrains from influencing the result of the parties' conflict resolution process. A judge seised can, by definition, never 'mediate' in a case before him or her, *i.e.*, where the parties know that the judge is the person rendering the decision if their attempt to find an amicable solution should fail.<sup>5</sup> A process by which the judge in the case before him / her engages in assisting the parties in finding an agreed solution and in bringing about a judicial settlement would rather fall under the meaning of conciliation as understood in this Guide.<sup>6</sup>

## Counselling

Mediation has to be distinguished from counselling, a process that can be used to assist couples or families in dealing with relationship problems. In contrast to mediation, counselling does not generally focus on the solution of a specific dispute.

## Arbitration

Mediation and conciliation can be distinguished from arbitration in that the former two aim at developing an agreed solution between the parties, whereas in arbitration the impartial third party (arbitrator) solves the dispute by making a decision. While the parties must agree to arbitration and to abide by the outcome, the arbitration process is not geared towards bringing about an agreed outcome.<sup>7</sup>

<sup>3</sup> See, for example, the UNCITRAL Model Law on International Commercial Conciliation adopted by UNCITRAL in 2002, available at < [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) > (last consulted 16 June 2012), Art. 1(3): 'For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.'

<sup>4</sup> Regarding the differences between mediation and conciliation, see also 'A fair say – A Guide to Managing Differences in Mediation and Conciliation' (August 1999), drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), p. 1, available at < <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/AFairSay.aspx> > (last consulted 16 June 2012).

<sup>5</sup> This is a widely respected principle; for a comparative overview of mediation definitions used in different countries, see K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 12; see also Art. 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L 136*, 24.5.2008 (hereinafter, 'European Directive on mediation'), available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT> > (last consulted 16 June 2012).

<sup>6</sup> But definitions of conciliation differ, see for example the UNCITRAL Model Law on International Commercial Conciliation (*supra* note 3), Art. 1(3).

<sup>7</sup> For further details on distinguishing mediation and arbitration, see, *inter alia*, N. Alexander, *International and Comparative Mediation*, Austin – Boston – Chicago – New York – the Netherlands, Wolters Kluwer, 2008, pp. 26, 27.

## Early neutral evaluation

In ‘early neutral evaluation’ the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.<sup>8</sup>

## Collaborative law

In the ‘collaborative law’ model, the parties are assisted by ‘collaborative lawyers’ who use interest based problem solving negotiation techniques to resolve the dispute without going to court.<sup>9</sup> Where no agreement is found and the matter has to be solved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation.

## Co-operative law

The ‘co-operative law’ model follows the principles of the ‘collaborative law’ model, except that the representatives are not disqualified when the matter has to be brought before a court.<sup>10</sup>

## Direct or indirect mediation

When using the term ‘direct mediation’, the Guide refers to mediation in which both parties directly and simultaneously participate in the mediation sessions with the mediator, either in a face-to-face meeting with the mediator or in a long-distance meeting using video / teleconferencing facilities or communication over the Internet.<sup>11</sup>

Conversely, the term ‘indirect mediation’ refers to mediation in which the parties do not directly meet one another during the mediation but each meet with the mediator separately. The separate meetings with the mediator can be held across two separate States or in the same State with mediation taking place at different times or at the same time but in different rooms.<sup>12</sup>

It is, of course, also possible for a mediation process to include both indirect and direct mediation. For example, a direct mediation can be accompanied or preceded by so-called ‘caucus’ meetings, where the mediator meets with each party separately.

## Court based / court annexed mediation

In this Guide the terms ‘court based mediation’ or ‘court annexed mediation’ are used to refer to mediation services that are run by or through the court itself. In these schemes mediation is offered either by mediators working for the court or by judges with mediator training who can, of course, only ‘mediate’ in cases where they are not the judge seised. The mediation venue is often somewhere in the court building itself.

<sup>8</sup> For further details, see, *inter alia*, N. ver Steegh, ‘Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process’, 42 *Fam. LQ* (2008-2009), 659, at p. 663.

<sup>9</sup> *Ibid.*, p. 667.

<sup>10</sup> *Ibid.*, p. 668.

<sup>11</sup> See ‘Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980’, drawn up by S. Vigers, former Legal Officer of the Permanent Bureau, Prel. Doc. No 5 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (hereinafter, ‘Note on the development of mediation, conciliation and similar means’, available on the Hague Conference website at < www.hcch.net > under ‘Child Abduction Section’), 4.1, p. 14.

<sup>12</sup> See *ibid.*, 4.1, p. 15.

## Out of court mediation

The term ‘out of court mediation’ is used in this Guide to refer to mediation operated by a body not directly linked to the court. It may involve State run or State approved bodies and mediation services provided by individuals as well as private mediation organisations.<sup>13</sup>

## Mediated agreement

This Guide uses the term ‘mediated agreement’ when referring to the outcome of mediation, *i.e.*, the agreed solution reached by the parties in mediation. It should be noted that in some jurisdictions the term ‘memorandum of understanding’ is preferred to refer to the immediate outcome of mediation, to avoid any assumption as to the legal nature of the mediated result. (See Chapter 12 below for more details.)

To avoid confusion, it should be noted that the Guide also uses the term ‘contract to mediate’ which relates to a contract between the mediator and the parties in dispute prior to mediation, by which the specifics of the mediation process as well as costs and other issues may be defined.<sup>14</sup>

## Parental responsibility

As defined in the 1996 Hague Child Protection Convention, the term ‘parental responsibility’ refers to ‘parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child’.<sup>15</sup> In other words, ‘parental responsibility’ includes all legal rights and duties a parent, a guardian or other legal representatives have in respect of a child with a view to raising the child and ensuring the child’s development. The concept of ‘parental responsibility’ encompasses ‘rights of custody’ as well as ‘rights of contact’, but is much broader than these two. Where parental rights and duties are referred to as a whole, many legal systems as well as regional and international instruments today refer to the term ‘parental responsibility’. This is to overcome the terminological focus in this area of law on the parents’ rights and to acknowledge the equal importance of parental duties and children’s rights and welfare.

As concerns the term ‘rights of access’, the Guide gives preference to the term ‘rights of contact’ which reflects a child-centred approach in line with the modern concept of ‘parental responsibility’.<sup>16</sup> The term ‘contact’ is used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means.<sup>17</sup> The Guide uses the term ‘rights of custody’ in accordance with the terminology of the 1980 Hague Child Abduction Convention.

<sup>13</sup> For further details on court annexed and out of court mediation, see also ‘Feasibility Study on Cross-Border Mediation in Family Matters’, drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference (available at < [www.hcch.net](http://www.hcch.net) > under ‘Work in Progress’ then ‘General Affairs’), section 2.4, p. 6.

<sup>14</sup> See section 3.5 below.

<sup>15</sup> Art. 1(2) of the 1996 Convention.

<sup>16</sup> This is in line with the terminology used by the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Jordan Publishing, 2008), hereinafter, ‘Guide to Good Practice on Transfrontier Contact’ (also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’ then ‘Guides to Good Practice’), see at p. xxvi.

<sup>17</sup> This is in line with the terminology used by the Guide to Good Practice on Transfrontier Contact (*ibid.*).

## Left-behind parent and taking parent

The parent who claims that his / her custody rights were breached by a wrongful removal or retention is referred to in this Guide as the 'left-behind parent'. In accordance with Article 3 of the 1980 Hague Child Abduction Convention, a removal or retention is considered wrongful where it is in breach of actually exercised custody rights attributed to a person, an institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. In a small number of cases within the scope of the 1980 Convention it is a person other than the parent (a grandparent a step-parent or any other related or unrelated person) or an institution or other body whose custody rights are breached by a wrongful removal or retention of the child. To avoid lengthy descriptions throughout the Guide, unless otherwise stated, the term 'left-behind parent' will be meant to include any other person or body<sup>18</sup> whose custody rights are allegedly breached by a wrongful removal or retention.

The parent who is alleged to have wrongfully removed a child from his / her place of habitual residence to another State or to have wrongfully retained a child in another State will be referred to in this Guide as the 'taking parent'. In parallel to the use of the term 'left-behind parent', unless otherwise stated, reference in this Guide to the term 'taking parent' will be meant to include any person, institution or other body<sup>19</sup> who is alleged to have wrongfully removed or retained a child.

## Domestic violence and child abuse

The term 'domestic violence' may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical or psychological; it may be directed towards the child ('child abuse') and / or towards the partner (sometimes referred to as 'spousal abuse') and / or other family members.

This Guide uses the term 'domestic violence', unless stated otherwise, in the broad sense outlined above. Regarding domestic violence against a child, the Guide will distinguish between indirect and direct violence. The first is domestic violence towards a parent or other members of the household, which affects the child, and the second is domestic violence towards the child. Only the latter will be referred to as 'child abuse' in this Guide.<sup>20</sup>

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<sup>18</sup> Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

<sup>19</sup> Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

<sup>20</sup> See Chapter 10 on domestic violence.

## Objectives and scope

This Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, ‘the 1980 Hague Child Abduction Convention’ or ‘the 1980 Convention’). In line with other modern Hague Family Conventions, the 1980 Hague Child Abduction Convention encourages the amicable resolution of family disputes. Article 7 of the 1980 Convention states that Central Authorities ‘shall take all appropriate measures (...) to secure the voluntary return of the child or to bring about an amicable resolution of the issues’. The more recent of the modern Hague Family Conventions explicitly mention the use of mediation, conciliation and similar methods.<sup>21</sup>

Among the different means of amicable dispute resolution, this Guide primarily addresses ‘mediation’ as one of the most widely promoted methods of alternative dispute resolution in family law. This Guide, however, also refers to good practices with regard to other processes to facilitate agreed solutions, such as conciliation. A separate chapter<sup>22</sup> is dedicated to these other methods and due consideration is given to their specific nature. However, some of the mediation good practices promoted in this Guide are applicable or adaptable to a number of these other processes.

While highlighting the particularities of amicable dispute resolution in the context of child abductions and disputes over access / contact under the 1980 Hague Child Abduction Convention, this Guide outlines principles and good practices which, it is hoped, will be valuable in the use of mediation and similar processes in cross-border family disputes in general. As such, the Guide is meant to be of assistance to States Parties to the 1980 Convention, but also to States Parties to other Hague Conventions that promote the use of mediation, conciliation or similar means to facilitate agreed solutions in international family disputes. These Conventions include the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, ‘the 1996 Hague Child Protection Convention’ or ‘the 1996 Convention’), the *Hague Convention of 13 January 2000 on the International Protection of Adults* and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. In addition, this Guide is intended to assist States that are not Parties to these Hague Conventions, but that are considering how best to develop effective structures to promote cross-border mediation in international family disputes. The Guide is addressed to governments and Central Authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.

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<sup>21</sup> See Art. 31 b) of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*; Art. 31 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*; and Arts 6(2) d), 34(2) i) of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

<sup>22</sup> Chapter 15.



This Guide is the fifth Guide to Good Practice developed to support the practical operation of the 1980 Hague Child Abduction Convention. The four previously published Guides are: *Part I – Central Authority Practice*; *Part II – Implementing Measures*; *Part III – Preventive Measures*; and *Part IV – Enforcement*.<sup>23</sup>

In addition, the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children*<sup>24</sup> relates to both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

Nothing in this Guide may be construed as binding on States Parties to the 1980 Hague Child Abduction Convention or other Hague Family Conventions. The general principles set forth in this Guide are purely advisory in nature.

All States Parties, and in particular Central Authorities designated under the 1980 Hague Child Abduction Convention, are encouraged to review their own practices and, where appropriate and feasible, to improve them. For both established and developing Central Authorities, implementation of the 1980 Convention should be seen as a continuing, progressive or incremental process constantly tending towards improvement.

.....

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<sup>23</sup> *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003), hereinafter, ‘Guide to Good Practice on Central Authority Practice’; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2005), hereinafter, ‘Guide to Good Practice on Preventive Measures’; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010), hereinafter, ‘Guide to Good Practice on Enforcement’. The Guides to Good Practice are also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’ then ‘Guides to Good Practice’.

<sup>24</sup> *Op. cit.* note 16.

<sup>25</sup> The following individuals served on the Experts Group assisting with the preparation of this Guide: Ms Gladys Alvarez (Argentina), the Honourable Judge Peter F. Boshier (New Zealand), Ms Cilgia Caratsch (Switzerland), Mr Eberhard Carl (Germany), Ms Denise Carter (United Kingdom), Ms Sandra Fenn (United Kingdom), Mme Lorraine Filion (Canada), Mme Danièle Ganancia (France), Mme Barbara Gayse (Belgium), Mme Ankeara Kaly (France), Mrs Robine G. de Lange-Tegelaar (Netherlands), Judge Wilney Magno de Azevedo Silva (Brazil), Mrs Lisa Parkinson (United Kingdom), Mr Christoph C. Paul (Germany), Ms Toni Pirani (Australia), Ms Els Prins (Netherlands), Ms Kathleen S. Ruckman (United States of America), Mr Craig T. Schneider (South Africa), Ms Andrea Schulz (Germany), Mr Peretz Segal (Israel), Ms Sarah Vigers (United Kingdom), Ms Lisa Vogel (United States of America) and Ms Jennifer H. Zawid (United States of America).

# Introduction

## A Background work of the Hague Conference on international mediation in family matters and similar processes to bring about agreed solutions

- 1 The Hague Conference's work in recent decades reflects the increasing importance of mediation and other methods to bring about agreed solutions in international family law. Most of the modern Hague Family Conventions explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes. Several of the Guides to Good Practice drafted to support the effective implementation and operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention draw attention to the importance of promoting agreed solutions.<sup>26</sup>
- 2 At the same time, mediation in cross-border family disputes in general has been discussed for many years as one of the topics of future work for the Hague Conference. In April 2006, the Permanent Bureau of the Hague Conference was mandated by its Member States to:
  - 'prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject'.<sup>27</sup>
- 3 The Feasibility Study on Cross-Border Mediation in Family Matters,<sup>28</sup> which explored possible directions of future work for the Hague Conference in the field of cross-border family mediation, was presented to the Council on General Affairs and Policy of the Conference (hereinafter, 'the Council') in April 2007. The Council decided to invite the Hague Conference Members to:
  - 'provide comments, before the end of 2007, on the feasibility study on cross-border mediation in family matters (...) with a view to further discussion of the topic at the spring 2008 meeting of the Council'.<sup>29</sup>
- 4 In April 2008, the Council:
  - 'invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters'.<sup>30</sup>
- 5 Furthermore, the Permanent Bureau was asked, as a first step, to commence work on:
  - 'a Guide to Good Practice on the use of mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (...), to be submitted for consideration at the next meeting of the Special Commission to review the practical operation of that Convention (...) in 2011'.<sup>31</sup>

<sup>26</sup> See for example the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), Chapter 2, pp. 6 *et seq.*; Guide to Good Practice on Central Authority Practice (*op. cit.* note 23), section 4.12, Voluntary return, pp. 49 *et seq.*; Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1.1, Voluntary agreement and mediations, pp. 15-16.

<sup>27</sup> Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 3.

<sup>28</sup> *Op. cit.* note 13.

<sup>29</sup> Recommendations and Conclusions adopted by the Council on General Affairs and Policy of the Conference (2-4 April 2007) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 3.

<sup>30</sup> Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), p. 1, 3rd para. (Cross-border mediation in family matters).

<sup>31</sup> *Ibid.*

- 6 In its Conclusions and Recommendations, the 2009 Council meeting confirmed that decision: ‘The Council reaffirmed its decision taken at the meeting of April 2008 in relation to cross-border mediation in family matters. It approved the proposal of the Permanent Bureau that the Guide to Good Practice for Mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* be submitted for consultation to Members by the beginning of 2010 and then for approval to the Special Commission to review the practical operation of the 1980 Child Abduction Convention and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* at its next meeting in 2011.’<sup>32</sup>
- 7 It should be noted that the discussion regarding the use of mediation and similar means in the context of the 1980 Hague Child Abduction Convention also dates back many years. The topic had been explored at a series of meetings of the Special Commission to review the practical operation of the 1980 Convention. In October 2006, the Permanent Bureau published a comparative study<sup>33</sup> which focused on mediation schemes in the context of the 1980 Convention for discussion at the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the implementation of the 1996 Hague Child Protection Convention (October / November 2006).
- 8 The 2006 Special Commission meeting reaffirmed Recommendations Nos 1.10 and 1.11 of the 2001 meeting of the Special Commission:
- 1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7((2)) c) of the (1980) Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.
- 1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings.’<sup>34</sup>
- 9 As regards mediation itself, the 2006 Special Commission concluded:
- 1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5 (Note on the development of mediation, conciliation and similar means).
- 1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006.’<sup>35</sup>

<sup>32</sup> Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009) (available at < www.hcch.net > under ‘Work in Progress’ then ‘General Affairs’), pp. 1-2 (Cross-border mediation in family matters).

<sup>33</sup> S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11).

<sup>34</sup> See the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), April 2001, reiterated in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006), November 2006, at Recommendation No 1.3.1; both texts available at < www.hcch.net > under ‘Child Abduction Section’.

<sup>35</sup> See Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*ibid.*).

- 10 Work on the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention commenced in 2009. A group of independent experts<sup>36</sup> from different Contracting States was invited to assist with the preparation of the Guide. A draft Guide<sup>37</sup> was circulated to the Contracting States to the 1980 Convention and the Hague Conference Members in advance of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. The Special Commission ‘welcome(d) the draft Guide to Good Practice on Mediation under the 1980 Convention’ and requested that the Permanent Bureau ‘make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts’ and to circulate a revised version to Members and Contracting States for final consultations.<sup>38</sup> A revised version of the Guide to Good Practice was circulated to the Hague Conference Members and Contracting States to the 1980 Convention in May 2012 for last comments, which were implemented subsequently.
- 11 Following a Recommendation of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, which had in some detail discussed the problem of cross-border enforceability of mediated agreements, the 2012 Council mandated the Hague Conference to
- ‘establish an Experts’ Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention’,
- indicating that
- ‘(s)uch work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area’.<sup>39</sup>
- 12 Furthermore, attention needs to be drawn to the Hague Conference’s activity in promoting mediation and the development of mediation structures in cross-border family disputes in the context of the Malta Process.
- 13 The Malta Process, a dialogue between judges and senior government officials from certain ‘Hague Convention States’ and certain ‘non-Convention States’, whose laws are based on or have been influenced by Shariah law, focuses on seeking solutions to cross-border disputes concerning child custody, contact and abduction that are particularly difficult due to the non-applicability of relevant international legal frameworks. Three conferences were held in Malta, in 2004, 2006 and 2009, to make progress on the issue.
- 14 Following a recommendation from the Third Malta Conference,<sup>40</sup> the 2009 Council mandated, in the context of the Malta Process, the establishment of
- ‘a Working Party to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children. The Working Party would comprise experts from a number of States involved in the Malta Process, including both States Parties to the 1980 Child Abduction Convention and non-States Parties.’<sup>41</sup>

<sup>36</sup> For the list of members of the group of independent experts assisting with the preparation of the Guide, see note 25 above.

<sup>37</sup> ‘Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part V – Mediation’, drawn up by the Permanent Bureau, Prel. Doc. No 5 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’).

<sup>38</sup> See the Conclusions and Recommendations adopted by Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011) (available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’), Recommendation No 58.

<sup>39</sup> Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012) (available at < [www.hcch.net](http://www.hcch.net) > under ‘Work in Progress’ then ‘General Affairs’), Recommendation No 7.

<sup>40</sup> For further information on the Malta Process and the Malta Conferences, see the Malta Declarations (available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’); see also *The Judges’ Newsletter on International Child Protection*, Vol. XVI (spring 2010) on the Third Malta Judicial Conference on Cross-Frontier Family Law Issues (23-26 March 2009) (available at < [www.hcch.net](http://www.hcch.net) > under ‘Publications’).

<sup>41</sup> Conclusions and Recommendations adopted by the 2009 Council (*op. cit.* note 32), p. 2.

- 15 The Working Party was set up in June 2009 and consisted of a small number of independent mediation experts as well as experts from Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. The latter list comprises both Contracting and non-Contracting States to the 1980 Hague Child Abduction Convention. The Working Party held two conference call meetings, on 30 July and 29 October 2009, as well as one in-person meeting from 11 to 13 May 2010 in Ottawa (Canada). Two Questionnaires, one on existing mediation structures and one on the enforceability of mediated agreements, were circulated in preparation of the Working Party conference calls, responses to which are published on the Hague Conference website.<sup>42</sup> Following the second conference call meeting, Draft Principles for the establishment of mediation structures were established, then discussed and further elaborated by the Working Party at the in-person meeting in Ottawa. The Principles were finalised in autumn 2010 together with an Explanatory Memorandum, both of which are available on the Hague Conference website, in English, French and Arabic.<sup>43</sup>
- 16 In early 2011, some States commenced implementation of the Principles in their jurisdictions and designated a Central Contact Point for international family mediation.<sup>44</sup> In April 2011 the Council ‘welcomed the Principles for the establishment of mediation structures in the context of the Malta Process (...) and agreed that the Principles should be presented for discussion at the Sixth Meeting of the Special Commission’.<sup>45</sup> At the same time, the Council mandated the Working Party to continue work on the implementation of mediation structures in the context of the Malta Process.<sup>46</sup>
- 17 At its meeting in June 2011, the Special Commission on the practical operation of the 1980 and the 1996 Hague Conventions noted ‘the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles’ and encouraged States ‘to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point’.<sup>47</sup>
- 18 Further steps towards an implementation of the Principles for an effective establishment of mediation structures for cross-border family disputes were discussed by the Working Party at an in-person meeting in The Hague on 16 April 2012 and reported to the 2012 Council. The Council welcomed the report and ‘direction for future work outlined’ and ‘agreed that the Working Party continue its work on the implementation of mediation structures, with the expectation of a further report on progress to the Council in 2013’.<sup>48</sup>

42 At < [www.hcch.net](http://www.hcch.net) >, under ‘Child Abduction Section’ then ‘Cross-border family mediation’ (‘Questionnaire I’ and ‘Questionnaire II’).

43 ‘Principles for the Establishment of Mediation Structures in the context of the Malta Process’, drawn up by the Working Party on Mediation in the context of the Malta Process with the assistance of the Permanent Bureau, November 2010 (hereinafter, ‘Principles for the Establishment of Mediation Structures’), reproduced in Annex 1 below (also available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’ then ‘Cross-border family mediation’).

44 These States include Australia, France, Germany, Pakistan and the United States of America. Further information on the Central Contact Points is available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’ then ‘Cross-border family mediation’.

45 Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011) (available at < [www.hcch.net](http://www.hcch.net) > under ‘Work in Progress’ then ‘General Affairs’), Recommendation No 8.

46 *Ibid.*

47 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 61.

48 See Conclusions and Recommendations adopted by the 2012 Council (*op. cit.* note 39), Recommendation No 9.



## B Work by other bodies

- 19 Mediation and other means of alternative dispute resolution are also promoted by other multilateral instruments and initiatives.
- 20 An example of a regional instrument encouraging the use of mediation and similar processes is the *European Convention on the Exercise of Children's Rights* prepared by the Council of Europe and adopted on 25 January 1996.<sup>49</sup>
- 21 A further example is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, 'the Brussels IIa Regulation').<sup>50</sup>
- 22 At the same time, the increasing use of mediation in national and international commercial and civil law prompted several international and regional initiatives to develop rules and minimum standards for the mediation process itself.<sup>51</sup>
- 23 On 21 January 1998, the Council of Europe adopted Recommendation No R (98) 1 on family mediation,<sup>52</sup> encouraging States to introduce and promote family mediation or to strengthen existing family mediation while, at the same time, requesting adherence to principles to ensure the quality of mediation and the protection of vulnerable persons affected. The principles address national family mediation as well as international family mediation.
- 24 On 18 September 2002, the Council of Europe adopted Recommendation Rec (2002)10 on mediation in civil matters,<sup>53</sup> which is broader in scope and describes further principles important for the promotion of mediation in a responsible manner.

49 Council of Europe – ETS-No 160, available at < <http://conventions.coe.int/treaty/en/treaties/html/160.htm> > (last consulted 16 June 2012), Art. 13 (Mediation or other processes to resolve disputes):

'In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties.'

50 See Brussels IIa Regulation, Preamble, para. 25:

'Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.' See also Art. 55 e):

'The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: (...) e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.'

51 Many of these regional and international instruments focus on alternative dispute resolution in commercial matters, see for example the UNCITRAL Model Law on International Commercial Conciliation (*supra* note 3) and the UNCITRAL Conciliation Rules, adopted in 1980, available at < <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> > (last consulted 16 June 2012).

52 Recommendation No R (98) 1 of the Committee of Ministers to Member States on family mediation, adopted by the Committee of Ministers on 21 January 1998, available at < <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&ecMode=1&DocId=450792&Usage=2> > (last consulted 16 June 2012).

53 Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002, available at < <https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM> > (last consulted 16 June 2012).

- 25 In 2001 the National Conference of Commissioners of Uniform State Laws of the United States of America developed the Uniform Mediation Act<sup>54</sup> as a model law to encourage the effective use of mediation and ensure legal privilege for all mediation communications. Several US states, meanwhile, have implemented these rules in their jurisdiction.<sup>55</sup> In 2005, the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution adopted the 'Model Standards of Conduct for Mediators' revising an older version of Standards from 1994.<sup>56</sup> The Model Standards are meant to give guidance to mediators but also serve to inform the mediating parties and to promote public confidence in mediation.<sup>57</sup>
- 26 With the assistance of the European Commission, a group of stakeholders developed the 'European Code of Conduct for Mediators',<sup>58</sup> launched on 2 July 2004. The European Code of Conduct established a number of principles to which individual mediators in civil and commercial mediation may commit themselves on a voluntary basis and under their own responsibility.
- 27 On 21 May 2008, the European Parliament and the Council of the European Union concluded the European Directive on certain aspects of mediation in civil and commercial matters.<sup>59</sup> According to Article 12 of the Directive, EU Member States were obliged to 'bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011 with the exception of Article 10, for which the date of compliance (was) 21 November 2010 (...)'.<sup>60</sup> Another European Union initiative should be mentioned in this context: following a ministerial seminar organised by the Belgian Presidency of the European Union on 14 October 2010, a working group on family mediation in cases of international child abduction was set up within the European Judicial Network in civil and commercial matters<sup>61</sup> in order to synthesise the different related initiatives and works and to propose means to promote and improve the use of mediation in this matter.
- 28 In addition, several bilateral arrangements drafted to address cross-border family disputes concerning children promote the amicable resolution of these disputes.<sup>62</sup>

54 The text of the Uniform Mediation Act (hereinafter, 'United States UMA') in its amended version of August 2003 is available on the Uniform Law Commission website at < <http://www.uniformlaws.org> >.

55 See information on the Uniform Law Commission website at < <http://www.uniformlaws.org> >.

56 The text of the Model Standards of Conduct for Mediators (hereinafter, 'US Standards of Conduct') is available at < [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) > (last consulted 16 June 2012).

57 See Preamble of the US Standards of Conduct, *ibid.*

58 Available at < [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm) > (last consulted 16 June 2012).

59 European Directive on mediation (*supra* note 5).

60 Regarding the measures taken in the European Union Member States to comply with the Directive, see the European Judicial Atlas at < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) > under 'Mediation (Directive 2008/52/EC)' (last consulted 16 June 2012).

61 For further information on the European Judicial Network in civil and commercial matters, see the European Commission website at < [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm) >.

62 See, for example, Art. 6 of the 'Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding cooperation on protecting the welfare of children', Cairo, 22 October 2000; Art. 2 of the 'Convention entre le gouvernement de la République française et le gouvernement de la République algérienne démocratique et populaire relative aux enfants issus de couples mixtes séparés franco-algériens', Algiers, 21 June 1988; Art. 2 of the 'Protocole d'accord instituant une commission consultative belgo-marocaine en matière civile', Rabat, 29 April 1981; the texts of all these bilateral arrangements are available at < [www.incadat.com](http://www.incadat.com) >, under 'Legal Instruments' then 'Bilateral Arrangements'.



## C Structure of the Guide

- 29 The Principles and Good Practices in this Guide are explored in the following order:
- Chapter 1 gives a general overview of the advantages and risks of the use of mediation in international family disputes.
  - Chapter 2 explores the specific challenges posed by mediation in international child abduction cases within the scope of the 1980 Hague Child Abduction Convention.
  - Chapter 3 deals with the question of the special qualifications necessary to mediate in international child abduction cases.
  - Chapters 4 to 13 follow the mediation process in international child abduction cases in a chronological order from questions of access to mediation to the outcome of mediation and its legal effects.
  - The last Chapters are dedicated to the use of mediation to prevent child abductions (Chapter 14), the use of other alternative dispute resolution mechanisms to bring about agreed solutions in international child abduction cases (Chapter 15) and, finally, special issues regarding the use of mediation in non-Convention cases (Chapter 16).

## D The context – Some typical cases

- 30 Some typical factual situations may illustrate the usefulness of mediation in international family disputes concerning children under the 1980 Hague Child Abduction Convention.
- a In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.
  - b Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.
  - c In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.<sup>63</sup>
  - d Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.<sup>64</sup>
  - e At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction. Where the relationship of the parents breaks down and one of the parents wishes to leave the country with the child, mediation can assist the parents in considering relocation and its alternatives, and help them to find an agreed solution.<sup>65</sup>

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<sup>63</sup> This topic is also covered by the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

<sup>64</sup> This topic is also covered by the Guide to Good Practice on Enforcement (*op. cit.* note 23).

<sup>65</sup> This topic is also covered by the Guide to Good Practice on Preventive Measures (*op. cit.* note 23).

# The Guide

## 1 The general importance of promoting agreements in cross-border family disputes over custody and contact

- 31 There is increasing use of mediation and similar processes facilitating the amicable resolution of disputes in family law in many countries. At the same time, an increasing number of States allow for more party autonomy in the resolution of family disputes while safeguarding the rights of third parties, in particular children.

### 1.1 Advantages of agreed solutions

→ All appropriate steps should be taken to encourage the parties to a cross-border family dispute concerning children to find an agreed solution to their dispute.

- 32 The promotion of dispute resolution by agreement has proven to be particularly helpful in family disputes concerning children, where the parties to the conflict will usually need to co-operate with each other on a continuing basis. Hence, in a dispute arising out of a parental separation, an agreed solution can be particularly helpful to assist in securing the ‘child’s right to maintain on a regular basis (...) personal relations and direct contacts with both parents’ as guaranteed by the United Nations Convention on the Rights of the Child (UNCRC).<sup>66</sup>
- 33 Agreed solutions are more sustainable since they are more likely to be adhered to by the parties. At the same time, ‘they establish a less conflictual framework for the exercise of custody and contact and are therefore strongly in the interests of the child’.<sup>67</sup> Furthermore, agreed solutions are said to be more satisfactory for the parties; each can influence the result and engage in finding a solution considered ‘just’ for both parties. Solving disputes by agreement avoids the perception of one party ‘winning’ and one ‘losing’ as an outcome. In contrast, court proceedings concerning matters of custody and contact can worsen the relationship between the parents, as a result of which children are likely to suffer psychologically.<sup>68</sup>
- 34 Among the different methods to bring about agreed solutions in family disputes, the process of mediation has particular advantages; it facilitates communication between the parties in an informal atmosphere and allows the parties to develop their own strategy regarding how to

66 *United Nations Convention of 20 November 1989 on the Rights of the Child*, see Art. 10(2), text available at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> > (last consulted 16 June 2012).

67 W. Duncan, ‘Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report’, Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002 (available at < [www.hcch.net](http://www.hcch.net) > under ‘Child Abduction Section’), at para. 89; see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 2.1, p. 6.

68 See, for example, for Germany the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact, commissioned by the German Federal Ministry of Justice, drawn up by R. Greger, ‘Mediation und Gerichtsverfahren in Sorge- und Umgangsrechtskonflikten’, January 2010, p. 118, available at < <http://www.reinhard-greger.de/ikv3.pdf> > (last consulted 16 June 2012).

overcome the conflict. Mediation is a structured but flexible process, which can easily be adapted to the needs of the individual case. It allows for the simultaneous discussion of legal and extra-legal considerations as well as for the informal involvement of (third) persons who might not have legal standing in the case.<sup>69</sup> Another very important advantage of mediation is that it empowers the parties to face future conflicts in a more constructive way.<sup>70</sup> Also, since the threshold for entering into mediation is generally lower than for entering into court proceedings, mediation can be of assistance at an early stage of a conflict before a possible escalation. Mediation may allow the parties to avoid cumbersome legal proceedings. In cross-border family disputes concerning children, where legal proceedings in one country may be followed or accompanied by legal proceedings in another country concerning different aspects of the same dispute, an agreement-based solution can be particularly advantageous.

35 This points to another benefit that mediation may bring, which is cost-effectiveness. Mediation can offer a path to avoiding costly legal proceedings – costly both for the parties and for the State.<sup>71</sup> However, since mediation costs differ immensely from jurisdiction to jurisdiction and, since some jurisdictions may offer legal aid for judicial proceedings but not for mediation, it cannot be said that mediation will in every case be less costly than legal proceedings for the parties. But when comparing costs in the individual case, the possibility that the mediation is more likely to lead to a sustainable solution, and is therefore likely to avoid possible legal proceedings between the same parties in the future, needs to be taken into consideration. On the other hand, costs necessary to render the mediated agreement binding and enforceable in the two jurisdictions concerned, which may require the involvement of judicial authorities, need to be included in the calculation of mediation costs.<sup>72</sup>

36 An example will illustrate some of the advantages that mediation may offer in an international child abduction case:

- *In 2005, F and M, unmarried and both nationals of State A, move from State A to the distant State Z together with their 2-year-old daughter, for whom they have joint custody according to the laws of both State A and State Z. The reason for their relocation is the employment of the father (F) by a firm in State Z. In the following years the family settles in State Z, although the mother (M) finds it difficult to adapt to the new environment due to language and cultural differences. Since State A is several thousand kilometres away, family visits are rare; the maternal grandparents therefore put pressure on M to return to State A. Following relationship problems, M finally decides to move back to State A in 2010. She secretly makes preparations and, following the Christmas holidays of 2010 which she spends at her parents' home in State A together with the child, she informs her husband that she and the child will not return to State Z. F is shocked and, having found out about the 1980 Hague Child Abduction Convention which is in force between State A and State Z, he lodges a return application and return proceedings are initiated in State A. At the same time, F applies to the courts in State Z for provisional sole custody of his daughter.*

*Apart from the obvious advantages of an agreed solution for the child in such a case in terms of maintaining personal relations and direct contact with both parents, an amicable resolution can help the parties to avoid a cumbersome and lengthy judicial resolution of the matter in the courts of the two States concerned. Namely: (1) return proceedings in State A, which, if none of the restricted exceptions to return apply, will lead to an expeditious return of the child to State Z, (2) the ongoing custody proceedings in State Z, which may possibly be followed by (3) proceedings for relocation from State Z*

69 See N. Alexander (*op. cit.* note 7), p. 48.

70 See also K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 10.

71 See, for example, for Germany, the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact, in R. Greger (*op. cit.* note 68), p. 115; see also for the United Kingdom (England and Wales) the report from the National Audit Office, 'Legal aid and mediation for people involved in family breakdown', March 2007, pp. 8, 10, available at [http://www.nao.org.uk/publications/0607/legal\\_aid\\_for\\_family\\_breakdown.aspx](http://www.nao.org.uk/publications/0607/legal_aid_for_family_breakdown.aspx) (last consulted 16 June 2012).

72 See further regarding costs of mediation under section 4.3.

to State A initiated by the mother. The lengthy judicial resolution of the parental dispute will not only deplete the financial resources of the parties but will most probably deepen the parents' conflict. Also, if the return proceedings in State A should end with a refusal to return, further proceedings (namely custody and contact proceedings) are likely to follow if the parental conflict is not settled. Should the parents be able to find an agreed solution, they can both 'move on' and concentrate on exercising their parental responsibilities amicably.

Mediation is flexible and can adapt to the needs of the specific case. For example, the mediation process could, if both parties agree and it is considered appropriate and feasible, include discussions with the maternal grandparents, who would not have legal standing in the judicial proceedings<sup>73</sup> to the conflict but who have a strong influence on one of the parties. Ensuring their support for the resolution of the conflict can make the solution more sustainable. Mediation can also be advantageous at the organisational level, since it can be organised cross-border with mediation sessions taking place through video link, for example, if the parties' participation in an in-person meeting is not feasible. ■

## 1.2 Limits, risks and safeguards

→ **Safeguards and guarantees should be put in place to prevent engagement in mediation from resulting in any disadvantage for either of the parties.**

- 37 The limits and risks that can be connected with agreed solutions reached in mediation or through similar dispute resolution mechanisms should not normally be taken as a reason to avoid the use of these means as a whole, but should lead to awareness that necessary safeguards may need to be established.
- 38 Not all family conflicts can be solved amicably. This is an obvious point, but it cannot be emphasised enough. Some cases require the intervention of a judicial authority. This may be related to the nature of the conflict, the specific needs of the parties or the specific circumstances of the case, as well as to particular legal requirements. Parties in need of a judicial determination should not be denied access to justice. Precious time can be lost in attempting mediation in cases where one party is clearly not willing to engage in the mediation process or in cases otherwise not suitable for mediation.<sup>74</sup>
- 39 Even where both parties agree to mediation, attention needs to be paid to specific circumstances such as possible indications of domestic violence.<sup>75</sup> The very fact of a joint meeting between the parties in the course of a mediation session might put the physical or psychological integrity of one of the parties, and indeed that of the mediator, at risk. Also, consideration may have to be given to the possibility that drug or alcohol abuse by one of the parties may result in that person's inability to protect his or her interests.
- 40 Assessment of cases for suitability for mediation is an essential tool to identify cases of special risk.<sup>76</sup> Potential mediation cases should be screened for the presence of domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation. Where mediation in a domestic violence case is still considered feasible,<sup>77</sup> necessary safeguards need to be taken to protect the security of those affected. Also, attention needs to be paid to differences in bargaining power, whether due to domestic violence or other circumstances or simply resulting from the personalities of the parties.

73 In some States grandparents may have a contact right of their own and could thus be a party to judicial proceedings concerning contact with the child.

74 The question of assessing the suitability for mediation is dealt with in detail under section 4.2 below.

75 See Chapter 10 on the subject of domestic violence.

76 See section 4.2 below for further details.

77 See Chapter 10 on the subject of domestic violence.

- 41 Furthermore, there may be a risk that the agreed solution will not have legal effect and thus may not safeguard the parties' rights in case of further dispute. There are various possible reasons for this. The mediated agreement or part of it may be in conflict with the applicable law or not legally binding and enforceable due to the fact that the agreement has not been registered, court approved and / or included in a court order where this is required. It needs to be highlighted in this context that several jurisdictions restrict party autonomy in regard to certain aspects of family law.<sup>78</sup> For example, in some systems agreements on parental responsibility may have no legal effect unless approved by a court. Also, many legal systems restrict the ability of a parent to limit the amount of payable child support by agreement.
- 42 In cross-border family disputes especially, the legal situation is complex. The interplay of two or more legal systems needs to be taken into account. It is important that parents be well informed about the law applicable to the subject matters dealt with in mediation as well as the law applicable to the mediation process itself, including confidentiality, and about how to give legal effect to their agreements in both (all) legal systems concerned.<sup>79</sup>
- 43 Some of the risks that may occur when agreements are drawn up without taking into consideration all necessary aspects of the legal situation are illustrated by the following variations of the example given above at paragraph 36.

#### VARIATION 1

*Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that M will return to State Z with the child under the condition that the father (F) will provide, until the custody proceedings in State Z are finalised, the necessary maintenance to enable the returning parent to remain in State Z with the child, including use of the family home, while F promises to reside in another location to avoid further disputes. Subsequently M, relying on the agreement, returns to State Z with the child, but F refuses to leave the family home and to financially support M. Given that the parental agreement was neither rendered enforceable in State A nor in State Z before its implementation, and given that neither State considers a parental agreement of that kind to have any legal effect without court approval, one parent can easily renege on the agreement to the disadvantage of the other.*

#### VARIATION 2

*Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that the child is to remain with M in State A and will spend part of the school holidays each year with the father (F) in State Z. Three months following the date of the wrongful removal, the child travels to State Z to spend the Easter holidays with F. At the end of the holidays F refuses to send the child back to State A. He claims that he is not wrongfully retaining the child since the child is now back at her place of habitual residence, from which she had only been away due to the wrongful removal by M. F also refers to the provisional sole custody order the competent court in State Z had granted him immediately after the wrongful removal by M. Again, in cases where the mediated solution is not rendered legally binding in the relevant jurisdictions before its practical implementation, it can easily be disobeyed by one of the parents.*

#### VARIATION 3

*The child is wrongfully removed from State Z to a third State T where the mother (M) wants to relocate for work reasons. While the left-behind unmarried father (F) has ex lege custody rights under the laws of State A and State Z, he does not have custody rights according to the laws of State T. The 1996 Hague Child Protection Convention is not in force between these States. Unaware of this situation, F gives his acquiescence to the relocation of the mother and child to State T based on the condition that he can have regular personal contact with the child. The mediated agreement, drawn up without taking into consideration the legal situation, is not registered or in any other way formalised; it does not have legal effect under the law of State Z or State T. A year later, M disrupts the contact*

<sup>78</sup> See Chapter 12 for further details.

<sup>79</sup> See section 6.1.7 on informed decision-making and Chapters 12 and 13 below.



*between father and child. According to the law of State T, which is, in this case, now applicable to custody and contact rights due to the change of the child's habitual residence, the unmarried father has no parental rights in respect of the child.*<sup>80</sup>

- 44 Another difficult issue in the mediation of international family disputes over custody and contact is how best to safeguard the rights of the children concerned. The court in a contact or custody decision will – according to the law of most countries – take into consideration the best interests of the child and in many jurisdictions the voice of the child, if of sufficient age and maturity, will be heard either directly or indirectly in this context. Mediation differs substantially from court proceedings when it comes to introducing the child's views into the process. A judge may, depending on the age and maturity of the child, hear the child in person or have the child interviewed by a specialist with the appropriate safeguards to protect the child's psychological integrity. The views of the child can thus directly be taken into account by the judge. The procedural powers of a mediator, in contrast, are limited. He or she has no interrogative powers and cannot, as judges can in some countries, summon the child to a hearing or order an expert interview of the child.<sup>81</sup> Safeguards need to be taken to protect the rights and welfare of children in mediation.<sup>82</sup>

### 1.3 General importance of linkage with relevant legal procedures

- Mediation and other processes to bring about agreed solutions of family disputes should generally be seen as a complement to legal procedures, not as a substitute.
- Access to judicial proceedings should not be restricted.
- Mediation in international family disputes needs to take account of relevant national and international laws, to prepare the ground for a mediated agreement that is compatible with the relevant laws.
- Legal procedures should be available to give legal effect to the mediated agreement.

- 45 It is important to note that mediation and similar processes facilitating agreed solutions should not be seen as a complete substitute for judicial procedures, but as a complement.<sup>83</sup> A close link between these processes can be fruitful in many ways and at the same time help to overcome certain shortcomings that exist in both judicial proceedings and amicable dispute resolution mechanisms, such as mediation.<sup>84</sup> It has to be emphasised that even where mediation and similar processes introduced at an early stage of an international family dispute are able to avoid litigation, complementary 'judicial processes' will frequently be required to render an agreed solution legally binding and enforceable in all legal systems concerned.<sup>85</sup>

<sup>80</sup> If the 1996 Hague Child Protection Convention is in force between State T and State Z, the father's *ex lege* parental responsibility will subsist; see Art. 16(3) of the Convention. See also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605, at pp. 579, 581 (also available at < www.hcch.net > under 'Publications').

<sup>81</sup> See also the Terminology section above, 'Mediation'.

<sup>82</sup> See section 6.1.6 on the consideration of the interests and welfare of the child in mediation, and Chapter 7 on the involvement of the child.

<sup>83</sup> See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Preamble: 'Noting that although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system'; and Principle III, 5 (Organisation of mediation): 'Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties.'

<sup>84</sup> It should be added that if amicable dispute resolution means are to be used in an international child abduction case, the close linkage with judicial proceedings is not just fruitful but almost inevitable, see further below, particularly at section 2.2.

<sup>85</sup> The processes required to render a mediated agreement legally binding and enforceable differ from one legal system to another. For further details on the topic see Chapters 12 and 13 below.

- 46 When mediation is offered to the parties to an international family dispute, they need to be informed that mediation is not their only recourse. Access to judicial proceedings must be available.<sup>86</sup>
- 47 The legal situation in international family disputes is often complex. It is important that the parties have access to relevant legal information.<sup>87</sup>
- 48 In international family disputes it is particularly important to ensure that the mediated agreement has legal effect in the relevant jurisdictions, before implementation of the agreement begins.<sup>88</sup> Appropriate procedures should be made available to give legal effect to mediated agreements, be it by court approval, court registration or otherwise.<sup>89</sup> Again, close co-operation between mediators and legal representatives of the parties may be very helpful in this regard, as well as the provision of relevant information by Central Authorities or Central Contact Points for international family mediation.<sup>90</sup>

## 2 The use of mediation in the framework of the 1980 Hague Child Abduction Convention – An overview of specific challenges

- 49 The 1980 Hague Child Abduction Convention promotes a search for amicable solutions. Article 7 states that the Central Authorities ‘shall take all appropriate measures (...) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues’, which is partially repeated in Article 10: ‘The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.’
- 50 Chapter 2 of this Guide is meant to draw attention to the specific challenges to the use of mediation in international child abduction cases under the 1980 Hague Child Abduction Convention.
- 51 It cannot be emphasised enough that there is a difference between national family mediation and international family mediation. Mediation in international family disputes is much more complex and requires mediators to have relevant additional training. The interplay of two different legal systems, different cultures and languages makes mediation much more difficult in such cases. At the same time, the risks that come with the parties relying on mediated agreements which do not take into account the legal situation and have no legal effect in the jurisdictions concerned are

86 See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III, 5 (Organisation of mediation): ‘Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties.’ See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

87 See section 6.1.7 and Chapters 12 and 13 below; for the role of Central Authorities and other bodies in facilitating the provision of this information, as well as regarding the role of the parties’ representatives, see section 4.1 below.

88 See also the Principles for the Establishment of Mediation Structures in Annex 1 below; see Chapters 11, 12 and 13 below.

89 See also the European Directive on mediation (*supra* note 5), Art. 6 (Enforceability of agreements resulting from mediation):

‘1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.’

90 On the role of Central Authorities and other bodies in facilitating the provision of this information as well as the role of the parties’ representatives, see section 4.1 below.



much higher. The parties might not be aware that the cross-border movement of persons or goods, to which they have agreed, will result in a change of their legal situation. When it comes to rights of custody or contact, for example, habitual residence is a widely used ‘connecting factor’ in private international law. Hence the change of the child’s habitual residence from one country to another following the implementation of a parental agreement may affect jurisdiction and applicable law regarding custody and contact, and may thus affect the legal evaluation of the parties’ rights and duties.<sup>91</sup>

- 52 International child abduction cases characteristically involve high levels of tension between the parties. The left-behind parent, often in shock as a result of the sudden loss, may be driven by the fear of never seeing his / her child again while the taking parent, once realising the full consequences of his / her action, may be in fear of legal proceedings, a forced return and a possible negative impact on custody proceedings. Besides the practical difficulties of how to engage the parents in a constructive mediation process, there is the all-encompassing need for expeditious action. Additional difficulties might arise from criminal proceedings brought against the taking parent in the country of the child’s habitual residence, as well as from visa and immigration issues.

## 2.1 Timeframes / Expeditious procedures

- Mediation in international child abduction cases has to be dealt with expeditiously.
- Mediation should not lead to delays in Hague return proceedings.
- The parties should be informed about the availability of mediation as early as possible.
- The suitability of mediation should be assessed in the particular case.
- Mediation services used in international child abduction cases need to provide for the scheduling of mediation sessions on short notice.
- Initiating return proceedings before commencing mediation should be considered.

- 53 Time is crucial in international child abduction cases. The 1980 Hague Child Abduction Convention seeks to ensure the child’s prompt return to the State of his / her habitual residence.<sup>92</sup> It is the purpose of the 1980 Convention to restore the *status quo ante* the abduction as quickly as possible to lessen the harmful effects of the wrongful removal or retention for the child. The 1980 Convention protects the interests of the child by preventing a parent from gaining advantage through establishing ‘artificial jurisdictional links on an international level, with a view to obtaining ((sole)) custody of a child’.<sup>93</sup>
- 54 It has to be emphasised that in abduction cases, time plays on the side of the ‘taking parent’; the longer the child stays in the country of abduction without the underlying family dispute being resolved, the more difficult it becomes to restore the relationship between the child and the left-behind parent. Delay may affect the rights of the left-behind parent, but more importantly it undermines the right of the child concerned to maintain continuing contact with both parents, a right embodied in the UNCRC.<sup>94</sup>
- 55 When the return proceedings are commenced before the court more than one year after the abduction, the 1980 Hague Child Abduction Convention gives discretion to the court to refuse the return, provided that it is proven the child has settled into his / her new environment (Art. 12(2)).
- 56 Mediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced. Circumvention of the 1980 Hague Child Abduction Convention to the disadvantage of the children concerned is one of the major issues against which safeguards in the use of mediation

<sup>91</sup> See Chapters 12 and 13 below.

<sup>92</sup> See the Preamble of the 1980 Convention.

<sup>93</sup> See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, in *Actes et documents de la Quatorzième session (1980)*, Tome II, *Child abduction*, The Hague, Imprimerie Nationale, 1998, pp. 425-476, at p. 428, para. 11 (also available at < www.hcch.net > under ‘Publications’).

<sup>94</sup> See Art. 10(2) of the UNCRC.

need to be established.<sup>95</sup> As much as it is in everybody's interest that an amicable resolution of an international family conflict be attempted, the misuse of mediation by one parent as a delaying tactic must be prevented.

- 57 Entrusted with a return application, Central Authorities under the 1980 Hague Child Abduction Convention will, as soon as the whereabouts of the child are known, generally try to bring about a voluntary return of the child (Arts 7(2) c) and 10). At this very early stage, where appropriate services for child abduction cases are available, mediation should already be suggested. See also Chapter 4 below ('Access to mediation').
- 58 The suitability of mediation in the specific child abduction case should be assessed before mediation is attempted, to avoid any unnecessary delays.<sup>96</sup>
- 59 Mediation services offered for abduction cases under the 1980 Hague Child Abduction Convention need to provide short-notice scheduling of mediation sessions. This requires a lot of flexibility from the mediators involved. However, the burden can be lessened with the help of a pool of qualified mediators who commit themselves to a system that secures availability on short notice.
- 60 In some States, mediation schemes specifically developed for international child abduction cases are already successfully providing such services.<sup>97</sup> Typically, they may offer two or three mediation sessions spread over a minimum of two (often subsequent) days, each session taking up to three hours.<sup>98</sup>
- 61 The institution of Hague return proceedings before commencing mediation should be considered. Experience in several countries has shown that the immediate initiation of return proceedings

95 See also S. Vigers, 'Mediating International Child Abduction Cases – The Hague Convention', Hart Publishing, Oxford, 2011, pp. 42 *et seq.*

96 For more information on the initial screening, particularly regarding what issues may influence the suitability for mediation as well as who can conduct the screening, see section 4.2.

97 For example, in the **United Kingdom (England and Wales)**, the non-governmental organisation reunite International Child Abduction Centre (hereinafter, 'reunite') has offered specialist mediation services in cases of international child abduction for more than 10 years, see the reunite website at < [www.reunite.org](http://www.reunite.org) >; see also the report of October 2006 on 'Mediation In International Parental Child Abduction – The reunite Mediation Pilot Scheme' (hereinafter, '2006 Report on the reunite Mediation Pilot Scheme'), available at < <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf> >. In **Germany**, the non-profit organisation MiKK e.V., founded in 2008 by the German associations BAFM and BM, is continuing the work of the latter associations in the field of 'Mediation in International Disputes Involving Parents and Children' including specialist mediation in Hague abduction cases. Mediation services are currently available under four bi-national co-mediation programmes: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-British** project in co-operation with reunite (commenced in 2003/4) and the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice (2003-2006). A fifth mediation scheme involving **German and Spanish** mediators is in preparation, see < [www.mikk-ev.de](http://www.mikk-ev.de) >. In the **Netherlands**, the non-governmental organisation *Centrum Internationale Kinderontvoering* (IKO) offers specialist mediation services in Hague child abduction cases organised through its Mediation Bureau since 1 November 2009, see < [www.kinderontvoering.org](http://www.kinderontvoering.org) > (last consulted 16 June 2012); see also R.G. de Lange-Tegelaar, 'Regiezittingen en mediation in internationale kinderonvoeringszaken', *Trema Special*, No 33, 2010, pp. 486, 487.

98 See, *e.g.*, the mediation services offered in the **United Kingdom (England and Wales)** by reunite (< [www.reunite.org](http://www.reunite.org) >), and the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 11. See also the mediation services offered in **Germany** through the association MiKK e.V., and S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in C.C. Paul and S. Kiesewetter (Eds), *Cross-Border Family Mediation – International Parental Child Abduction, Custody and Access Cases*, Wolfgang Metzner Verlag, 2011, pp. 39 *et seq.* See also in the **Netherlands**, the Dutch Mediation Pilot Programme using 3x3-hour sessions in the course of two days, see I. Bakker, R. Verwijs *et al.*, *Evaluatie Pilot Internationale Kinderontvoering*, July 2010, p. 77.

followed, where necessary,<sup>99</sup> by a stay of these proceedings for mediation works well.<sup>100</sup> This approach has several advantages:<sup>101</sup>

- a It may positively affect the taking parent's motivation to engage in finding an amicable solution when otherwise faced with the concrete option of court proceedings.
- b The court may be able to set a clear timeframe within which the mediation sessions must be held. Thus the misuse of mediation as a delaying tactic is avoided and the taking parent is not able to gain any advantages from the use of Article 12(2) of the 1980 Hague Child Abduction Convention.
- c The court may take necessary protective measures to prevent the taking parent from taking the child to a third country or going into hiding.
- d The left-behind parent's possible presence in the country to which the child was abducted to attend the Hague court hearing can be used to arrange for a short sequence of in-person mediation sessions without creating additional travel costs for the left-behind parent.
- e The court seised could, depending on its competency in this matter, decide on provisional contact arrangements between the left-behind parent and the child, which prevents alienation and may have a positive effect on the mediation process itself.
- f Funding for court-referred mediation may be available.
- g Furthermore, the fact that the parties will most likely have specialist legal representation at this stage already helps to ensure that the parties have access to the relevant legal information in the course of mediation.
- h Finally, the court can follow up the result of mediation and ensure that the agreement will have legal effect in the legal system to which the child was abducted, by turning the agreement into a court order or taking other measures.<sup>102</sup> The court can also assist with ensuring that the agreement will have legal effect in the other relevant jurisdiction.

62 However, the question of when to institute return proceedings where mediation is an option may be answered differently. Depending on how the Hague return proceedings are organised in the relevant legal system and depending on the circumstances of the case, the commencement of mediation before the institution of return proceedings can be an option. In Switzerland, for example, the legislation implementing the 1980 Hague Child Abduction Convention provides for an explicit possibility for the Central Authority to initiate conciliation or mediation procedures before the institution of the return proceedings.<sup>103</sup> In addition, the Swiss implementation legislation emphasises the importance of attempting an amicable settlement of the conflict by requiring that the court, once seised with the Hague return proceedings, initiate mediation or conciliation procedures if the Central Authority has not already done so.<sup>104</sup>

<sup>99</sup> States which do not stay the return proceedings for mediation are, for example, **France, Germany** and the **Netherlands**. In **Germany** and the **Netherlands**, the mediation in international abduction cases is integrated into the schedule of the court proceeding, *i.e.*, mediation takes place within the short period of 2-3 weeks before the (next) court hearing. A stay of proceedings is therefore not necessary in these States. In **France**, mediation is conducted as a process parallel to, and independent of, the Hague return proceedings; *i.e.*, the return proceedings follow the usual timeline regardless of whether there is an ongoing mediation or not. An amicable result reached in the parallel process of mediation can be introduced into the return proceedings at any time.

<sup>100</sup> For example, **Germany** and the **United Kingdom**; see also S. Vigers, *Mediating International Child Abduction Cases – The Hague Convention* (*op. cit.* note 95), pp. 45 *et seq.*

<sup>101</sup> See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

<sup>102</sup> On the question of rendering the agreement enforceable and the question of jurisdiction, see Chapters 12 and 13 below.

<sup>103</sup> See Art. 4 of the Swiss Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*), available at < <http://www.admin.ch/ch/d/sr/2/211.222.32.de.pdf> > (last consulted 16 June 2012), unofficial English translation available at < <http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf> > (last consulted 16 June 2012); see also A. Bucher, 'The new Swiss Federal Act on International Child Abduction', *Journal of PIL*, 2008, pp. 139 *et seq.*, at 147.

<sup>104</sup> Art. 8 of the Swiss Federal Act of 21 December 2007.

- 63 Independently of whether mediation or similar processes in international child abduction cases under the 1980 Hague Child Abduction Convention are introduced prior to or following the institution of return proceedings, it is of the utmost importance that Contracting States take safeguards to ensure that mediation and similar processes take place with very clear and limited timeframes.
- 64 Regarding the scope of mediation, a balance has to be struck between giving the communication process between the parties sufficient time and not delaying possible return proceedings.<sup>105</sup>

## 2.2 Close co-operation with administrative / judicial authorities

→ **Mediators and bodies offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts.**

- 65 Mediators and organisations offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts on an organisational level to ensure a speedy and efficient resolution of the matter. The mediators should do their best to make the organisational aspects of the mediation procedures as transparent as possible, while safeguarding the confidentiality of mediation. For example, the Central Authority and the court seised should be informed of whether mediation will be conducted or not in the case. The same is true when mediation is terminated or interrupted. This information should be communicated speedily to the Central Authority and the court seised. It is therefore advisable in international child abduction cases that the Central Authority and / or the relevant court should maintain close links with the specialist mediation services on an administrative level.<sup>106</sup>

## 2.3 More than one legal system involved; enforceability of the agreement in both (all) jurisdictions concerned

- **Mediators need to be aware that mediation in international child abduction cases has to take place against the background of interaction between two or more legal systems and of the applicable international legal framework.**
- **The parties need to have access to relevant legal information.**

- 66 Specific difficulties for the mediation process itself may result from the fact that more than one legal system is involved. To find a sustainable solution for the parties that can have legal effect, it is therefore important to take the laws of both (all) legal systems concerned into consideration, as well as regional or international law applicable in the case.
- 67 It has already been stressed above in section 1.2 how dangerous it can be when parties rely on mediated agreements that have no legal effect in the relevant jurisdictions. Mediators conducting mediation in international family disputes concerning children have a responsibility to draw the parties' attention to the importance of obtaining the relevant legal information and specialist legal advice. It needs to be highlighted in this context that mediators, even those having the relevant specialist legal training, are not in a position to give legal advice to the parties.

<sup>105</sup> See Chapter 5 below; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission (*op. cit.* note 34), Recommendation No I.II, 'Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings', reiterated in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*id.*), Recommendation No I.3.I.

<sup>106</sup> For example, in Germany, the Central Authority concluded a co-operation contract with the specialist mediation organisation MiKK e.V., which includes, *inter alia*, terms on a speedy information exchange on an organisational level.

- 68 Legal information becomes particularly relevant with respect to two aspects: first, the content of the mediated agreement, which needs to be compatible with legal requirements and, second, the question of how to give legal effect to the mediated agreement in the two or more legal systems concerned. The two are closely linked.
- 69 The parties should be made aware of the fact that specialist legal advice may be needed with regard to the relevant legal systems' approaches to the law applicable to the matters discussed in the mediation. The parents' autonomy regarding agreements on custody and contact in respect of their child may be restricted in that the law may provide for mandatory court approval of any such agreement to ensure that the best interests of the child are secured.<sup>107</sup> At the same time, the parents should understand that, once a mediated agreement has legal effect in one jurisdiction, further steps might be necessary to give it legal effect in the other legal system(s) concerned in their case.<sup>108</sup>
- 70 The parties should ideally have access to pertinent legal information throughout the mediation process. That is why many mediators working in the field of international child abduction encourage the parties to maintain specialist legal representatives throughout the mediation process. Relevant information may also be provided by Central Authorities or Central Contact Points for international family mediation.<sup>109</sup>

## 2.4 Different cultural and religious backgrounds

→ Mediation in international family disputes should take due consideration of the possibly different cultural and religious backgrounds of the parties.

- 71 One of the particular challenges of international family mediation in general is that the parties often have different cultural and religious backgrounds. Their values and expectations regarding many aspects of the exercise of parental responsibility, such as the education of their children, may differ immensely.<sup>110</sup> The cultural and religious backgrounds of the parties may also affect the way they communicate with each other and with the mediator.<sup>111</sup> The mediator needs to be aware that a part of the family dispute may be caused by misunderstandings due to a lack of recognition of the other party's cultural differences.<sup>112</sup>
- 72 Mediators conducting mediation in such cases should have a good understanding of the cultures and religious background(s) of the parties.<sup>113</sup> Specific training is needed in this respect.<sup>114</sup> Where a choice of specialist mediators is available and feasible for the parties, it can be helpful to employ mediators versed in the cultural and religious backgrounds of the parties or sharing one party's background and being versed in the other party's culture and religion.

<sup>107</sup> See Chapter 12.

<sup>108</sup> See Chapters 12 and 13.

<sup>109</sup> On the role of Central Authorities and other bodies in facilitating the provision of this information as well as the role of the parties' representatives, see section 4.1 below.

<sup>110</sup> See, e.g., K.K. Kovach, *Mediation in a nutshell*, St. Paul, 2003, at pp. 55, 56; D. Ganancia, 'La médiation familiale internationale', *Èrès*, Ramonville Saint-Agne 2007, 132 ff; R. Chouchani Hatem, 'La différence culturelle vécue au quotidien dans les couples mixtes franco-libanais', *Revue Scientifique de LAIFI*, Vol. 1, No 2, *Automne* 2007, pp. 43-71; K. Kriegel, 'Interkulturelle Aspekte und ihre Bedeutung in der Mediation', in S. Kiesewetter and C.C. Paul (Eds), *Mediation bei internationalen Kindschaftskonflikten – Rechtliche Grundlagen, Interkulturelle Aspekte, Handwerkszeug für Mediatoren, Einbindung ins gerichtliche Verfahren, Muster und Arbeitshilfen*, Verlag C.H. Beck, 2009, pp. 91-104; M.A. Kucinski, 'Culture in International Parental Kidnapping Mediations', *Pepperdine Dispute Resolution Law Journal*, 2009, pp. 555-582, at 558 *et seq.*

<sup>111</sup> See, e.g., K.K. Kovach (*loc. cit.* note 110), pointing out that eye contact may in some cultures be considered as insulting or demonstrating a lack of respect, while in most Western cultures it is on the contrary a sign of active listening. D. Ganancia, 'La médiation familiale internationale' (*id.*), 132 ff.

<sup>112</sup> See K.K. Kovach (*op. cit.* note 110), at p. 56.

<sup>113</sup> See also section 6.1.8 below.

<sup>114</sup> See Chapter 3 on mediator training.



- 73 A model that has been successfully followed in some mediation schemes and which was specifically developed for cross-border child abductions involving parents from different States of origin is that of 'bi-national' mediation.<sup>115</sup> Here, the requirement that the mediators have a good understanding of the parties' cultural backgrounds is met by employing, in co-mediation, two mediators from the two States concerned, each being knowledgeable of the other culture. 'Bi-national' could as well stand for 'bi-cultural' in this context. It is important to highlight that mediators are neutral and impartial and do not represent either of the parties.<sup>116</sup>

## 2.5 Language difficulties

→ In mediation each party should, as far as possible, have the opportunity to speak a language with which he or she feels comfortable.

- 74 A further challenge to mediation in international family disputes arises when the parties to the dispute speak different mother tongues. Where the parties have different native languages, they may in mediation, at least temporarily, each prefer to speak their own language. This may be the case even if one of the parties masters the other's language or is comfortable using a language other than his / her mother tongue in the everyday context of their relationship. In the emotionally stressful circumstances of discussing their dispute, the parties may simply prefer speaking their mother tongue, and this might also give them the feeling of being on equal footing.
- 75 On the other hand, parties with different mother tongues may well feel comfortable speaking a third language in mediation, *i.e.*, the mother tongue of neither of the parties, or one party may be willing to speak the other's language. In any case, the mediator has to be aware of the additional risk of misunderstandings as a result of language difficulties.
- 76 The wishes of the parties regarding the language(s) used in mediation should be respected as much as possible. Ideally, the mediator(s) themselves should be able to understand and speak those languages.<sup>117</sup> Co-mediation allows for the involvement of mediators with the same mother tongues as the parties and fluent in, or having a good command of, the other relevant language (so-called 'bilingual' co-mediation).<sup>118</sup> Co-mediation may also include one mediator speaking only the mother tongue of one party and the other being fluent in the two relevant languages. Here, however, the mediator speaking the two languages will partly play an interpreting role.
- 77 Offering the parties the possibility to directly communicate in their preferred language during mediation is clearly the first choice; however, there may be cases where this is not feasible. Communication in the preferred language might also be facilitated through the use of interpretation. Where interpretation is considered an option, the interpreter has to be chosen with care and needs to be well prepared and aware of the highly sensitive nature of the conversation, and of the emotional atmosphere of the mediation, so as not to add a further risk of misunderstanding and jeopardise an amicable resolution. Furthermore, safeguards concerning confidentiality of mediation communications must be extended to include the interpreter(s).<sup>119</sup>

<sup>115</sup> Franco-German Project of Bi-national Professional Mediation (2003-2006); US-German Bi-national Mediation Project; Polish-German Bi-national Mediation Project; see also section 6.2.3 below.

<sup>116</sup> See further under Chapter 6, section 6.2.3 below.

<sup>117</sup> See also section 3.3 regarding lists of mediators.

<sup>118</sup> The bi-national mediation programmes referred to under note 115 above are all bilingual mediation programmes.

<sup>119</sup> Regarding confidentiality, see section 6.1.5 below.

## 2.6 Distance

→ The geographical distance between the parties to the dispute needs to be taken into account when it comes to making arrangements for a mediation meeting, as well as in relation to the modalities agreed on in the mediated agreement.

- 78 Another challenge of mediation in cases of child abduction from one country to another is that of geographical distance between the parties. The distance between the State of the child's habitual residence, which is where the left-behind parent resides, and the State to which the child was taken may be very great.
- 79 Distance may on the one hand affect the practical arrangements for the mediation sessions. On the other hand, distance may play a role regarding the content of the mediated solution itself, which may need to take account of the possibility that a considerable geographical distance will remain between the parents in the future. The latter would be the case, for example, if the left-behind parent agreed to relocation of the child together with the taking parent, or in cases where the child is returned to the State of habitual residence but the taking parent decides to remain abroad.
- 80 When it comes to arranging a mediation session, the distance between the parties and the potentially high travel costs will affect the question of the appropriate venue for mediation, and the question of whether direct or indirect mediation should be used. Both topics are dealt with in detail below (the place of mediation under section 4.4, and the question of direct or indirect mediation under section 6.2). Of course, modern means of communication such as video-link or Internet communication may assist in mediation.<sup>120</sup>
- 81 As regards the content of an eventual agreement allowing for the exercise of cross-border custody and / or contact rights, *i.e.*, where the parents decide to reside in different countries, the geographical distance as well as the connected travel costs need to be given due consideration. Any arrangements agreed on need to be realistic and feasible in terms of time and expenses. This topic will be explored further under Chapter 11 ('Reality check').

## 2.7 Visa and immigration issues

- All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to a parent wishing to attend an in-person mediation meeting in another State.
- All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to any parent needing to enter another country to exercise his / her custody or contact rights with his / her child.
- The Central Authority should take all appropriate steps to assist the parents with obtaining the necessary documents through provision of information and advice, or by facilitating specific services.

- 82 In cases of international family disputes, visa and immigration issues often add to the difficulties of the case. In order to promote amicable resolutions of international family disputes, States should take measures to ensure that a left-behind parent is capable of obtaining necessary travel documents to attend a mediation session in the country to which the child was abducted, or indeed to participate in legal proceedings.<sup>121</sup> At the same time, States should take measures to facilitate the

<sup>120</sup> For further details see section 4.4 below.

<sup>121</sup> For information on possible assistance with visa and immigration issues, see the Country Profiles under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011 (available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'), at sections 10.3 j) and 10.7 l).



provision of necessary travel documents to the taking parent to re-enter the State of the habitual residence of the child for a mediation session and / or legal proceedings.<sup>122</sup>

- 83 The provision of travel documents may also play an important part in the result of legal proceedings or mediation in an international parental dispute. For example, where the return of a child is ordered in Hague return proceedings, the taking parent might need travel documents to re-enter the State of the child's habitual residence together with the child. States should facilitate the provision of necessary travel documents in such cases. The same applies to cases where the taking parent decides to return the child voluntarily, including where a return of the child and parent has been agreed on in mediation. Nor should visa and immigration issues constitute an obstacle to the cross-border exercise of contact rights; the right of children to have contact with both their parents, as supported by the UNCRC, needs to be safeguarded.<sup>123</sup>
- 84 The Central Authority should assist the parents in obtaining promptly the necessary travel documents by providing information and advice or by providing assistance with the application for any necessary visa.<sup>124</sup>

## 2.8 Criminal proceedings against the taking parent

- Mediation in international child abduction cases needs to take into consideration possible criminal proceedings initiated against the taking parent in the country from which the child was abducted.
- Where criminal proceedings were initiated, the issue needs to be addressed in mediation. Close co-operation among the relevant judicial and administrative authorities may be needed to help ensure that any agreement reached in mediation is not frustrated by ongoing criminal proceedings.

- 85 Although the 1980 Hague Child Abduction Convention only deals with the civil aspects of international child abduction, criminal proceedings against the taking parent in the country of the child's habitual residence may affect return proceedings under the 1980 Convention.<sup>125</sup> The criminal charges may include child abduction, contempt of court and passport offences. Pending criminal

<sup>122</sup> See also the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 31.

<sup>123</sup> See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.

<sup>124</sup> *Ibid.* See also the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 31:

'Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.'

<sup>125</sup> The responses to the 2006 Questionnaire showed that criminal proceedings are commonly, but not necessarily, viewed as having a negative effect, see question No 19 of the 'Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Including questions on implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children)', drawn up by the Permanent Bureau, Prel. Doc. No 1 of April 2006 for the attention of the Fifth Meeting of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction; see also 'Report on the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006)', drawn up by the Permanent Bureau, March 2007, at p. 56; both documents are available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'.

proceedings in the State of the child's pre-abduction residence can – under certain circumstances – result in the court seised with a Hague return application refusing to return the child. This may, in particular, be the case where the child was abducted by the actual carer and the return order would result in the separation of actual carer and child,<sup>126</sup> and this separation – due to the age of the child or other circumstances – would constitute a grave risk of physical or psychological harm in the sense of Article 13(1) *b*) of the 1980 Convention.<sup>127</sup>

- 86 The means by which criminal charges can be brought against the taking parent and whether and to what extent the left-behind parent has an influence on the initiation of criminal proceedings related to the child abduction will depend on the relevant legal system and the circumstances of the case. It should be noted that, even in cases where criminal proceedings were initiated on the motion or with the agreement of the left-behind parent, it might be a matter left to the prosecutor or court alone to decide whether criminal proceedings may be terminated. This means that should criminal proceedings against the taking parent turn out to be a possible obstacle to the return of the child, the left-behind parent may have little influence on removing this obstacle, whether or not the criminal charges were brought on his or her motion or with his or her approval.
- 87 Within mediation in international child abduction cases, it is important to take into consideration that criminal proceedings, particularly if threatening an imprisonment of the taking parent, may have been initiated or that there is a potential risk that such criminal proceedings might be filed in the future, even after the agreed return of the taking parent and child. In view of the possible implication these proceedings may have, it is crucial to address the issue in mediation.
- 88 Central Authorities and courts involved should as far as possible support the parties in obtaining the necessary general information on the relevant laws governing the initiation and termination of criminal proceedings as well as on the specific status of criminal proceedings. Close co-operation among the relevant judicial and administrative authorities may be necessary to ensure that criminal proceedings are not pending before a mediated agreement providing for the taking parent or child to travel to the State of the child's pre-abduction residence is implemented, or that no such proceedings can be initiated following the return of the taking parent and child. With regard to co-operation among the relevant judicial authorities, the International Hague Network of Judges may be of particular use.<sup>128</sup>
- 89 General information regarding criminal law aspects of international child abduction in the different Contracting States including information on who is able to initiate, withdraw or suspend criminal proceedings relating to the wrongful removal or wrongful retention of a child can be found in the Country Profiles under the 1980 Hague Child Abduction Convention.<sup>129</sup>

<sup>126</sup> Because the parent's only choice was between not returning with the child or imprisonment upon return.

<sup>127</sup> 'This problem has sometimes been resolved by suspending (the enforcement of) the return order until the charges against the abducting parent are withdrawn', see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22 and note 118.

<sup>128</sup> For more information on the International Hague Network of Judges and the functioning of direct judicial communications, see 'Emerging rules regarding the development of the International Hague Network of Judges and draft General Principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges', drawn up by the Permanent Bureau, Prel. Doc. No 3 A of March 2011, and P. Lortie, 'Report on Judicial Communications in relation to international child abduction', Prel. Doc. No 3 B of April 2011, both documents for the attention of the Special Commission of June 2011 and available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'.

<sup>129</sup> See section 11.3. of the Country Profiles under the 1980 Convention (*supra* note 121).

### 3 Specialised training for mediation in international child abduction cases / Safeguarding the quality of mediation

#### 3.1 Mediator training – Existing rules and standards

- 90 To guarantee the quality of mediation it is indispensable that those conducting mediation have undergone appropriate training. Some States have enacted legislation regulating mediator training or the qualifications or experience<sup>130</sup> a person must have before being able to obtain a certain title, be registered as mediator, or be allowed to conduct mediation or certain forms of mediation (for example, State funded mediation).
- 91 For example, Austria established a State register for mediators in 2004. Registration requires mediators to comply with regulated training requirements.<sup>131</sup> The registration is only valid for five years; renewal requires proof of continuing training as set forth in the law.<sup>132</sup>
- 92 France also introduced legislation regarding the training for family mediation and penal mediation.<sup>133</sup> A State diploma in family mediation was introduced in 2004.<sup>134</sup> Only candidates with professional experience and / or a national diploma in the social or health sectors are admitted,<sup>135</sup> and they must have successfully passed the selection process.<sup>136</sup> The curriculum is regulated in detail and comprises 560 hours of training in, *inter alia*, law, psychology and sociology, 70 hours of which must be devoted to practice.<sup>137</sup> Another way to obtain the diploma is through recognition of professional experience.<sup>138</sup>
- 93 In many of the legal systems where mediator training has not been regulated by legislation, mediation organisations and associations have, with a view to guaranteeing the quality of mediation, established minimum training requirements which they request mediators to fulfil when joining the network. However, often due to the lack of a central point of reference regarding the training requirements for the relevant jurisdiction, there is no uniform approach to training standards.

<sup>130</sup> The following States indicated in the Country Profiles under the 1980 Convention (*supra* note 121) that legislation on mediation (and in the case of some States, specific legislation on family mediation) addresses the issue of necessary qualifications and experience of mediators: Argentina, Belgium, Finland, France, Greece, Hungary, Norway, Panama, Paraguay, Poland, Romania, Slovenia, Spain, Switzerland and the United States of America.

<sup>131</sup> See *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003, available at < [http://www.ris.bka.gv.at/Dokumente/BgblPdf/2003\\_29\\_1/2003\\_29\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/2003_29_1/2003_29_1.pdf) > (last consulted 16 June 2012) and *Zivilrechts-Mediations-Ausbildungsverordnung (ZivMediatAV)* of 22 January 2004, available at < [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2004\\_II\\_47/BGBLA\\_2004\\_II\\_47.html](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_II_47/BGBLA_2004_II_47.html) > (last consulted 16 June 2012).

<sup>132</sup> See Arts 13 and 20 of the *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003 (*supra* note 131).

<sup>133</sup> See K. Deckert, 'Mediation in Frankreich – Rechtlicher Rahmen und praktische Erfahrungen', in K.J. Hopt and F. Steffek (*op. cit.* note 2), pp. 183-258, at pp. 242, 243.

<sup>134</sup> See *Décret No 2003-1166 du 2 décembre 2003 portant création du diplôme d'État de médiateur familial* and *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007*, available at < <http://www.legifrance.gouv.fr> > (last consulted 16 June 2012); see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

<sup>135</sup> For details see *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007* (*supra* note 134), Art. 2.

<sup>136</sup> *Ibid.*, Art. 3.

<sup>137</sup> *Ibid.*, Arts 4 *et seq.*

<sup>138</sup> Two stages are necessary for the recognition of professional experience: the public authorities first assess the applicant's admissibility and then a panel of examiners assesses the development of skills acquired through experience, see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

- 94 An example of a jurisdiction in which central training requirements have evolved indirectly through self-regulation is England and Wales, where only mediators who have completed the Legal Services Commission (LSC) recognised training and have passed successfully the LSC's Assessment of Competence for family mediation are permitted to undertake publicly funded mediation.<sup>139</sup>
- 95 Furthermore, the issue of mediator training is addressed in several national<sup>140</sup> and regional non-binding instruments, such as mediation standards and codes of conduct<sup>141</sup> or recommendations.<sup>142</sup> However, there is not necessarily consensus regarding the training standards among the different bodies promoting mediator training. Also, many of the rules and standards address mediator training generally and do not focus specifically on training for family mediation, let alone international family mediation.
- 96 Among the initiatives for regionally promoting standards of mediator training for family mediation is that of AIFI,<sup>143</sup> an interdisciplinary non-governmental organisation with members in Europe and Canada. The AIFI Guide to Good Practice in Family Mediation, drawn up in 2008, addresses the issue of specialised training and accreditation for international family mediation.<sup>144</sup> Another organisation active in this field of mediation is the European Association of Judges for Mediation (GEMME, *Groupement Européen des Magistrats pour la Médiation*),<sup>145</sup> which consists of several national sections. The organisation links judges from different European States with the aim of promoting methods of amicable dispute resolution, in particular mediation. In 2006, GEMME France published a Practical Guide on the use of judicial mediation, which also touches upon issues of mediator training and professional ethics.<sup>146</sup>
- 97 Some non-binding regional mediation instruments encourage States to provide relevant structures to secure the quality of mediation. For example, Council of Europe Recommendation No R (98) 1 on family mediation encourages States to ensure the existence of 'procedures for the selection, training and qualification of mediators' and emphasises that, '(t)aking into account the particular nature of international mediation, international mediators should be required to undergo specific training'.<sup>147</sup> In addition, Council of Europe Recommendation Rec (2002)10 on mediation in civil matters requests States to 'consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues'.<sup>148</sup> Also the European Directive on mediation, a

<sup>139</sup> See Legal Services Commission Mediation Quality Mark Standard, 2nd ed., September 2009, available online at < <http://www.justice.gov.uk/downloads/legal-aid/quality/mediation-quality-mark-standard.pdf> > (last consulted 16 June 2012).

<sup>140</sup> For example, regarding a training model developed by the National Centre for Mediation and Conflict Resolution in the Ministry of Justice in Israel, see E. Liebermann, Y. Foux-Levy and P. Segal, 'Beyond Basic Training – A Model for Developing Mediator Competence', in *Conflict Resolution Quarterly* 23 (2005) pp. 237-257.

<sup>141</sup> For example, the European Code of Conduct for Mediators (*supra* note 58), which establishes a number of principles to which individual mediators may commit themselves on a voluntary basis, states that '(m)ediators must be competent and knowledgeable in the process of mediation' and emphasises that '(r)elephant factors include proper training and continuous updating of their education and practice in mediation skills (...)', see Point I.I.

<sup>142</sup> See also 'Legislating for Alternative Dispute Resolution – A Guide for Government Policy-Makers and Legal Drafters', November 2006, pp. 49 *et seq.*, drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), available at < <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/LegislatingforAlternativeDisputeResolution.aspx> > (last consulted 16 June 2012).

<sup>143</sup> *Association Internationale Francophone des intervenants auprès des familles séparées*.

<sup>144</sup> Original title: 'Guide de bonnes pratiques en médiation familiale à distance et internationale', see Art. 5.

<sup>145</sup> The GEMME website can be found at < [www.gemme.eu/en](http://www.gemme.eu/en) >.

<sup>146</sup> The Guide is available on the GEMME website at < <http://www.gemme.eu/nation/france/article/le-guide> > (last consulted 16 June 2012).

<sup>147</sup> *Supra* note 52, see parts II, c) and VIII e).

<sup>148</sup> *Supra* note 53, see Principle V.

binding regional instrument, requests European Union Member States to ‘encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties’.<sup>149</sup>

### 3.2 Specific training for mediation in international child abduction cases

- Mediation in international child abduction cases should only be conducted by experienced family mediators who preferably should have undergone specific training for mediation in international child abduction cases.
- Mediators working in this field need continuing training to maintain their professional competence.
- States should support the establishment of training programmes and standards for cross-border family mediation and mediation in international child abduction cases.

- 98 In view of the particular nature of mediation in international child abduction cases, only experienced family mediators preferably having received specific training for international family mediation and, more specifically, mediation in international child abduction cases should conduct mediation in such cases.<sup>150</sup> Less experienced mediators should ideally only mediate such cases in co-mediation with more experienced colleagues.
- 99 Training for mediation in international child abduction cases should prepare the mediator to face the specific challenges of cross-border child abduction cases, as set out above, while building on the foundation of the regular mediator training.<sup>151</sup>
- 100 Generally, the mediator must possess the socio-psychological and legal knowledge necessary for conducting mediation in high conflict family cases. The mediator must have adequate training in assessing the suitability of an individual case for mediation. He or she must be able to assess the parties’ capacity to mediate, *e.g.*, recognise mental impairment and language difficulties, and must be able to identify patterns of domestic abuse and child abuse and to draw the necessary conclusions.
- 101 Furthermore, training for international family mediation should encompass the development or consolidation of the necessary cross-cultural competence as well as the necessary language skills.
- 102 At the same time, the training needs to impart knowledge and understanding of the relevant regional and international legal instruments as well as the applicable national law. Although it is not the mediator’s role to give legal advice, basic legal knowledge is crucial in cross-border family cases. It enables the mediator to understand the greater picture and conduct mediation in a responsible manner.
- 103 Responsible mediation in international child abduction cases includes encouraging the parents to focus on the needs of the children, and reminding them of their prime responsibility for their children’s welfare. It stresses the need for them to inform and consult their children, and draws the parties’ attention to the fact that their agreed solution can only be sustainable if it complies with

<sup>149</sup> See Art. 4 of the European Directive on mediation (*supra* note 5).

<sup>150</sup> See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), VIII (International matters): ‘e. Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training.’

<sup>151</sup> An example of a specialised training programme is the EU-co-founded project TIM (Training in international family mediation), which aims to create a network of international family mediators in Europe, see the network website < <http://www.crossbordermediator.eu> >. Further details on the TIM project, which is carried out by the Belgian NGO Child Focus in co-operation with the Katholieke Universiteit van Leuven and the German specialist mediation organisation MiKK e.V. with the support of the Dutch Centre for International Child Abduction, are available on the website of the German organisation MiKK e.V. at < <http://www.mikk-ev.de/english/eu-training-project-tim/> > (last consulted 16 June 2012).



both (all) legal systems involved and is rendered legally binding in those legal systems, which will require specialist legal advice. Specialised training is required for child-inclusive mediation that takes into account the views of the child in child abduction cases.

- 104 Mediators working in the field of international child abduction need continuing training to maintain their professional competence.
- 105 The establishment of mediation training programmes and the further elaboration of standards for cross-border family mediation and mediation in international child abduction cases should be supported by States.

### 3.3 Establishment of mediator lists

→ States should consider supporting the establishment of publicly available family mediator lists through which specialist mediators can be identified.

- 106 With a view to promoting the establishment of mediation structures for cross-border family disputes, States should consider encouraging the establishment, on a national or supranational level, of publicly available family mediator lists through which specialist mediators and mediation services can be identified.<sup>152</sup> Ideally, these lists should include the mediators' contact details, information about their field(s) of speciality, training, language skills, intercultural competence and experience.
- 107 States can also facilitate the provision of information on specialised international family mediation services available in their jurisdiction through a Central Contact Point on international family mediation.<sup>153</sup>

### 3.4 Safeguarding the quality of mediation

→ Mediation services used in cross-border family disputes should be monitored and evaluated, preferably by a neutral body.  
 → States are encouraged to support the establishment of common standards for the evaluation of mediation services.

- 108 To safeguard the quality of international family mediation, mediation services should be monitored and evaluated, ideally by a neutral body. However, where no such body exists, mediators and mediation organisations should themselves establish transparent rules on the monitoring and evaluation of their services. In particular, the parties should be able to give their feedback on the mediation and a procedure to file complaints should be available.
- 109 Mediators and mediator organisations working in the field of international child abduction should have a structured and professional approach to administration, record keeping, and evaluation of services, and should have access to the requisite administrative and professional support.<sup>154</sup>
- 110 States should work towards the establishment of common standards for the evaluation of mediation services.

<sup>152</sup> For example, France, one of the first States to establish a Central Contact Point for international family mediation, is preparing a central list of specialised mediators; Austria established a central register for mediators in 2004 (for further details see para. 91 above), which is accessible online at <http://www.mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/contentByKey/VSTR-7DXPU8-DE-p> > (last consulted 16 June 2012). Furthermore, the Country Profiles under the 1980 Convention (*supra* note 121) specify an availability of mediator lists (although not necessarily one central list) for the following legal systems and indicate from which bodies these lists can be obtained: Argentina, Belgium, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Norway, Panama, Paraguay, Poland, Romania, Slovenia, Spain, Switzerland, the United Kingdom (England and Wales, Northern Ireland) and the United States of America.

<sup>153</sup> Regarding the Central Contact Point on international family mediation, see section 4.1 below.

<sup>154</sup> See the Principles for the Establishment of Mediation Structures in Annex 1 below.

## 4 Access to mediation

- Information on available mediation services for international child abduction cases as well as other related information, such as mediation costs, should be provided through the Central Authority or a Central Contact Point for international family mediation.
- Contracting States to the 1980 Hague Child Abduction Convention and other relevant Hague Conventions<sup>155</sup> are encouraged to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities.

- III It is important to facilitate access to mediation. This begins by providing parties who wish to consider mediation with information on mediation services available in the relevant jurisdiction along with other related information.
- II2 It should be noted that the Principles for the Establishment of Mediation Structures<sup>156</sup> drawn up by the Working Party on Mediation in the context of the Malta Process, the aim of which is to establish structures for cross-border family mediation, ask States which agree to implement those Principles to establish 'a Central Contact Point for international family mediation', which should, *inter alia*, 'provide information about family mediation services available in that country', such as a list of mediators and organisations providing mediation services in international family disputes, information on mediation costs and further details. Furthermore, the Principles request the Central Contact Point to '(p)rovide information on where to obtain advice on family law and legal procedures, (...) on how to give the mediated agreement binding effect (as well as) on the enforcement of the mediated agreement'.
- II3 According to these Principles, the 'information should be provided in the official language of that State as well as in either English or French'. Furthermore, the Principles demand that 'the Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone number, e-mail address and names of responsible person(s) as well as information on what languages they speak' and that '(r)equists for information or assistance addressed to the Central Contact Point should be processed expeditiously'.
- II4 Although these Principles were drawn up with a view to establishing cross-border mediation structures for non-Hague cases, they are also relevant for Hague cases. With the rapid and diverse development of family mediation services in recent years, it is difficult to obtain an overview of the services offered, or to judge which of the services may be suitable for mediation in cross-border child abduction cases. It would therefore be extremely valuable if Contracting States to the 1980 Hague Child Abduction Convention and / or other relevant Hague Conventions were to collect and provide information on mediation services available for international family disputes in their jurisdiction, as well as other related information which could be pertinent to mediation in cross-border family disputes, and more specifically in international child abduction cases.

<sup>155</sup> Regarding the promotion of mediation by other Hague Children's Conventions, see 'Objectives and scope' above.

<sup>156</sup> Principles for the Establishment of Mediation Structures (see Annex 1 below). See also the 'Explanatory Memorandum on the Principles for the Establishment of Mediation Structures in the context of the Malta Process' reproduced in Annex 2 below (also available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section' then 'Cross-border family mediation').



- 115 In Contracting States to the 1980 Hague Child Abduction Convention, the Central Authority under the Convention might be in an ideal position to take on that role.<sup>157</sup> However, some Contracting States to the 1980 Convention may prefer to establish an independent Central Contact Point for international family mediation to provide the relevant information. The Central Authority could in that case refer interested parties to that Central Contact Point for international family mediation, provided that the co-operation between Central Authority and Central Contact Point is regulated on an organisational level in such a way that the parties' referral to that Point will not lead to a delay in the processing of the return application.
- 116 Where an external body is appointed to serve as a Central Contact Point for international family mediation, measures should be taken to avoid any conflicts of interest, especially where that body offers mediation services itself.
- 117 It should be noted that in addition the Country Profile under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011 and subsequently filled in by the Contracting States, can be a helpful source of information on mediation services available in these States.<sup>158</sup>

#### 4.1 Availability of mediation – Stage of Hague return proceedings; referral / self-referral to mediation

- The possibility of using mediation or other processes to bring about agreed solutions should be introduced as early as possible to the parties to an international family dispute concerning children.
- Access to mediation and other processes to bring about agreed solutions should not be restricted to the pre-trial stage, but should be available throughout the proceedings, including at the enforcement stage.

- 118 The possibility of using mediation or other means of amicable dispute resolution should be introduced as early as possible. Mediation can already be offered as a preventive measure at an early stage of a family conflict to avoid a subsequent abduction.<sup>159</sup> This is particularly significant in cases where, following a couple's separation, one of the parents considers relocation to another country. While awareness needs to be raised that generally one parent may not leave the country without the consent of the other holder of (actually exercised) custody rights or an authorisation by the competent authority,<sup>160</sup> mediation can offer valuable support in finding an amicable solution.

<sup>157</sup> At its meeting in June 2011, the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention encouraged States 'to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point', see Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 61.

<sup>158</sup> See Part V of the Country Profiles under the 1980 Convention (*supra* note 121).

<sup>159</sup> See the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1, pp. 15-16; see also Chapter 14 below.

<sup>160</sup> See the 'Washington Declaration on International Family Relocation', International Judicial Conference on Cross-Border Family Relocation, Washington, D.C., United States of America, 23-25 March 2010, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC) with the support of the U.S. Department of State: 'States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.' The Washington Declaration is available at < www.hcch.net > under 'Child Abduction Section'.

- 119 It should be emphasised that the manner in which ‘parents are approached to consider mediation is very important’<sup>161</sup> and may be ‘critical to its prospects of success’.<sup>162</sup> Since mediation is still relatively new in many jurisdictions, ‘parents need full and frank explanations as to what mediation is and what mediation is not, so that they can come to mediation with appropriate expectations’.<sup>163</sup>
- 120 Once child abduction has occurred, parents should be informed about the possibility of mediation as early as possible, where specific mediation services are available for these cases. It should, however, be highlighted that mediation ‘is not the only recourse the parents have and that the availability of mediation does not affect a parent’s right to litigate if they prefer’.<sup>164</sup>
- 121 With a view to increasing the chances of an amicable resolution of the dispute, mediation or similar means should be available not only at a pre-trial stage, but also throughout the judicial proceedings, including at the enforcement stage.<sup>165</sup> The most appropriate of the available processes facilitating agreed solutions at a particular stage of the proceedings will depend on the circumstances.
- 122 As discussed in detail in section 2.1 (Timeframe / Expedious procedures), it is of the utmost importance that safeguards be taken to ensure that mediation cannot be used as a delaying tactic by the taking parent. A helpful measure in this regard can be the initiation of return proceedings and, if necessary, the staying of those proceedings for the duration of the mediation.<sup>166</sup>

#### 4.1.1 ROLE OF THE CENTRAL AUTHORITY

- **Central Authorities shall, either directly or through any intermediary, take all appropriate measures to bring about an amicable resolution of the dispute.**
  - **When receiving a return application, the Central Authority in the requested State should facilitate the provision of information on mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Hague Child Abduction Convention where available in that jurisdiction.**
  - **States should include information on mediation and similar processes and their possible combination in the training of their Central Authority staff.**
- 123 Central Authorities under the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention play a key role in encouraging an amicable resolution of international family disputes concerning children. Both the 1980 and 1996 Conventions recognise the need to promote agreed solutions and require Central Authorities to play an active role in achieving that goal. Article 7(2) *c* of the 1980 Convention requires Central Authorities to take all appropriate measures ‘to secure the voluntary return of the child or to bring about an amicable resolution of the issues’. Similarly, Article 31 *b* of the 1996 Convention requires the Central Authorities to take all appropriate steps to ‘facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies’.
- 124 Central Authorities under either Convention should therefore, as early as possible, facilitate the provision of information on mediation services or similar means available to assist with finding an agreed solution where parties seek the Central Authority’s support in a cross-border family dispute.<sup>167</sup> Such information however should not be given instead of, but rather in addition to, information on procedures under the Hague Conventions and other related information.

<sup>161</sup> See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

<sup>162</sup> 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 8.

<sup>163</sup> S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 18.

<sup>164</sup> See S. Vigers, (*ibid.*), (5.1), p. 17.

<sup>165</sup> See also the Guide to Good Practice on Enforcement (*op. cit.* note 23), sections 5.1, 5.2, p. 25.

<sup>166</sup> See section 2.1 above.

<sup>167</sup> The Central Authority may in this regard serve as a Central Contact Point in the sense described in the Principles for the Establishment of Mediation Structures (see Annex 1 below); for further details on the Principles, see the introduction to Chapter 4 above. See also section 4.1.4 below.

- 125 For example, in an international child abduction case, the Central Authority in the requested State should, when contacted by the left-behind parent (either directly or through the Central Authority in the requesting State), provide the parent with information about the mediation and similar services available in that jurisdiction along with information on the Hague procedures. At the same time the Central Authority may, when approaching the taking parent to encourage the voluntary return<sup>168</sup> of the child, inform that parent about the possibilities for mediation and similar processes facilitating agreed solutions. Also, the Central Authority in the requesting State can provide information to the left-behind parent on methods to solve disputes amicably alongside information on the Hague return proceedings. The task of providing information on relevant mediation services can also be delegated to another body.<sup>169</sup>
- 126 However, the duty of the Central Authority to process return applications expeditiously must not be compromised. Central Authorities have a special responsibility to stress that abduction cases are time-sensitive. Where the Central Authority delegates the provision of information on relevant mediation services to another body, the Central Authority has to ensure that the parties' referral to that body does not lead to a delay. Furthermore, where the parties decide to attempt mediation, they should be informed that mediation and return proceedings can be pursued in parallel.<sup>170</sup>
- 127 In 2006, the comparative study on mediation schemes in the context of the 1980 Hague Child Abduction Convention<sup>171</sup> identified some Central Authorities that actively promote mediation, either by offering mediation themselves in certain cases or by employing the services of a local mediation provider. Today, as is also indicated by the Country Profiles under the 1980 Convention,<sup>172</sup> an increasing number of Central Authorities are proactive in encouraging parties to attempt mediation or similar processes to bring about an agreed solution of their dispute.<sup>173</sup>
- 128 States are encouraged to include in the training of Central Authority staff general information on mediation and similar processes, as well as specific information on available mediation and similar services in international child abduction cases.

<sup>168</sup> Art. 7(2) c) and Art. 10 of the 1980 Hague Child Abduction Convention.

<sup>169</sup> For example, a requested State may have designated a body other than the Central Authority as Central Contact Point for international family mediation (see paras 111 *et seq.* above) and tasked the Central Contact Point with not only the provision of information on mediation in non-Hague cases but also with the provision of information on specialised mediation services for international child abduction cases falling within the scope of the 1980 Convention.

<sup>170</sup> Regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, see section 2.1 above.

<sup>171</sup> See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

<sup>172</sup> *Supra* note 121.

<sup>173</sup> For example: In France, in April 2007 the Central Authority took over the tasks formerly carried out by the Assistance Mission to International Mediation for Families (*Mission d'aide à la médiation internationale pour les familles*, MAMIF), an office established to promote mediation of cross-border family disputes and that was involved in the successful Franco-German bi-national mediation programme; for further information on the Assistance to international family mediation (*aide à la médiation familiale internationale*, AMIF) now carried out by the French Central Authority, see < <http://www.justice.gouv.fr/justice-civile-11861/enlèvement-parental-12063/la-médiation-21106.html> > (last consulted 16 June 2012). In Switzerland, the Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009, implemented concrete obligations for the Swiss Central Authority in regard to promoting conciliation and mediation procedures, see Art. 3, Art. 4 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*) (*supra* note 103). In Germany, the Central Authority notifies the parents about the possibility to mediate. Furthermore, the following other States indicated in the Country Profiles under the 1980 Convention (*supra* note 121) that their Central Authorities provide information on mediation: **Belgium**, **China (Hong Kong SAR)**, **Czech Republic**, **Estonia**, **Greece**, **Hungary**, **Paraguay**, **Poland** (only to applicant), **Romania**, **Slovenia**, **Spain**, the **United Kingdom (England and Wales, Northern Ireland)**, the **United States of America** and **Venezuela**. In Argentina and in the Czech Republic the Central Authority offers mediation, see section 19.3 of the Country Profiles (*ibid.*).

## 4.1.2 ROLE OF THE JUDGE(S) / COURTS

129 The role that courts play in family disputes has changed considerably over the past decades in many legal systems. In civil proceedings generally, but especially in family law proceedings, the promotion of agreed solutions has been put on a statutory footing in many States.<sup>174</sup> Nowadays, judges are often under an obligation to attempt the amicable settlement of a dispute. In some legal systems, in family disputes concerning children, attending an information meeting on mediation or attempting mediation or other processes to bring about agreed solutions may even be obligatory for the parties under certain circumstances.<sup>175</sup>

→ The judge(s) seized in an international child abduction case should consider whether a referral to mediation is feasible in the case before him / her, provided that mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Hague Child Abduction Convention are available in that jurisdiction. The same applies for other available processes to bring about agreed solutions.

→ States are encouraged to include information on mediation and similar processes and their possible combination with judicial proceedings in the training of judges.

130 In international child abduction cases, courts play an important role in promoting agreed solutions. Regardless of whether mediation has already been suggested by the competent Central Authority, a court seized with Hague return proceedings should consider the referral of the parties to mediation or similar services, where available and regarded as appropriate. Among the several factors that may influence this consideration are issues affecting the general suitability of the individual case for mediation<sup>176</sup> as well as the question of whether appropriate mediation services, *i.e.*, services that are compatible with tight timeframes and other specific requirements for mediation in international child abduction cases, are available. Where mediation has already been attempted without success before the institution of the Hague return proceedings, referral to mediation for a second time may not be appropriate.

<sup>174</sup> See, for example, in Israel, the State courts presiding in a civil matter may, at any stage in the proceedings, propose to the parties that the matter or part of it be referred to mediation, section 3 of the State of Israel Regulation No 5539 of 10 August 1993. See also for Australia, Arts 13 C *et seq.* of the Family Law Act 1975 (last amended by Act No 147 of 2010), according to which '(a) court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders: (...) (b) that the parties to the proceedings attend family dispute resolution', which includes mediation; the full text of the law is available at < <http://www.comlaw.gov.au/Details/C2010C00870> > (last consulted 16 June 2012). See also, more generally on the promotion of alternative dispute resolution in Australia, the website of the National Alternative Dispute Resolution Advisory Council (NADRAC) at < <http://www.nadrac.gov.au/> >; NADRAC is an independent body established in 1995 to provide policy advice to the Australian Attorney-General on the development of ADR. In South Africa, the Children's Act 38 of 2005 (last amended in 2008), available at < <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf> > (last consulted 16 June 2012), also encourages the amicable resolution of family disputes and allows judges to refer certain matters to mediation or similar processes.

<sup>175</sup> See for example in the United Kingdom (England and Wales) the Practice Direction 3A – Pre-Application Protocol for Mediation Information and Assessment – Guidance for HMCS, entered into force on 6 April 2011, available at < [http://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_03a](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a) > (last consulted 16 June 2012), which stipulates for family proceedings as follows, unless one of the exceptions stated in the Protocol applies: 'Before an applicant makes an application to the court for an order in relevant family proceedings, the applicant (or the applicant's solicitor) should contact a family mediator to arrange for the applicant to attend an information meeting about family mediation and other forms of alternative dispute resolution (referred to in this Protocol as 'a Mediation Information and Assessment Meeting').'

<sup>176</sup> See below under section 4.2.

- 131 When a judge refers a case to mediation, the judge needs to remain in control of the timeframe. Depending on the applicable procedural law, the judge may choose to adjourn the proceedings<sup>177</sup> for mediation for a short period of time or, where no adjournment is necessary, set the next court hearing before which mediation has to be finalised, within a reasonably short time, *e.g.*, between two and four weeks.<sup>178</sup>
- 132 Furthermore, where a judge refers a case to mediation, it is preferable for that judge to retain sole management of the case in the interest of continuity.
- 133 When it comes to mediation at the stage of judicial proceedings, two types of mediation can be distinguished: ‘court based or annexed mediation’ and ‘out of court mediation’.<sup>179</sup>
- 134 Several ‘court based or annexed mediation schemes’ have been developed for disputes in civil matters, including family matters.<sup>180</sup> In these schemes mediation is offered either by a mediator working for the court or by a judge with mediator training, who is not the judge seised in the case.<sup>181</sup> However, in most States, these ‘court annexed or court based mediation services’ were created with a clear focus on purely national disputes, *i.e.*, disputes without international links. Therefore, the adaptability of existing ‘court based or annexed mediation schemes’ to the special needs in international family disputes and particularly disputes within the scope of the 1980 Hague Child Abduction Convention has to be considered carefully. Only where an existing ‘court annexed or court based mediation service’ fulfils the principal criteria set out in this Guide as essential for child abduction mediation schemes should a referral to that service be considered in Hague return proceedings.
- 135 Referral to mediation at the stage of court proceedings is also possible to ‘out of court’ mediation services, *i.e.*, mediation services operated by mediators or mediation organisations not directly linked to the court.<sup>182</sup> As for ‘court based or annexed mediation services’, the adaptability of existing ‘out of court’ mediation services to the special needs in international family disputes has to be considered carefully.

<sup>177</sup> For example in the **United Kingdom (England and Wales)** the court seised with Hague return proceedings can refer the parties to mediation to take place during an adjournment of the proceedings, see S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.2, p. 18, referring to the United Kingdom and the reunite Mediation Pilot Scheme (*supra* note 97). Regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, see section 2.1 above. On the subject of compulsory mediation sessions, see section 6.1.1 below.

<sup>178</sup> See, for example, for the family court of **New Zealand**, the Practice Note ‘Hague Convention Cases: Mediation Process – Removal, Retention And Access’, available at < <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/> > (last consulted 16 June 2012), which provides for a 7- to 14-day period within which mediation in Hague child abduction cases should take place.

<sup>179</sup> See above, in the Terminology section; see also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III (Organisation of mediation): ‘4. Mediation may take place within or outside court procedures.’

<sup>180</sup> Among the many States in which court annexed mediation schemes currently exist are: **Argentina** (*Ley 26.589 - Mediación y Conciliación* of 03.05.2010, *Boletín Oficial* de 06.05.2010 replacing earlier legislation dating back to 1995; attending mediation is mandatory in most civil cases save regarding certain exceptional matters such as custody, see Arts 1 and 5 of the law); **Germany** (court annexed mediation schemes operate in several *Bundesländer* in civil matters, see, *inter alia*, the report on the mediation pilot project in Lower Saxony, commissioned by the Lower Saxony Ministry of Justice and Economics and Culture, drawn up by G. Spindler, ‘Gerichtsnaher Mediation in Niedersachsen’, Göttingen, 2006); and **Mexico** (see *Ley de Justicia Alternativa del Tribunal Superior de Justicia para el Distrito Federal* of 8 January 2008, last revised on 8 February 2011, published in *Gaceta Oficial del Distrito Federal* el 08 de enero de 2008, No 248 and *Gaceta Oficial del Distrito Federal* el 08 de febrero de 2011, No 1028; mediation is facilitated through the *Centro de Justicia Alternativa* (Alternative Dispute Resolution Center) within the *Tribunal Superior de Justicia del Distrito Federal* (Superior Court of Justice of the Federal District); the centre administers the mediation processes, including the appointment of the mediator from a list of registered mediators).

<sup>181</sup> Regarding the difference between mediation by a judge and conciliation by a judge, see the Terminology section above.

<sup>182</sup> See above, in the Terminology section; see also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.4, p. 6.



- 136 Many of the mediation schemes specifically developed for child abduction cases within the scope of the 1980 Hague Child Abduction Convention are currently run as ‘out of court mediation’.<sup>183</sup>
- 137 Once the parties have reached an agreement in mediation or through similar means, the court seised with Hague return proceedings may, depending on the content of the agreement and the court’s jurisdiction<sup>184</sup> in this regard, be asked to turn the agreement into a court order.
- 138 It is of great importance that judges dealing with international family disputes be well informed about the functioning of mediation and similar processes facilitating amicable dispute resolution and their possible combination with judicial proceedings. States are therefore encouraged to include general information on such matters in the training of judges.
- 139 In particular, the training of judges dealing with Hague return proceedings should include details on mediation schemes and similar processes suitable for use in international child abduction cases.

#### 4.1.3 ROLE OF LAWYERS AND OTHER PROFESSIONALS

- 140 In recent years, in many jurisdictions, the role of lawyers in family disputes has changed, along with that of courts, with greater emphasis being placed on finding agreed solutions. Recognising the importance of a stable and peaceful basis for ongoing family relations, lawyers today are more inclined to promote an agreed solution rather than to take a purely partisan approach on behalf of their clients.<sup>185</sup> Developments such as collaborative law and co-operative law<sup>186</sup> and the growing number of lawyers with mediator training reflect this trend.

- Information on mediation and similar processes should be included in the training of lawyers.
- Lawyers and other professionals dealing with the parties to an international family dispute should, where possible, encourage the amicable resolution of the dispute.
- Where the parties to an international family dispute decide to attempt mediation, the legal representatives should support the parties by providing the legal information needed for the parties to make an informed decision. Furthermore, the legal representatives need to support the parties in giving legal effect to the mediated agreement in both (all) legal systems involved in the case.

- 141 As has been highlighted above in relation to judges’ training, it is important that States raise awareness within the legal profession of amicable dispute resolution. Information on mediation and similar processes should be included in the curriculum of lawyers.
- 142 When representing a party to an international family dispute over children, lawyers should be aware that their responsibility towards their client encompasses a certain responsibility for the interests and welfare of the child concerned. Given that an agreed solution will generally be in the child’s best interests, the legal representative should, where the parents are willing to attempt mediation, be supportive and, as far as his / her mandate allows, co-operate closely with the other party’s legal representative.
- 143 Once the parties have decided to commence mediation, the legal representatives play an important role in providing the legal information necessary for the parties to make informed decisions and in ensuring that the mediated agreement has legal effect in both (all) legal systems concerned. It should be emphasised that, due to the complexity of the legal situation in international family conflicts, lawyers should only agree to represent a party to such a conflict when they have the

<sup>183</sup> For example in Germany, the Netherlands and the United Kingdom (England and Wales), for details see note 97 above.

<sup>184</sup> See Chapters 12 and 13 below.

<sup>185</sup> See N. ver Steegh (*op. cit.* note 8), pp. 666 *et seq.*, with further references.

<sup>186</sup> See Chapter 15 for an examination of other means of solving disputes amicably and their suitability for international child abduction cases.

necessary specialist knowledge. The involvement of a non-specialist lawyer in international child abduction cases can have negative effects and may create additional obstacles to finding an amicable resolution of the matter. In mediation it can add to an imbalance of powers between the parties.

- I44 Depending on how the mediation process is organised and on how the mediator(s) and parties wish to proceed, legal representatives may be present during all or part of the mediation sessions. It is, however, important that lawyers attending a mediation session together with their clients understand their very different role during the mediation session, which is a subsidiary one.
- I45 Close co-operation with the specialist legal representatives is particularly important when it comes to evaluating whether the solution favoured by the parties would fulfil the legal requirements in both jurisdictions concerned and determining what additional steps may be necessary to render the agreed solution legally binding and enforceable.
- I46 A lawyer, of course, may also conduct mediation him- or herself, if he or she meets any existing requirements for acting as a mediator in his or her jurisdiction. However a lawyer may not 'mediate' a case in which he or she represents a party, due to conflicts of interest.<sup>187</sup>
- I47 A lawyer may also engage in the amicable resolution of a family dispute in other ways. See Chapter 15 below on other mechanisms to encourage agreed solutions, such as co-operative law.

## 4.2 Assessment of suitability for mediation

→ Initial screening should take place to assess the suitability of the individual case for mediation.

- I48 Before commencing mediation in international child abduction cases, an initial screening should be conducted to assess the suitability of the individual case for mediation.<sup>188</sup> This helps to avoid delays that can be caused by attempting mediation in cases poorly suited to it. At the same time, initial screening helps to identify cases that carry special risks, such as cases involving domestic violence or alcohol or drug abuse, where either special precautions must be taken or mediation might not be appropriate at all.<sup>189</sup>
- I49 Two important questions arise in this context: (1) what issues should be addressed in the assessment of suitability for mediation and (2) who can / should carry out this assessment.
- I50 Whether a case is suitable for mediation needs to be decided on an individual basis. It has to be noted that there are no universal rules on this question. The suitability of the case for mediation will depend on the circumstances of the individual case and, to a certain extent, on the facilities and characteristics of the available mediation services and standards applied by the mediator / mediation organisation to such matters.
- I51 Among the many issues that may affect the suitability of an international child abduction case for mediation, are:
  - willingness of the parties to mediate,<sup>190</sup>
  - whether the views of one or both of the parties are too polarised for mediation,
  - indications of domestic violence and its degree,<sup>191</sup>

<sup>187</sup> The lawyer cannot be a neutral and impartial third party and at the same time respect the professional obligation to protect the interests of his / her client.

<sup>188</sup> See sections 19.4 c) and d) of the Country Profiles under the 1980 Convention (*supra* note 121) for information on the assessment of suitability for mediation in the different Contracting States to the 1980 Convention.

<sup>189</sup> See also Chapter 10 below on mediation and accusations of domestic violence.

<sup>190</sup> Of course, where a party with no knowledge of the mediation process is opposed to the idea of mediation, the provision of more detailed information on how mediation works may affect that party's willingness to attempt mediation positively. See, however, section 6.1 below regarding the principle of voluntariness of mediation.

<sup>191</sup> In cases involving alleged domestic violence for example, some mediators generally refuse to conduct mediation. Others may consider a case with alleged domestic violence suitable for mediation, depending on the alleged degree of violence and on the protective measures available to avoid any risks associated with the mediation process, see Chapter 10 below.



- incapacity resulting from alcohol or drug abuse,<sup>192</sup>
  - other indications of a severe imbalance in bargaining powers,
  - indications of child abuse.
- 152 The assessment of the suitability of the case for mediation should involve a confidential exchange with each party individually to enable each party to express his / her possible concerns regarding mediation freely.
- 153 The initial exchange with the parties to assess the suitability of the case for mediation can be used to address various logistical issues, arising, for example, from disabilities of one of the parties, which might need to be taken into account when making practical arrangements for the mediation session. Also, the language(s) that mediation should be conducted in can be addressed in the initial exchange. At the same time, it can be assessed whether interim contact with the child should be arranged and whether the child concerned has attained an age or degree of maturity at which his / her views should be heard. See further in Chapter 7 below regarding hearing the child in mediation.
- 154 The initial screening interview is also an ideal occasion to inform the parties of the details of the mediation process and about how mediation and Hague return proceedings affect each other.<sup>193</sup>
- 155 The assessment of the suitability of the case for mediation should be entrusted to a mediator or other experienced professional with knowledge of the functioning of international family mediation. Appropriate training is required to recognise cases of special risk and indications of differences in bargaining powers. Whether the assessment should be conducted by a person linked to the relevant mediation service itself or a person working for the Central Authority, another central body or the court will very much depend on the way mediation is organised in the relevant jurisdiction. Some mediators emphasise the importance of the assessment being carried out by the mediator(s) who are asked to mediate the case.<sup>194</sup> Other mediators prefer the assessment to be made by a colleague mediator familiar with the mediation service suggested to the parties.
- 156 Should the assessment of the suitability of the case for mediation be carried out by a person not familiar with the mediation services in question, there is a risk that a second assessment by a person familiar with the mediation services or the mediator(s) who is (are) asked to mediate the case might be necessary, which may lead to an unnecessary delay of the matter and possibly additional costs.
- 157 Many mediation services established for international child abduction cases successfully use initial screening.<sup>195</sup> In some programmes the suitability of the case for mediation is assessed through a written questionnaire in combination with a telephone interview.

<sup>192</sup> Where the individual case is still considered to be suitable for mediation, safeguards may need to be taken to avoid disadvantages for the party in question.

<sup>193</sup> See also section 6.1.2 below on informed consent.

<sup>194</sup> It needs to be highlighted in this context that the question of whether the mediator is willing to take on the mediation of an individual case is to be distinguished from that of the suitability of a case for mediation. Once the suitability of a case for mediation is established, the mediator approached by the parties is generally still free in his / her discretion to take on mediation in that case.

<sup>195</sup> For example, in the **United Kingdom (England and Wales)** the reunite scheme, see 'Mediation Leaflet', available at < <http://www.reunite.org/edit/files/Downloadable%20forms/Mediation%20Leaflet.pdf> > (last consulted 16 June 2012); see also the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), pp. 10, 13, in which the following are considered as indicative of unsuitability for mediation in child abduction cases: (1) one parent is not willing to attend mediation; (2) the views of the parents are too polarised; (3) there are concerns about domestic violence or its alleged degree; (4) there are allegations of child abuse.

### 4.3 Costs of mediation

- All appropriate efforts should be made to avoid a situation in which the costs of mediation become an obstacle or a deterrent to the use of mediation.
- States should consider making legal aid available for mediation in international child abduction cases.
- Information on costs for mediation services and possible further cost implications, as well as the interplay with costs for Hague return proceedings, should be made available in a transparent way.

- 158 The willingness of parties to attempt mediation is likely to be influenced by the overall costs connected with the mediation. These costs may include costs for the initial assessment of the case's suitability for mediation, the mediator's fee, travel expenses, costs for reserving the rooms in which mediation is to take place, possible interpretation fees or for the involvement of other experts, and the possible costs of legal representation. Mediator's fees, which may be charged on an hourly or daily basis, may differ immensely from jurisdiction to jurisdiction and between different mediation services.
- 159 Some pilot projects specifically designed for mediation in international child abduction cases have offered mediation to the parties cost-free.<sup>196</sup> However, in many jurisdictions it has proven difficult to secure the funding to offer such services to parties for free on a long-term basis.
- 160 In many jurisdictions, no legal restrictions on mediator fees apply; the question is left to the self-regulation of the 'market'.<sup>197</sup> However, many mediators sign up to a fee scheme when joining a mediation association, or to codes of conduct requiring them 'to charge reasonable fees taking into account the type and complexity of the subject matter, the expected time the mediation will take and the relative expertise of the mediator'.<sup>198</sup> At the same time, several codes of conduct stress that 'the fees charged by a mediator should not be contingent on the outcome'.<sup>199</sup> In other States, mediation fees are regulated by law or may be defined by a court and allocated between the parties.<sup>200</sup>
- 161 Every effort must be made to ensure that the cost of mediation will not become an obstacle or a deterrent to its use. Acknowledging the advantages of promoting mediation in international child abduction cases, some States offer mediation in international child abduction cases free of charge

<sup>196</sup> For example, the **Franco-German** bi-national mediation project, and see the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97). See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11); regarding the reunite Mediation Pilot Scheme, see 5.3, p. 19:

'To undertake its pilot project reunite was awarded a research grant by the Nuffield Foundation. All costs associated with the mediation, including travel to and from the UK were fully funded for the applicant parent up to an upper limit. Hotel accommodation and additional travel and subsistence costs were also fully funded. The mediators' fees, administration fees and interpreters' fees were also covered by the grant. The UK based parent was also reimbursed for all travel and subsistence costs and provided with accommodation where necessary.'

<sup>197</sup> See K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 33.

<sup>198</sup> See Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.7.3, p. 12.

<sup>199</sup> *ibid.*, section 2.7.3, pp. 12, 13, with further references.

<sup>200</sup> See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.3, p. 19, referring, *inter alia*, to **France**, where court control has been established regarding the fees of court annexed mediation; see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 34 for further examples.

or have opened their legal aid system to mediation.<sup>201</sup> States that have not yet done so should consider the desirability of making legal aid available for mediation, or otherwise ensure that mediation services can be made available either cost-free or at a reasonable price for parties with limited means.<sup>202</sup>

- 162 It should be noted that it is a great achievement of the 1980 Hague Child Abduction Convention that return proceedings are made available to the applicant parent in some States completely cost-free;<sup>203</sup> in other States the national legal aid systems can be used for Hague proceedings.<sup>204</sup> It would be encouraging if similar support could be made available for mediation in international child abduction cases in the context of the 1980 Convention.
- 163 The costs associated with mediation are an essential aspect of access to mediation in practice. Information on mediation fees and other possible related costs, such as fees for rendering the mediated agreement binding in the two (all) legal systems concerned, is important for the parties to decide on whether to attempt mediation or not.
- 164 Parents should therefore be given detailed and clear information on all possible expenses connected with mediation, to allow them to properly estimate their likely financial burden.<sup>205</sup>
- 165 'It is often recommended that such information is put in writing before the mediation',<sup>206</sup> it can be made part of the contract to mediate that is frequently concluded between the mediator and the parties before commencing the mediation.<sup>207</sup>

201 Free of charge mediation in international child abduction cases under the 1980 Hague Child Abduction Convention is, for example, available in: **Denmark**, **France** (mediation arranged for by the Central Authority), **Israel** (for mediation through the court assistance unit), **Norway** and **Sweden** (if the court appoints the mediator), see also the Country Profiles under the 1980 Convention (*supra* note 121) at section 19.3 d). Legal aid for mediation in international child abduction cases is available under certain conditions, for example, in the **United Kingdom (England and Wales)** where mediators or mediation organisations that hold a Public Funding Franchise from the Legal Services Commission can offer publicly funded mediation to clients who are eligible for legal aid, see < <http://www.legalservices.gov.uk> >. Similarly, in the **Netherlands**, legal aid is available for mediation costs provided mediation is conducted by mediators registered with the Dutch Legal Aid Board (official website < [www.rvr.org](http://www.rvr.org) >), see the Dutch Legal Aid Act (*Wet op de rechtsbijstand*). Furthermore, according to the Country Profiles under the 1980 Convention (*ibid.*), legal aid may cover mediation costs in international child abduction cases, for example, in the following jurisdictions: **Argentina**, **Israel**, **Slovenia**, **Switzerland** and the **United Kingdom (Northern Ireland)**.

202 See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III (Organisation of mediation):

'9. States should consider the opportunity of setting up and providing mediation, wholly or partly free of charge, or of providing legal aid for mediation, in particular if the interests of one of the parties require special protection.

10. Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator.'

203 Art. 26(2) of the 1980 Convention requests Contracting States to 'not require any payment from the applicant towards cost and expenses of the (Convention) proceedings', but many Contracting States have made use of the possibility to declare a reservation regarding Art. 26 and have thereby subjected Hague proceedings to the normal legal aid rules in their jurisdiction; for details see also the Country Profiles under the 1980 Convention (*supra* note 121).

204 See also Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), sections 2.7.3, p. 12; for details see also the Country Profiles under the 1980 Convention (*supra* note 121).

205 See also the European Code of Conduct for Mediators (*supra* note 58), 1.3 (Fees):

'Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.'

206 See Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.7, p. 12.

207 See section 4.5 below on the contract to mediate.

#### 4.4 Place of mediation

166 As set out under section 2.6, geographical distance poses special challenges for mediation in international child abduction cases. Arranging for an in-person meeting for one or several mediation sessions may be costly and time-consuming. Nonetheless, many experienced mediators recommend in-person meetings if feasible.

- The views and concerns of both parents need to be taken into consideration when determining in which State an in-person mediation session should be convened.
- The venue chosen for the in-person mediation sessions needs to be neutral and appropriate for mediation in the individual case.
- Where the physical presence of both parties in a mediation session is not appropriate or feasible, long-distance and indirect mediation should be considered.

167 Mediators approached with a mediation request in an international child abduction case will have to discuss the feasibility of in-person mediation sessions with the parties as well as the appropriate location for such in-person mediation sessions, both of which will depend on the circumstances of the individual case.

168 Very often, mediation sessions in child abduction cases are held in the country to which the child was abducted. One advantage of such an arrangement is the possibility to arrange for interim contact between the left-behind parent and the child during the left-behind parent's stay in that country; this can have a positive effect on the mediation.<sup>208</sup> Another advantage is that this simplifies linking the mediation process with the Hague court proceedings. However, choosing as the location the State to which the child was taken may be construed as an additional injustice by the left-behind parent who might already consider his / her agreement to attempt mediation (instead of simply following the Hague return proceedings) as a concession. Besides practical impediments, such as travel expenses, the left-behind parent might also face legal difficulties in entering the State to which the child was abducted due to visa and immigration issues (see above, section 2.7). On the other hand, the left-behind parent's possible presence in the State to which the child was taken, to attend the Hague return proceedings (for which a visa should also be granted – see section 2.7) can be used as an opportunity to attempt mediation in that State. In such a case at least no additional travel costs need to be borne by the left-behind parent.

169 Holding an in-person mediation session in the country from which the child was wrongfully removed, by contrast, may pose some additional practical challenges. The taking parent might face criminal prosecution in that country (see section 2.8 above) or be reluctant to leave the child in the care of a third person during his / her absence.

170 In exceptional circumstances consideration may be given to holding an in-person mediation meeting in a third 'neutral' country. However, travel costs and visa issues may be impediments.

171 As concerns the actual venue for the in-person mediation meeting, it is evident that the meeting must take place in neutral premises, such as rooms in a court building or the premises of an independent body offering the mediation service. A religious or community building might also be considered a neutral location by the parties. The location of the mediation meeting must be suitable to the individual case, for example providing adequate security for the persons involved if necessary.<sup>209</sup>

172 Although mediators generally consider the atmosphere of an in-person meeting as conducive to reaching an amicable resolution, the circumstances of the individual case will determine which option is feasible and most appropriate. Where an in-person mediation session is not appropriate or feasible, long-distance mediation may be an option. With the help of modern technology virtual

<sup>208</sup> S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 46, 47.

<sup>209</sup> See, *e.g.*, regarding the specific needs in domestic violence cases, Chapter 10 below.

in-person meetings may be relatively easy to set up.<sup>210</sup> In some States, such as Australia, due to their large geographic territory, long-distance mediation services, by phone, video link or online (also referred to as Online Dispute Resolution – ODR), have developed rapidly in the past years.<sup>211</sup>

- 173 Long-distance mediation, however, faces a number of specific challenges,<sup>212</sup> one of which is how to ensure the confidentiality of the mediation session. At the same time, the practical arrangements for the mediation session have to be considered carefully. For example, to avoid any doubts regarding fairness and neutrality of the mediation, it may be helpful, in a case of single mediation, to avoid the mediator joining a video link together with one of the parties (*i.e.*, in the same room as the party).
- 174 Long-distance mediation might also be of interest for cases where there are allegations of domestic violence and one of the parties indicates that, though wishing to mediate, the prospect of being in the same room with the other party would be very difficult.<sup>213</sup>

#### 4.5 The contract to mediate – Informed consent to mediation

- To ensure that the parties are well informed about the terms and conditions of the mediation service, it can be advisable to establish a contract between the mediator and the parties (contract to mediate).
- The contract to mediate should be clear and provide the necessary information on the mediation process, including detailed information on possible costs.
- Where no such contract to mediate is established, it must be ensured that the parties are otherwise well informed about the terms and conditions of the mediation service before entering into mediation.

- 175 With a view to ensuring the informed consent of the parties to the mediation, the establishment of a written agreement between the mediator and the parties on the terms and conditions of the mediation service should be considered, unless otherwise regulated in the relevant legal system.<sup>214</sup> This contract to mediate should be clear and contain the necessary information on the mediation process.
- 176 The contract should explain the mediator's role as a neutral and impartial third party. It should be highlighted that the mediator only assists with communication between the parties and that he or she does not represent (one of) the parties. The latter is of particular importance where mediation is to be conducted as bi-national, bilingual co-mediation, in a cross-border family conflict where the parties might tend to feel a closer link with the mediator who speaks the same language and shares the same cultural background.<sup>215</sup>

<sup>210</sup> Regarding the use of technology in international family mediation, see, for example, M. Kucinski, 'The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases', *Journal of Dispute Resolution*, 2010, pp. 297 *et seq.* at pp. 312 *et seq.*

<sup>211</sup> Regarding the development of an online family dispute resolution service in Australia see, for example, T. Casey, E. Wilson-Evered and S. Aldridge, 'The Proof is in the Pudding: The Value of Research in the Establishment of a National Online Family Dispute Resolution Service', 11th Australian Institute of Family Studies conference proceedings, available at < <http://www.aifs.gov.au/conferences/aifs11/> > (last consulted 16 June 2012).

<sup>212</sup> Regarding the special challenges of long-distance mediation, see the Draft Principles for Good Practice on 'Dispute Resolution and Information Technology', drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), 2002, available at < <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/PrinciplesonTechnologyandADR.aspx> > (last consulted 16 June 2012).

<sup>213</sup> See Chapter 10 below on mediation and accusations of domestic violence.

<sup>214</sup> See also section 6.1.2.

<sup>215</sup> See also section 6.2.3 on the concept of bi-cultural, bilingual co-mediation.

- 177 A contract to mediate drawn up for an international family dispute should draw attention to the importance of acquiring relevant legal information / advice regarding parental agreements and their implementation in the different legal systems concerned, while pointing out that the mediator him- or herself, even if referring to legal information, will not give legal advice.<sup>216</sup> This is where close co-operation with the specialist legal representatives of the parties can be helpful and / or the parties can be referred to sources of independent specialist legal advice.
- 178 The contract to mediate should highlight the importance of confidentiality of the mediation process and should draw attention to applicable legal provisions.<sup>217</sup> In addition, the contract may include terms obliging the parties not to subpoena the mediator.<sup>218</sup>
- 179 Reference should be made in the contract to mediation methods / models used and to the scope of mediation.<sup>219</sup>
- 180 The contract should also provide detailed information on the possible costs of the mediation.<sup>220</sup>
- 181 Where no contract to mediate is drawn up the above information should nonetheless be made available to the parties in writing, for example through information leaflets, a personalised letter or general terms and conditions available on the website to which reference is made before commencing mediation.

## 5 Scope of mediation in international child abduction cases

- 182 An issue always highlighted when referring to the advantages of mediation in comparison with court proceedings is that of the scope of mediation. It is said that mediation can better deal with all the facets of a conflict, since mediation can also include topics that are not legally relevant and which would therefore have no place in a court hearing. In a family dispute, mediation can help with disentangling old, long-lasting family feuds of which the current dispute might be a mere symptom. However, this can mean engaging in a time-consuming process.

### 5.1 Focus on the issues of urgency

- Mediation in international child abduction cases under the 1980 Hague Child Abduction Convention has to comply with very rigid time requirements and may therefore need to be limited in scope.
- A good balance needs to be struck between including the topics necessary to work out a sustainable agreed solution and complying with the strict time requirements.

<sup>216</sup> See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

‘States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.’

<sup>217</sup> For further details on confidentiality, see section 6.1.5 below.

<sup>218</sup> For the example of including a deterring provision ‘that a party must pay the mediator’s attorneys’ fee if the party subpoenas the mediator and the testimony is not compelled’ where the law does not protect the confidentiality of the mediation, see K.K. Kovach (*op. cit.* note 110), at pp. 197, 198.

<sup>219</sup> On the scope of mediation, see Chapter 5 below.

<sup>220</sup> See also Standard VIII of the US Standards of Conduct, prepared by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution in 1994, as revised in 2005 (*supra* note 56).



- 183 Mediation in the particular circumstances of international child abduction has to be conducted against the background of the applicable international legal framework. To be compatible with the 1980 Hague Child Abduction Convention, mediation has to comply with very rigid time requirements and thus may need to be limited in scope. The 1980 Convention may furthermore give indications as to the subjects addressed in the mediation.
- 184 The primary issue at stake is, evidently, the return of the child. As the comparative study prepared for the 2006 Special Commission highlighted in this context:  
 ‘(An) application under the (1980) Convention is primarily concerned with seeking the return of a child habitually resident in one Contracting State who has been wrongfully removed to or retained in another Contracting State (...) The basic premise of the Convention is that the State of the child’s habitual residence retains jurisdiction to decide on issues of custody / contact and that prompt return of the child to that State will enable such decisions to be made expeditiously in the interests of the child without the child having the time to become settled in another State.’<sup>221</sup>
- 185 The 1980 Hague Child Abduction Convention seeks to expeditiously restore the *status quo ante* the abduction, leaving the long-term decisions on custody and contact, including the question of a possible relocation of the child, to the competent court which, in accordance with the 1996 Hague Child Protection Convention and other relevant instruments supporting that principle, is in the State of the child’s habitual residence. Where none of the exceptions apply, the judge seised with a Hague return application is required to order the return of the child.
- 186 One could consequently raise the question of whether mediation in child abduction cases under the 1980 Hague Child Abduction Convention should be restricted to discussing the modalities of the immediate return of the child to the competent jurisdiction. The clear answer is no. Mediation in the context of the 1980 Convention can also discuss the possibility of a non-return, its conditions, modalities and connected issues, *i.e.*, the long-term decision of the child’s relocation. Dealing with those issues in mediation is not, in principle, in contradiction with the 1980 Convention and other relevant instruments, although the legal framework naturally affects what *in concreto* may be agreed upon.<sup>222</sup>
- 187 It should be noted that mediation does not face the same jurisdictional restrictions as judicial proceedings. While court proceedings can only deal with matters for which the court has (international) jurisdiction, mediation is not restricted in the same way, even though jurisdictional issues will play a role when it comes to rendering the mediated agreement legally binding in the different legal systems involved. It is therefore widely accepted that mediation in international child abduction cases can also deal not only with the conditions and modalities of a return or non-return but also other longer-term issues affecting the parental responsibility of the parties, including custody, contact or even child support arrangements.
- 188 By contrast, Hague return proceedings cannot, in general, address the merits of custody. Article 16 of the 1980 Hague Child Abduction Convention states that ‘(a)fter receiving notice of a wrongful removal or retention of a child (...) the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned (...)’. The 1996 Hague Child Protection Convention works hand in hand with the 1980 Convention in this regard: long-term decisions on custody are left to the jurisdiction of the competent court in the State of the habitual residence of the child immediately before the abduction. According to Article 16 of the 1980 Convention, the possibility of a change in jurisdiction on matters of custody to the courts of the requested State generally only arises when the ongoing Hague return proceedings have ended.<sup>223</sup>

<sup>221</sup> See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.1, pp. 10, 11.

<sup>222</sup> See also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 95), pp. 39 *et seq.*; see also E. Carl and M. Erb-Klünemann, ‘Integrating Mediation into Court Proceedings in Cross-Border Family Cases’, in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59-76.

<sup>223</sup> See Chapter 13 below on issues of jurisdiction and applicable law rules; regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention, see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention (available at < [www.hcch.net](http://www.hcch.net) > under ‘Publications’).



189 When it comes to deciding exactly which issues can be covered in the mediation sessions in the individual international child abduction case, a good balance has to be struck between addressing the topics necessary to work out a sustainable agreed solution and complying with rigid time requirements. Also, the possible (additional) steps required to render the agreement on a certain subject matter legally binding and enforceable in both legal systems concerned need to be considered carefully, when deciding on the scope of mediation. It is, for example, conceivable that, in the individual case, the inclusion of maintenance issues in an agreement on the return of the child may risk delaying considerably the process of rendering the mediated agreement enforceable in the two legal systems due to complex jurisdictional issues.<sup>224</sup> Here, it may be advisable to separate the matter of maintenance from the issues primarily at stake in the international child abduction situation, *i.e.*, the question of return or non-return of the child and possibly related questions concerning parental responsibility. The parties should be made aware that the exclusion of any matters from the scope of the mediation at this stage does not constitute an obstacle to taking up these matters in separate mediation sessions at a later stage.

## 5.2 Importance of jurisdiction and applicable law regarding parental responsibility and other subjects dealt with in the mediated agreement

→ In international family mediation, the interrelation between the subjects covered in mediation and aspects of jurisdiction and applicable law need to be taken into account.

190 Mediation in international family disputes needs to take into consideration the interrelation between the matters dealt with in mediation and issues of applicable law and jurisdiction. Giving legal effect to a mediated agreement will often require the involvement of a court, be it for registration purposes or for turning the agreement into a court order. Hence, considering which court(s) may have jurisdiction on the issues that are to be included in the mediated agreement is important, as is the question of applicable law. Where a mediated agreement covers a wide range of subjects, it may be that the involvement of more than one judicial or administrative authority in the process of giving legal effect to the content of that agreement becomes necessary.<sup>225</sup>

## 6 Mediation principles / models / methods

191 With a view to guaranteeing the quality of mediation, several mediation principles have been developed, many of which can be found incorporated in mediation legislation, codes of conduct and other relevant instruments. Some of these principles, such as impartiality and neutrality, are often even featured in the definition of mediation itself.

192 Even though the mediation principles promoted in different jurisdictions and by individual mediation bodies may vary, many common elements can be identified. This Guide deals with good practice regarding the most commonly promoted principles, which have particular relevance for mediation in international child abduction cases.

193 When it comes to mediation models and methods employed in different States and by different mediation schemes, the picture is even more diverse and this Guide cannot give an exhaustive overview. While respecting the diversity in approach to mediation methods and models, the Guide aims to draw attention to certain good practices useful for mediation in international child abduction cases.

<sup>224</sup> See section 5.2 below and Chapter 13 for further details on the issue of jurisdiction.

<sup>225</sup> See Chapter 13 below on the issues of jurisdiction and applicable law.

## 6.1 Mediation principles – International standards

### 6.1.1 VOLUNTARY NATURE OF MEDIATION

- Mediation is a voluntary process.
- The commencement of Hague return proceedings should not be made contingent upon attendance at mediation or at a mediation information session.
- The willingness or lack thereof to enter into mediation should not influence Hague return proceedings.

- 194 It is the very nature of mediation to engage the parties in a voluntary process of finding an amicable resolution to their dispute. ‘Voluntariness’ is a basic and undisputed principle of mediation commonly used in mediation definitions and it has, therefore, also been incorporated in the definition of mediation for this Guide.<sup>226</sup>
- 195 The principle of ‘voluntariness’ is not contrary to the requirements in some jurisdictions of mandatory information meetings on mediation.<sup>227</sup> Even in jurisdictions where it is compulsory for the parties to a dispute to attempt mediation,<sup>228</sup> it can be argued that this is compatible with the voluntary nature of mediation as long as the parties are not forced to actually settle their dispute in mediation.
- 196 In international child abduction cases, the use of mediation should not delay expeditious return proceedings, and thus the use of ‘compulsory’ measures to promote mediation has to be considered carefully.
- 197 The institution of Hague return proceedings should not depend on the attendance of both parties at a mediation information session, especially if, as a result, the taking parent would be given the possibility to delay unilaterally the institution of proceedings. Furthermore, any compulsory measures encouraging parents to mediate cannot disregard the specific circumstances of international abduction cases. States need to consider whether the mechanisms used in national family law disputes to promote the use of mediation are appropriate for international child abduction cases under the 1980 Hague Child Abduction Convention.
- 198 A recurring pattern of these cases is, for example, that the left-behind parent is not familiar with the legal system of the requested State (the State to which the child was taken) and does not speak the language of that State, while the taking parent usually has at least the language link with this State. Here, pressure put on the left-behind parent to enter into mediation only available in the language of the requested State, *i.e.*, in which the left-behind parent will not be able to communicate in his or her mother tongue, will most likely be perceived as unfair by that parent. Giving the left-behind parent in such a situation the impression that the commencement of Hague proceedings is dependent on his or her attempting mediation might well be viewed by the parent as undue pressure and therefore be counterproductive.

<sup>226</sup> See the Terminology section above.

<sup>227</sup> For example in France and in Germany, in a parental dispute over children, the family judge may oblige the parents to attend an information meeting about mediation, but may not oblige them to attempt mediation, see Art. 373-2-10 (last amended 2004) and Art. 255 (last amended 2002) of the French Civil Code and § 156 para. 1, sentence 3 (last amended 2012) and § 81 para. 2, number 5 (last amended 2012) of the German Domestic Family Law Procedure Act (FamFG); also in Australia, a court may order ‘that the parties to the proceedings attend family dispute resolution (...)’, which includes mediation, see Arts 13 C *et seq.* of the Family Law Act 1975 (last amended by Act No 147 of 2010) (*supra* note 174). For further information on compulsory meetings regarding mediation in civil matters in some States, see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 12.

<sup>228</sup> See H. Joyce, ‘Mediation and Domestic Violence: Legislative Responses’, Comment, 14 *J. Am. Acad. Matrimonial Law* (1997), p. 451.

- 199 Both parents need to be informed that mediation is only an option, which exists in addition to recourse to Hague return proceedings. The parents' willingness or lack of willingness to enter into mediation or to continue mediation once commenced should not influence the decision of the court.<sup>229</sup>

#### 6.1.2 INFORMED CONSENT

→ The parties' decision to enter into mediation should be based on informed consent.

- 200 All necessary information on mediation and connected issues should be provided to the parties in advance of the mediation process to allow the parties to make an informed decision about entering into mediation.<sup>230</sup> This information should include: details on the mediation process and the principles determining that process, such as confidentiality; details on the method and model used, as well as information on the practical modalities; the possible costs involved for the parties. Furthermore, information should be given on the interrelation of mediation and judicial proceedings. The parties should be informed that mediation is only one option and that attempting mediation does not prejudice their access to judicial proceedings.
- 201 Where a contract to mediate between the mediator and the parties is drawn up on the terms and conditions of the mediation, the relevant information could be reflected in that contract; see also section 4.5 above on the subject of the 'contract to mediate'.
- 202 Since the legal situation in international family disputes is particularly complex, the parties' attention should be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation and to assist with drafting the mediated agreement, as well as with giving legal effect to the agreement in the jurisdictions concerned. Access to this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see Chapter 4 above, 'Access to mediation') or could be provided by specialist legal representatives of the parties.<sup>231</sup>

#### 6.1.3 ASSESSMENT OF SUITABILITY FOR MEDIATION

→ A screening process should be applied to assess the suitability of mediation for the particular case.

- 203 The advantages of an initial screening have been set out above, in sections 2.1 and 4.2.

<sup>229</sup> See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, pp. 17, 18, referring to the reunite Mediation Pilot Scheme (*supra* note 97):

'When potential participants for the reunite pilot project were approached it was emphasised to both parents that mediation could only be undertaken with the full consent of both parties and an unwillingness to enter mediation would have no effect on the outcome of the Hague application.'

<sup>230</sup> See the Principles for the Establishment of Mediation Structures in Annex 1 below, including the general principle of 'Informed consent'.

<sup>231</sup> See below, section 6.1.7, regarding informed decision making; see also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.'

## 6.1.4 NEUTRALITY, INDEPENDENCE, IMPARTIALITY AND FAIRNESS

→ **The general principles of neutrality, independence, impartiality and fairness are indispensable for mediation; they need to be safeguarded.**

204 The principles of neutrality, independence, impartiality and fairness are crucial to mediation.<sup>232</sup> They are closely linked although they address different aspects of the mediation process. Mediation should be neutral in relation to the outcome of the process. The mediator needs to be independent as to the way in which he or she conducts mediation. At the same time, the mediator needs to be impartial towards the parties.<sup>233</sup> Finally, the mediation must be conducted fairly. The latter implies that the parties need to be given equal opportunity to participate in the mediation process. The mediation process needs to be adapted in each individual case to allow for balanced bargaining powers. For example, the parties' wish to use their mother tongue or a language with which they feel comfortable should be respected as far as possible.<sup>234</sup>

## 6.1.5 CONFIDENTIALITY

→ **States should ensure that appropriate safeguards are in place to support the confidentiality of mediation.**

→ **States should consider the introduction of rules ensuring that the mediator and others involved in the mediation may not be compelled to give evidence on communications related to the mediation in civil or commercial proceedings unless certain exceptions apply.**

→ **In international family mediation, the parties need to be fully informed about the rules applicable to confidentiality in the different jurisdictions concerned.**

205 All communications in the course of, and in the context of, mediation should, subject to the applicable law,<sup>235</sup> be confidential, unless otherwise agreed by the parties.<sup>236</sup> Confidentiality of communications related to the mediation helps to create the atmosphere of trust needed for the parties to engage in an open discussion on a whole range of possible solutions to their dispute. The parties may be less willing to consider different options if they fear that their proposals may be taken as a concession and held against them in legal proceedings. In a child abduction case for example, the left-behind parent is likely to feel reluctant to indicate that he or she could agree to the child remaining in the other jurisdiction, if he or she fears that this might be interpreted as 'acquiescence' in the sense of Article 13(1) *a*) of the 1980 Hague Child Abduction Convention.

206 Passing on purely administrative information regarding whether the mediation has commenced, is continuing or has been terminated to the competent court or Central Authority who was involved

<sup>232</sup> See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.2-3.4, pp. 11-13, and also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles:

- i. the mediator is impartial between the parties;
- ii. the mediator is neutral as to the outcome of the mediation process;
- iii. the mediator respects the point of view of the parties and preserves the equality of their bargaining positions'.

<sup>233</sup> See also Standard II of the US Standards of Conduct (*supra* note 56); see also Art. 8 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 144); see also J. Zawid, 'Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators', *Inter-American Law Review*, Vol. 40, 2008, 1 *et seq.*, 37 *et seq.*

<sup>234</sup> See section 2.5 above.

<sup>235</sup> See below, para. 211, for exceptions to the principle of confidentiality.

<sup>236</sup> See also Standard V of the US Standards of Conduct (*supra* note 56); see also Art. 7 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 144).

in the referral to mediation does not infringe confidentiality.<sup>237</sup> On the contrary, sharing this information is an important part of the organisational co-operation between mediators, the Central Authorities and courts in international child abduction cases.<sup>238</sup>

- 207 Different measures are applied to help secure the confidentiality of mediation. In many Contracting States to the 1980 Hague Child Abduction Convention, confidentiality of mediation is addressed in legislation.<sup>239</sup> Furthermore, contracts concluded between the mediator and the parties before commencing mediation often include rules on confidentiality.<sup>240</sup> The contract may, for example, include terms that forbid the parties to subpoena the mediator, and even include as a deterrent a provision whereby a party that subpoenas the mediator needs to cover the mediator's attorneys' fees.<sup>241</sup>
- 208 However, in the absence of legislation or other rules binding the courts, exempting the mediator and others involved in the mediation process from being called to give evidence on information obtained in connection with the mediation in civil or commercial proceedings, the confidentiality of mediation may be pierced in the course of such legal proceedings.
- 209 States should consider the introduction of rules to ensure that this would not be the case unless certain exceptions apply.<sup>242</sup> Different regional instruments, such as the European Directive on mediation<sup>243</sup> or the United States of America's model law on mediation (the United States

237 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52):

'V. Relationship between mediation and proceedings before the judicial or other competent authority (...)

b. States should set up mechanisms which would: (...)

iii. inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement'.

238 See section 2.1.2 above.

239 See the Country Profiles under the 1980 Convention (*supra* note 121), section 19.2; the States with legislation on the confidentiality of mediation include: **Belgium, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Israel, Lithuania, Norway, Panama, Paraguay, Poland, Romania, Slovenia, Spain, Sweden, Switzerland and the United States of America** (different rules apply in the different US federal states).

240 See section 4.5 above; see also S. Vigers, *Mediating International Child Abduction Cases – The Hague Convention* (*op. cit.* note 95), pp. 47 *et seq.*

241 See K.K. Kovach (*op. cit.* note 110), at pp. 197, 198.

242 For the exceptions, see para. 211 below.

243 European Directive on mediation (*supra* note 5), see Art. 7 (Confidentiality of mediation):

'1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.'

See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

v. the conditions in which family mediation takes place should guarantee privacy;

vi. discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law'.

UMA),<sup>244</sup> request that confidentiality of mediation be safeguarded by such legislative measures. And many States have indeed already introduced such measures.

- 210 The mediator needs to inform the parties fully about the applicable rules on confidentiality. In international family mediation it is of the utmost importance that the views of both (all) relevant jurisdictions on the issue of confidentiality be considered. The parties need to know whether the information exchanged in the course of the mediation can be used in court in any of the jurisdictions in question. If the mediator has no knowledge of the other jurisdictions' confidentiality rules, he or she needs to draw the parties' attention to the fact that these rules may be different and that the communications in the course of mediation might not be considered confidential in the other jurisdiction. Inquiries with the specialist legal representatives of the parties can be encouraged. In addition, the Country Profiles under the 1980 Hague Child Abduction Convention can be a useful source of information regarding existing legislation on the confidentiality of mediation in a Contracting State to the Convention.<sup>245</sup>
- 211 There are, of course, exceptions to the principle of confidentiality when it comes to information on committed or planned criminal acts. Many rules regulating the confidentiality of mediation include explicit exceptions in this regard.<sup>246</sup> In addition, exceptions may derive directly from other rules such as criminal law rules. According to such rules a mediator or other person involved in mediation may be obliged to report certain information to the police and, where the information is

<sup>244</sup> United States UMA (*supra* note 54), see Section 4 (Privilege against disclosure; admissibility; discovery):

'(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.'

<sup>245</sup> *Supra* note 121, see also note 239. Relevant legislation referred to in the Country Profiles is, if submitted by the relevant Contracting States, also available on the Hague Conference website together with the Country Profiles.

<sup>246</sup> See also the European Directive on mediation (*supra* note 5), Art. 7 (a), providing for an exception 'where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person'; see also the United States UMA (*supra* note 54), Section 6 (Exceptions to privilege):

'(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under (insert statutory reference to open records act) or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the (Alternative A: (State to insert, for example, child or adult protection) case is referred by a court to mediation and a public agency participates.)

(Alternative B: public agency participates in the (State to insert, for example, child or adult protection) mediation (...).'



related to a potential risk of psychological or physical harm to a child, possibly to additional child welfare organisations or other child protection bodies. Whether a mediator can, in such cases, be asked to give evidence before a court on the information obtained in the context of the mediation is another question, and will depend on the applicable law.

#### 6.1.6 CONSIDERATION OF THE INTERESTS AND WELFARE OF THE CHILD

- Mediation in international child abduction cases needs to take the interests and welfare of the child concerned into consideration.
- The mediator should encourage parents to focus on the needs of the children and remind them of their prime responsibility for their children's welfare, and of the need for them to inform and consult their children.<sup>247</sup>

212 Given that the outcome of mediation in parental conflicts on custody and contact directly affects the child concerned, mediation needs to take the interests and welfare of the child into account. Of course, mediation is not a directive process; the mediator only facilitates communication between the parties, enabling them to find a self-accountable solution to their conflict. However, the mediator:

‘should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children’.<sup>248</sup>

213 Also, the Principles for the Establishment of Mediation Structures in the context of the Malta Process<sup>249</sup> recognise the importance of this point by stating that parents should be assisted with reaching an agreement ‘that takes into consideration the interests and welfare of the child’.

214 Taking into account the interests and welfare of the child concerned does not only give due importance to the rights of the child, but may also be decisive when it comes to giving legal effect to the mediated agreement. In many States, parental agreements relating to parental responsibility will need to be approved by the court ensuring that the agreement is compatible with the best interests of the child concerned.

#### 6.1.7 INFORMED DECISION-MAKING AND APPROPRIATE ACCESS TO LEGAL ADVICE

- A mediator conducting mediation in international child abduction cases needs to draw the parties' attention to the importance of considering the legal situation in both (all) legal systems concerned.
- The parties need to have access to the relevant legal information.

215 The parties' agreed solution should be the result of informed decision making.<sup>250</sup> They need to be fully aware of their rights and duties, as well as the legal consequences of their decisions. As already highlighted, the legal situation in international family disputes is particularly complex. The parties' attention must therefore be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation sessions, and to assist both with drafting the mediated agreement and giving it legal effect in the jurisdictions in question.

<sup>247</sup> This principle is included in Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), under III (Process of mediation).

<sup>248</sup> *Ibid.*

<sup>249</sup> See Annex 1 below.

<sup>250</sup> See *ibid.*, including the general principles of ‘Informed decision making and appropriate access to legal advice’.



- 216 The parties should have access to specialist legal advice.<sup>251</sup> Access to relevant legal information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see section 4.1.4 above), or could be provided by specialist legal representatives of the parties.<sup>252</sup>
- 217 Where only one party is legally represented, the mediator needs to draw the other party's attention to the necessity of accessing legal information. Certain legal information can also be provided by the mediator him- or herself, of course, with the latter making clear, however, that he / she is not in a position to give legal advice.

#### 6.1.8 INTERCULTURAL COMPETENCE

**→ Mediation in international family disputes needs to be conducted by mediators with intercultural competence.**

- 218 As has been pointed out above, mediation in international family disputes regularly involves parties from different cultural and religious backgrounds.<sup>253</sup> Mediators conducting mediation in such cases need to be knowledgeable of, and sensitive to, the cultural and religious issues that may be involved. Specific training is needed in this regard.<sup>254</sup>

#### 6.1.9 QUALIFICATION OF MEDIATORS OR MEDIATION ENTITIES – MINIMUM STANDARDS FOR TRAINING

**→ Mediation in international child abduction cases needs to be conducted by experienced family mediators specifically trained for this kind of mediation.**

- 219 Specialist training is required for mediators conducting mediation in international child abduction cases. See Chapter 3 above for further information.

## 6.2 Mediation models and methods

- 220 As stated above, when it comes to mediation models and methods employed in different States and by different mediation schemes, this Guide cannot possibly give an exhaustive overview. Nor can it conclude that one model or method is preferable to another. The Guide aims to draw attention to specific good practices useful for mediation in international child abduction cases regarding certain mediation models or methods.

<sup>251</sup> See also section 6.1.2 above on informed consent, para. 202.

<sup>252</sup> See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.'

<sup>253</sup> See section 2.4 above; see also, for example, K. Kriegel, 'Interkulturelle Aspekte und ihre Bedeutung in der Mediation', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 91-104; R. Chouchani Hatem (*op. cit.* note 110), pp. 43-71; D. Ganancia (*op. cit.* note 110), pp. 132 *et seq.*; M.A. Kucinski (*op. cit.* note 110), pp. 555-582.

<sup>254</sup> On the subject of training, see Chapter 14 below.

## 6.2.1 DIRECT OR INDIRECT MEDIATION

→ Whether direct or indirect mediation is most appropriate in the individual case will depend on the circumstances of the case.

- 221 The decision on whether to use direct or indirect mediation,<sup>255</sup> or a combination of the two, will depend on the circumstances of the case, such as the costs related to geographical location, and possible allegations of domestic violence (see Chapter 10), etc. The decision is also closely linked to that of determining the place of mediation, once a face-to-face meeting has been identified as the way forward (see above, section 4.4).

## 6.2.2 SINGLE OR CO-MEDIATION

→ In highly conflictual international child abduction cases the use of co-mediation should be encouraged where feasible.

- 222 Co-mediation, *i.e.*, mediation conducted by two mediators, has been used successfully in international child abduction cases by different mediation schemes set up specifically for those cases.
- 223 Mediation in highly conflictual international child abduction cases is very intense and complex; the parties' discussion may be very emotional and can be potentially explosive. The use of co-mediation in such circumstances has proven to be particularly advantageous.<sup>256</sup> Co-mediation is beneficial in providing the experience, knowledge and methodology of two mediators, which increases the likelihood of arriving at an agreed outcome in these highly conflictual cases. Already the presence of two mediators in the room can make it easier to create a calm and constructive atmosphere for discussion. The mediator's co-operation can serve as an example to the parents. Furthermore, the very fact that co-mediation can guarantee that the parties are never left alone with each other throughout the mediation sessions is an advantage. At the same time, it has to be taken into account that mediation in international child abduction cases has to take place within a tight timeframe, which can mean that mediation sessions might have to be organised in a short sequence of mediation sessions of two to three hours. Taking into account that mediation under such circumstances places a heavy burden on the mediator, co-mediation can be helpful for the sake of all involved.<sup>257</sup>
- 224 However, there may be cases where co-mediation is not feasible. Co-mediation is likely to be more expensive than single mediation. In addition, finding two appropriate mediators within the given short timeframe may be difficult. Furthermore, if the two mediators have not co-mediated before, there may be a risk that they will need time to adapt to the different dynamics of co-mediation. This points to the advantages of single mediation by a mediator with experience in mediating disputes in international child abduction, which is likely to be less costly, may be easier to schedule and does not involve the risk that the methodologies of two mediators who have not co-mediated before will conflict.
- 225 Nonetheless, in view of the various advantages of co-mediation, when envisaging the setting up of a mediation scheme for child abduction cases under the 1980 Hague Child Abduction Convention, the introduction of co-mediation for high conflict cases should be considered.<sup>258</sup>

<sup>255</sup> For the definitions, see the Terminology section above.

<sup>256</sup> See for example the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), pp. 42-44, on the experience of mediators in international child abduction cases.

<sup>257</sup> In the 2006 Report on the reunite Mediation Pilot Scheme (*ibid.*), at p. 11, mediators highly recommended that mediation be conducted as co-mediation in such cases.

<sup>258</sup> For Contracting States to the 1980 Convention in which co-mediation is available, see also the Country Profiles (*supra* note 121) at section 19.1 d). Co-mediation is, for example, available in Australia, Belgium, France, Germany, Hungary, Lithuania, Slovenia, the United Kingdom (England and Wales, Northern Ireland) and the United States of America.

## 6.2.3 CONCEPT OF BI-CULTURAL, BILINGUAL MEDIATION

- Where appropriate and feasible, the use of bi-cultural, bilingual co-mediation should be encouraged in cross-border child abduction cases.
- Information about the possible mediation models and procedures should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation.

- 226 A special form of co-mediation is bi-cultural, bilingual mediation. Bi-cultural, bilingual co-mediation addresses the specific needs for intercultural competence as well as language skills when mediating between parties from different States of origin with different mother tongues.
- 227 According to this model, mediation is to be conducted by two experienced family mediators: one from each party's State of origin and cultural background. Where different languages are spoken in the States of origin, the mediators will bring with them the necessary language skills, although it has to be highlighted that at least one of them needs to have a good understanding of the other language involved. There are two further issues that some of the mediation schemes set up for international child abduction using bi-national mediation try to balance, *i.e.*, the gender and professional expertise of the mediators. Co-mediation in these schemes is conducted by one female and one male mediator, one with a legal background and one with a socio-psychological background. This allows for the combining of professional expertise and cultural competence in handling different mediation issues. These co-mediation schemes involving mediators of different genders and from different professional backgrounds could thus be referred to as bi-cultural, bi-lingual, bi-gender and bi-professional mediation schemes.<sup>259</sup>
- 228 Historically, the development of bi-cultural mediation schemes in the context of child abductions under the 1980 Hague Child Abduction Convention goes back to a bi-national Franco-German parliamentary mediation initiative. To assist particularly difficult abduction cases between Germany and France, involving nationals from both countries, the Ministers of Justice of France and Germany decided in 1998 to establish a group of Parliamentary mediators and to fund its work. The group, comprising three French and three German Parliamentarians, one of each being Members of the European Parliament, commenced its work in 1999. Cases were mediated in co-mediation by one French and one German mediator.<sup>260</sup> In 2003 the parliamentary scheme was replaced by a scheme involving non-Parliamentarian professional mediators from both countries, which operated until 2006.<sup>261</sup> Moving away from the involvement of Parliamentarians and towards co-mediation by professional independent mediators was a step forward in avoiding the

<sup>259</sup> For example, the mediation schemes currently accessible through the German non-profit organisation MiKK e.V.: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice (2003-2006), the **German-British** project in co-operation with reunite (commenced in 2003/4), for further details see note 97 above. See also the Wroclaw declaration from 2008 for the principles to which these 'bi-cultural' mediation schemes aspire to adhere, discussed in S. Kiesewetter, C.C. Paul and E. Dobiejewska, 'Breslauer Erklärung zur binationalen Kindschaftsmediation', in FamRZ 8/2008, pp. 753 *et seq.*; the Wroclaw declaration is also available at:

< <http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration/> > (last consulted 16 June 2012).

<sup>260</sup> For a brief description of the parliamentary mediation initiative project, see the report on the **Franco-German** professional bi-national co-mediation in T. Elsen, M. Kitzing and A. Böttger, 'Professionelle binationale Co-Mediation in familienrechtlichen Streitigkeiten (insbesondere Umgang) – Endbericht', Hannover 2005. In the Franco-German parliamentary mediation project there were also professional mediators involved, see *ibid.*

<sup>261</sup> See also *ibid.*, 'The German Ministry of Justice estimates that around 30 cases of mediation have been or are being handled by this group for the period from its establishment in October 2003 until its termination in March 2006.' Knowing that the governmental funding of the project would end in 2006, the professional mediators involved in these cases established in 2005 an association for bi-national family mediation in Europe – *Médiation familiale binationale en Europe* (MFBE) – to allow the project to continue.

- politicisation and nationalistic characterisation of some private family disputes.<sup>262</sup>
- 229 Following the positive experiences of the Franco-German mediation project,<sup>263</sup> further bi-national mediation projects were initiated in Germany (one with the United States of America, as well as a Polish-German bi-national pilot mediation scheme).
- 230 Of course, it is not the nationality of the professional mediators *per se* which makes them particularly well-suited to conduct mediation in tandem in cases where parties from the mediators' home countries are involved. It is rather the mediator's cultural background and resulting ability to understand the party's values and expectations which are important, as well as the ability to translate culturally linked verbal and non-verbal communication in a way that renders it more understandable for the other party. The latter evidently presupposes that the mediator has a good knowledge of the other party's culture.
- 231 Recognising that a person's culture is influenced by many factors, of which nationality is only one, and that in a given case other aspects like religion and the link to a specific ethnic group might influence a person's culture in a much stronger way than his or her citizenship, one might wish to speak of encouraging 'bi-cultural' mediation as a principle.<sup>264</sup>
- 232 The big advantage of 'bi-cultural', 'bilingual' co-mediation is that it may provide a confidence-building framework for the parties, creating an atmosphere where the parties feel understood and assisted in their communication by someone from their own linguistic and cultural background. In view however of the possible danger of a party identifying him- or herself with one of the mediators and considering this person as a representative in the mediation, the mediators need to highlight their role as neutral and impartial third parties.
- 233 The model of 'bi-cultural' mediation can also be helpful where the parties come from the same State of origin but have a different cultural identity because they belong to different religious or ethnic communities and where mediation could then be conducted in co-mediation by mediators with the same cultural backgrounds.
- 234 Disadvantages of 'bi-cultural', 'bilingual' co-mediation can be the cost implications. Moreover, it might be even more difficult to find appropriate, available mediators within a short time-period than with regular co-mediation, particularly when the mediation is in addition to be 'bi-gender', 'bi-professional' mediation.
- 235 Clearly, in cases where the parties come from the same cultural background, 'bi-cultural' mediation does not bring an added value; however, 'bi-gender', 'bi-professional' co-mediation might, where feasible.
- 236 Information about mediation models should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation (see Chapter 4 above).

<sup>262</sup> Unfortunately, many of the particularly difficult international child abduction cases are additionally polarised by the media, regularly overemphasising the nationality aspects of the cases. For the relevant international legal framework, especially the 1980 Hague Child Abduction Convention but also other instruments such as the 1996 Hague Child Protection Convention and the Brussels IIa Regulation, the nationality of the parties does not play a role. What matters according to these instruments is the habitual residence of the subject child.

<sup>263</sup> For details see the report on the German Bi-national Professional mediation project drafted on request of the German Ministry of Justice: T. Elsen, M. Kitzing and A. Böttger (*op. cit.* note 260); see also E. Carl, J.-P. Copin and L. Ripke, *Das deutsch-französische Modellprojekt professioneller Mediation*, KindPrax 2005, 25-28.

<sup>264</sup> See also S. Vigers, *Mediating International Child Abduction Cases – The Hague Convention* (*op. cit.* note 95), pp. 34 *et seq.*

## 7 Involvement of the child

- 237 In international family disputes concerning children, the involvement of the child in the resolution of the dispute can serve different purposes. First, listening to the child's views provides insight into his or her feelings and wishes, which may be important information when it comes to determining whether a solution is in the child's best interests. Second, it may open the parents' eyes to their child's wishes and help them to distance themselves from their own positions for the sake of an acceptable common solution.<sup>265</sup> Third, the child's involvement respects the child's right to be heard<sup>266</sup> while at the same time providing an opportunity for the child to be informed about what is going on.
- 238 In considering the extent to which children could and should be involved in mediation in international child abduction cases, it is helpful to take a brief look at the involvement of children in Hague return proceedings and family law proceedings in general in different legal systems. Particularly when it comes to rendering a mediated agreement legally binding and enforceable, the standards set by the relevant legal systems concerned will have to be considered.

### 7.1 Involvement of the child in Hague return proceedings and family law proceedings

- 239 In return proceedings under the 1980 Hague Child Abduction Convention, the child's views can, depending on his or her age and maturity, inform the judge's decision. Particular emphasis is given to a child's objection to return. Article 13(2) of the 1980 Convention provides that the court may 'refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'.<sup>267</sup>
- 240 Historically, this provision was to be read in connection with Article 4 of the 1980 Hague Child Abduction Convention, which limits the Convention's application to children under the age of 16 years and acknowledges that 'a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority'.<sup>268</sup> Article 13(2) was introduced to give the court discretion regarding the return order if an older child under the age of 16 years objects to being returned.<sup>269</sup>

<sup>265</sup> See for example J. McIntosh, *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Family Relations Clearinghouse, 2007, pp. 1-23.

<sup>266</sup> See Art. 12 of the UNCRC, which promotes the child's right 'to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'; regarding the effective implementation of Art. 12, see General Comment No 12 (July 2009) – The right of the child to be heard, drawn up by the Committee on the Rights of the Child, available at < <http://www2.ohchr.org/english/bodies/crc/comments.htm> > (last consulted 16 June 2012).

<sup>267</sup> In addition, interviewing the child might be important in considering whether 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation', in the sense of Art. 13(1) b) of the 1980 Convention.

<sup>268</sup> E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), p. 450, para. 77; see also P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford 1999, pp. 177, 178.

<sup>269</sup> On the further background of Art. 13(2) of the 1980 Convention, see E. Pérez-Vera (*loc. cit.* note 268). See also P. McEleavy, INCADAT-Case Law Analysis Commentary: Exceptions to Return – Child's Objection – Requisite Age and Degree of Maturity, available at < [www.incadat.com](http://www.incadat.com) > under 'Case Law Analysis'.

- 241 Today, however, this provision is increasingly viewed in the wider context of the child's right to be heard,<sup>270</sup> as recognised by the UNCRC,<sup>271</sup> the 1996 Hague Child Protection Convention<sup>272</sup> and several regional instruments<sup>273</sup> and initiatives.<sup>274</sup>
- 242 This development is reflected in the information provided by Contracting States in the Country Profiles<sup>275</sup> to the 1980 Hague Child Abduction Convention and was discussed at the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions. The Special Commission 'welcome(d) the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised'.<sup>276</sup> The Special Commission also recognised 'the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity'.<sup>277</sup>

<sup>270</sup> See P. Beaumont and P. McEleavy (*loc. cit.* note 268).

<sup>271</sup> See Art. 12 of the UNCRC (reproduced in note 266 above) promoting the child's right to be heard; regarding the effective implementation of Art. 12, see General Comment No 12 (July 2009) – The right of the child to be heard (*op. cit.* note 266).

<sup>272</sup> Inspired by Art. 12 of the UNCRC, the 1996 Hague Child Protection Convention provides in Art. 23(2) *b*) that recognition of a measure taken in a Contracting State may be refused 'if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State'; see also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 80), p. 585, para. 123.

<sup>273</sup> For example, in 1996 the Council of Europe adopted the *European Convention on the Exercise of Children's Rights*, which entered into force 1 July 2000, aiming to protect the best interests of children through a number of procedural measures to allow the children to exercise their rights, in particular in judicial family proceedings. The Convention was in force at the time of writing in Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Montenegro, Poland, Slovenia, The former Yugoslavian Republic of Macedonia, Turkey and Ukraine, see < <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=8&DF=05/12/2010&CL=ENG> > (last consulted 16 June 2012); also, the Brussels IIa Regulation, applicable as of 1 March 2005 for all EU Member States except Denmark, which supplements the application of the 1980 Hague Child Abduction Convention in these States, reflects the recent rapid developments in promoting children's rights in legal proceedings. Based to a large extent on the 1996 Hague Child Protection Convention, the Brussels IIa Regulation encourages even more vigorously the consideration of children's wishes.

<sup>274</sup> For example, the 'Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice', adopted on 17 November 2010 by the Committee of Ministers of the Council of Europe, available at < <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDBo21&BackColorLogged=F5D383> > (last consulted 16 June 2012); see also 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Agenda for the Rights of the Child', COM(2011)60 final of 15.2.2011, in particular p. 6, available online at < [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf) > (last consulted 16 June 2012). See further the preparatory report by U. Kilkelly, 'Listening to children about justice: Report of the Council of Europe on Child-friendly Justice', available at < [http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20\\_2010\\_%2014%20rev.%20E%205%20oct.%202010.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20_2010_%2014%20rev.%20E%205%20oct.%202010.pdf) > (last consulted 16 June 2012).

<sup>275</sup> See section 10.4 of the Country Profiles under the 1980 Convention (*supra* note 121).

<sup>276</sup> See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.

<sup>277</sup> *Ibid.*



- 243 It should be added that case law in many Contracting States also reflects the increased awareness of the need for separate representation of the child in certain difficult abduction cases.<sup>278</sup>
- 244 Nevertheless, it has to be said that the paths States take to protect children's rights and interests in legal proceedings are diverse and the manner in which the child may be involved or represented in legal proceedings, or the methods by which the child's views may be ascertained, differ considerably.<sup>279</sup> In some States judges in family proceedings concerning parental responsibility hear children directly; the child may be interviewed in a normal court hearing or in a special hearing, where the judge interviews the child alone or in the presence of a social worker, etc.<sup>280</sup> But even among the countries that involve children directly in judicial proceedings, views on the earliest age at which a child may be involved differ. In other States, where judges are reluctant to hear children directly, the child's view might be submitted to the court through a report prepared, for example, by a social worker or psychologist who interviews the child for that purpose.<sup>281</sup>
- 245 Apart from the question of how the child's views can be made known to the judge seized, the separate question of how much importance should be accorded the child's opinions and wishes will depend on the subject matter of the case and the child's age and degree of maturity.
- 246 At the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, the Special Commission 'note(d) the different approaches in (State's) national law as to the way in which the child's views may be obtained and introduced into the proceedings' and emphasised 'the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible'.<sup>282</sup>

## 7.2 The voice of the child in mediation

- The child's views should be considered in mediation in accordance with the child's age and maturity.
- How the child's views can be introduced into the mediation and whether the child should be involved directly or indirectly must be given careful consideration and depend on the circumstances of the individual case.

<sup>278</sup> See section 10.4 d) of the Country Profiles under the 1980 Convention (*supra* note 121) and the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 51. See also regarding the **United Kingdom**, M. Freeman and A.-M. Hutchinson, 'Abduction and the Voice of the Child: Re M and After', *IFL* 2008, 163-167; see also, for example, in **New Zealand**, the Practice Note 'Hague Convention Cases: New Zealand Family Court Guidelines', available at < <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes> > (last consulted 16 June 2012) and sec. 106 and 6 of the New Zealand Care of Children Act 2004 No 90 (as at 29 November 2010), available at < <http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html> > (last consulted 16 June 2012).

<sup>279</sup> See for example a comparison of different European States in M. Reich Sjögren, 'Protection of Children in Proceedings', Note prepared for the European Parliament's Committee on Legal Affairs, Brussels, November 2010, PE 432.737.

<sup>280</sup> See for example **Germany**: children have to be heard as of the age of 14 years or younger if the child's views are considered particularly relevant for the proceedings (§ 159 FamFG, *supra* note 227, replacing § 50 b FGG), which will normally be the case in custody proceedings (here, children are sometimes heard as early as 3 or 4 years old); see also a study requested by the Ministry of Justice on the hearing of children, M. Karle, S. Gathmann, G. Klosinski, 'Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach § 50 b FGG', 2010. In **France** children can be heard by the judge or a person designated by the judge to hear the child in accordance with Art. 388-1 of the French Civil Code.

<sup>281</sup> See, with further references, M. Reich Sjögren (*op. cit.* note 279); in the **United Kingdom** the court can order a Welfare report from a specialist social worker of the Children and Family Court Advisory and Support Service (CAFCASS) in the context of custody or contact proceedings; see also M. Potter, 'The Voice of the Child: Children's 'Rights' in Family Proceedings', *IFL* 2008, 140-148, at p. 143.

<sup>282</sup> See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.



- 247 In the mediating of a family dispute concerning children, the child's views need to be taken into consideration.<sup>283</sup> The same applies to other alternative dispute resolution mechanisms. Particularly in view of the developments in safeguarding children's rights and interests in the context of judicial proceedings, there should be a parallel respect for children's rights and interests, and particularly for the child's right to have his / her views taken into account, in alternative forms of dispute resolution.
- 248 Confirming this principle, in its discussion of the effective implementation of Article 12 of the UNCRC, the Committee on the Rights of the Child stated in its 2009 General Comment on the right of the child to be heard that the right 'to be heard in any judicial and administrative proceedings affecting the child' also needs to be respected where those proceedings 'involve alternative dispute mechanisms such as mediation and arbitration'.<sup>284</sup>
- 249 When it comes to 'hearing the voice of the child' in mediation, two major differences exist in comparison with judicial proceedings. First, the means by which a child's voice may be introduced into the mediation process may differ considerably from those available in the context of judicial proceedings. Second, there is a difference in the manner in which the child's opinions and wishes can be taken into consideration.
- 250 Whether and the means by which the voice of the child can be introduced in the mediation process will to some extent depend on the parents' agreement to a certain procedure. This is due to the fact that in most jurisdictions mediators do not have interrogative powers, *i.e.*, in contrast to judges, mediators are generally not in a position to summon the child to a hearing or to order an expert interview of the child and a report being drawn up. The mediator can only draw the parents' attention to the importance of hearing the child's voice and indicate, where applicable, that the court requested to render the agreement legally binding and enforceable may examine whether the child's views have been sufficiently taken into account. The mediator should recommend a procedure of introducing the child's voice into mediation taking into consideration the circumstances of the individual case (*e.g.*, the age of the children, the risk of re-abduction, whether there is a history of domestic violence, etc.). One possible option is the direct participation of the child in one or more of the mediation sessions. Another possibility is arranging for a separate interview of the child and reporting back to the parents.<sup>285</sup> However, the person interviewing the child needs to have specialised training,<sup>286</sup> to guarantee that the consultation with the child is conducted in a 'supportive, and developmentally appropriate manner' and to ensure 'that the style of consultation avoids and removes any burden of decision-making from the child'.<sup>287</sup>
- 251 Once the child's views have been introduced into the mediation process, the manner of taking them into consideration also differs from judicial proceedings. In judicial proceedings, the judge will draw his / her conclusions from the hearing and, depending on the age and maturity of the child, will take the child's views into consideration when making his / her decision regarding the

283 See also 'The Involvement of Children in Divorce and Custody Mediation – A Literature Review', published by the Family Justice Services Division of the Justice Services Branch (British Columbia Ministry of Attorney General), March 2003, available at < <http://www.ag.gov.bc.ca/dro/publications/index.htm> > (last consulted 16 June 2012).

284 See General Comment No 12 (2009) – The right of the child to be heard (*op. cit.* note 266), p. 12, para. 33; see also p. 15, para. 52.

285 In the Mediation Pilot project of the *Centrum Internationale Kinderontvoering* in the Netherlands, a specially trained mediator, who was not conducting the mediation in the specific case, interviewed the child concerned and submitted a report on the interview; in the United Kingdom, the mediators involved in the reunite mediation scheme, where appropriate, ask the court seised with the return proceedings to order that the child be interviewed by a Children and Family Court Advisory Support Service Officer (CAFCASS Officer) and that the report be made available to the parents and mediators, see the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 10.

286 For example in the United Kingdom (England and Wales), the Family Mediation Council's 'Code of Practice for Family Mediators' agreed by the Member Organisations, 2010, available at < [www.familymediationcouncil.org.uk](http://www.familymediationcouncil.org.uk) > (last consulted 16 June 2012), provides that '(m)ediators may only undertake direct consultation with children when they have successfully completed specific training approved by their Member Organisation and / or the Council and have received specific clearance from the Criminal Records Bureau' (at paras 3.5 and 5.7.3); see also Chapter 14 below.

287 See J. McIntosh (*op. cit.* note 265), p. 5.

child's best interests. In contrast a mediator can only draw the parties' attention to the child's point of view or to aspects that may be relevant to the interests and welfare of the child, but it remains entirely up to the parents to decide on the content of their agreement. As already stated above, it needs to be emphasised in this respect that the mediator 'should have a special concern for the welfare and best interests of the children (and) should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children (...)'.<sup>288</sup>

- 252 Depending on the legal systems involved, the mediator may also need to remind the parents that judicial approval of the agreement may depend on whether the rights and interests of the children have been properly protected.

## 8 Possible involvement of third persons

→ Where the parties to the conflict agree, and where the mediator considers it feasible and appropriate, mediation can be open to the involvement of third persons whose presence might be of assistance in finding an agreed solution.

- 253 To reach a sustainable solution in a family dispute, it can sometimes be helpful to include within the mediation process a person who has close links with one or both of the parties and whose co-operation is needed to implement the agreed solution successfully. This may be, for example, the new partner of one of the parents or a grandparent. Depending on the parties' cultural background, the parties might wish to have a senior representative of their community participate in the mediation.
- 254 It is indeed one of the advantages of mediation that the process is flexible enough to allow for the inclusion of persons that do not have a legal standing in the case, but who may still have a strong influence on the success of the dispute resolution. However, the mediator will have to decide on a case-by-case basis whether the inclusion of a third person in a mediation session or part of it is feasible and appropriate without endangering the effectiveness of mediation. The attendance of a third person at a mediation session or arranging for a mediator to interview a third person, of course, presupposes the agreement of both parties. The inclusion of a third person may constitute a challenge particularly when it comes to ensuring that there is no imbalance of power between the parties. Also, should a third person participate in mediation communications, the issue of confidentiality has to be addressed.
- 255 When it comes to the agreed solution found in mediation, it has to be emphasised that it is an agreement between the parties and that the third person does not through his or her involvement in the mediation become a party to that agreement. However, in certain cases it may be helpful if the third person, on whose co-operation the implementation of the agreement depends, gives his or her endorsement to the agreement of the parties as a sign of his or her commitment to support that agreement.

<sup>288</sup> See Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), under III (Process of mediation); on the principle of consideration of the interests and welfare of the child, see section 6.1.6 above.

## 9 Arranging for contact between the left-behind parent and child during the mediation process

- 256 Child abduction regularly leads to a sudden and complete disruption of contact between left-behind parent and child. This is very painful for both and may, depending on the duration of the disruption of their contact, lead to alienation. In order to protect the child from further harm and in view of the child's right to maintain contact with both parents, the swift restoration of contact between child and left-behind parent is important. There are various ways by which contact can be restored on an interim basis immediately following the abduction. Modern means of communication can be considered (including e-mail, instant messaging, Internet calls, etc.).<sup>289</sup>
- 257 If the left-behind parent is travelling to the requested State on the occasion of a court hearing in connection with Hague return proceedings or for a mediation meeting, it is highly recommended that measures be considered to allow for an in-person meeting between the child and the left-behind parent.<sup>290</sup> This is a valuable step towards de-escalation of the conflict. Particularly in mediation, where constructive dialogue between the parties is crucial, such in-person meetings can be very helpful. Mediators with experience in international child abduction cases acknowledge the positive effects of such in-person contact on the mediation process itself.<sup>291</sup>

### 9.1 Safeguards / Avoiding re-abduction

→ Safeguards may need to be put in place to ensure respect for the terms and conditions of interim contact arrangements and to eliminate any risk of re-abduction.

Such safeguards may include:<sup>292</sup>

- the surrender of passport or travel documents, requesting that foreign consulates / embassies should not issue new passports / travel documents for the child;
- requiring the requesting parent to report regularly to the police or some other authority during a period of contact;
- the deposit of a monetary bond or surety;
- supervision of contact by a professional or a family member;
- restricting the locations where visitation may occur, etc.

- 258 For further details see the Guide to Good Practice on Transfrontier Contact Concerning Children,<sup>293</sup> Chapter 6, which also takes into consideration the objectives of the Council of Europe Convention of 15 May 2003 on Contact concerning Children.<sup>294</sup>

<sup>289</sup> See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.7, p. 33.

<sup>290</sup> See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 6.1, p. 20.

<sup>291</sup> See, e.g., S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), p. 47.

<sup>292</sup> See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.3, pp. 31-32.

<sup>293</sup> *Ibid.*, pp. 31 *et seq.*

<sup>294</sup> CETS 192; Convention text available at < <http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm> > (last consulted 16 June 2012).

## 9.2 Close co-operation with Central Authorities and administrative and judicial authorities

→ When arranging for contact between the left-behind parent and abducted child in the course of the mediation process, co-operation with the authorities may be necessary to eliminate any risks for the child, including re-abduction.

- 259 Under the 1980 Hague Child Abduction Convention the Central Authority has a responsibility ‘in a proper case, to make arrangements for organising or securing the effective exercise of rights of access’ (see Art. 7(2) *f*); see also Art. 21.<sup>295</sup> At the same time Article 7(2) *b* of the 1980 Convention obliges Central Authorities to take all appropriate measures ‘to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures’. As recognised by the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, ‘pursuant to Articles 7(2) *b* and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case’.<sup>296</sup>
- 260 Central Authorities are encouraged ‘to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases’.<sup>297</sup> Mediators should be aware of the considerable assistance that Central Authorities may be able to give in arranging for interim contact between the left-behind parent and the abducted child. They should equally be aware of the need for close co-operation with Central Authorities and other bodies regarding the arrangement of necessary protective measures. For further details see the Guide to Good Practice on Transfrontier Contact Concerning Children.<sup>298</sup>

## 10 Mediation and accusations of domestic violence

- 261 Domestic violence, unfortunately, is a widespread phenomenon that can take many forms: it can consist of physical or psychological abuse;<sup>299</sup> it can be directed towards the child (‘child abuse’)<sup>300</sup> and / or towards the partner;<sup>301</sup> and it can range from a single isolated incident to being part of a sustained and recurring pattern. Where domestic violence is recurring, a typical cycle of

295 For details see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.6, p. 23.

296 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 20; see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.

297 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 18; see also the Guide to Good Practice on Transfrontier Contact (*loc. cit.* note 296).

298 *Op.cit.*note 16.

299 Physical and psychological abuse can extend to sexual, emotional and even financial abuse. Domestic violence is ‘a complex and culturally nuanced phenomenon’ and ‘cuts across gender, race, ethnicity, age and socio-economic lines’, see J. Alanen, ‘When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense’, 40 *U. Miami Inter-Am. L. Rev.* 49 (2008-2009), p. 64.

300 Regarding violence against the child, the Guide distinguishes direct from indirect violence. Direct violence is defined as violence directed towards the child and the latter is violence directed against a parent or another member of the household, which affects the child. See also the definition of domestic violence in the Terminology section above and at para. 270 below.

301 In the majority of cases, the woman in a couple is the victim of domestic violence; see, e.g., ‘Domestic Violence Parliamentary Report of the United Kingdom’, published in June 2008, Summary in *IFL* 2008, pp. 136, 137, ‘the vast majority of serious and recurring violence was perpetrated by men towards women’; see also H. Joyce (*op. cit.* note 228), p. 449, ‘Women are the victims in 95 percent of reported domestic violence incidents.’

violence can consist of: (1) a tension-building phase with minor assaults; (2) an acute incident with an escalation of violence; and (3) a reconciliation phase, in which the perpetrator often begs for forgiveness and promises never to be violent again while the victim tries to believe the assurances, sometimes even feeling responsible for the abuser's psychological well-being.<sup>302</sup> It is a characteristic of recurring violence that the victim feels trapped in the cycle of violence and helpless, believing that the situation cannot change and afraid to leave the perpetrator for fear of retaliatory violence.<sup>303</sup>

- 262 In international child abduction cases, allegations of domestic violence are not rare. Some of these accusations may prove to be unfounded but others are legitimate and may be the reason why the taking parent left the country with the child. Domestic violence is a very sensitive issue and needs to be dealt with accordingly.
- 263 Views differ widely as to whether family disputes involving domestic violence are suitable for mediation. Some experts consider mediation in such cases generally inappropriate, for a number of reasons. They point out that mediation may put the victim at risk. Based on the consideration that the moment of separation from the abuser is the most dangerous time for the victim, they argue that a possible face-to-face contact with the abuser at that time carries the risk of further violence or traumatisation.<sup>304</sup> Furthermore, it is reasoned that mediation as a means of solving disputes amicably is ineffective in cases involving domestic violence, since mediation is based on co-operation<sup>305</sup> and its success depends on the parties having equal bargaining powers. It is argued that, since victims of domestic violence often have difficulties in advocating their own interests when facing the abuser, mediation is bound to lead to unfair agreements.<sup>306</sup> Some of those opposed to the use of mediation in domestic violence cases point out that mediation would legitimise domestic violence instead of punishing abusers.
- 264 By contrast, many experts are against a general exclusion of mediation in cases involving domestic violence, provided that well-trained professionals knowledgeable in the subject matter are involved.<sup>307</sup> They point to the fact that cases of domestic violence differ significantly, and that a case-by-case assessment is key: some cases may be amenable to a mediation process while some should clearly be dealt with by the courts.<sup>308</sup> Where a victim has received sufficient information to make an informed choice, the victim's wish to participate in a process that could be beneficial – if safe – should be respected.<sup>309</sup> Some authors have stated that a victim's involvement in an appropriate and well-run mediation process can be empowering for that person.<sup>310</sup> Concerns about victims' safety in the course of mediation are met with the counter-argument that mediation does not necessarily have to involve in-person mediation sessions, but can also be conducted as a telephone conference or as shuttle mediation.
- 265 In relation to the mediation process, the argument is that there are many ways in which it can be adapted to protect and empower the victim. For example, the rules set out for the mediation session can prohibit degrading behaviour combined with a provision for the mediation's immediate termination if these rules are not respected. Mediation professionals should be aware of rehabilitation programmes and other resources that might be available for an abusive parent.
- 266 The different views are also reflected in legislation. In some jurisdictions statutory provisions explicitly bar the use of mediation in family disputes involving children where there is evidence of a 'history' of domestic violence, or make mediation in such cases subject to certain conditions.<sup>311</sup>

<sup>302</sup> *Ibid.*, pp. 499, 450.

<sup>303</sup> *Ibid.*

<sup>304</sup> For further references regarding this view, see *ibid.*, p. 452.

<sup>305</sup> For further references regarding this view, see *ibid.*

<sup>306</sup> For further references regarding this view, see *ibid.*, p. 451.

<sup>307</sup> See, for example, the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 53.

<sup>308</sup> See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.

<sup>309</sup> See, with further references, *ibid.*

<sup>310</sup> J. Alanen (*op. cit.* note 299), p. 69, note 69.

<sup>311</sup> See also H. Joyce (*op. cit.* note 228), pp. 459 *et seq.*



267 It should be emphasised that the domestic violence itself often constitutes a serious offence and is not, of course, the subject of the mediation; at issue in mediation are such matters as child custody and access, support stipulations, and other family organisation matters.<sup>312</sup>

### 10.1 Treatment of domestic violence in Hague return proceedings

268 Before addressing the question of mediation in child abduction cases involving accusations of domestic violence, it is important to say a few words on domestic violence accusations in Hague return proceedings in general.

269 Where a child abduction has occurred, Central Authorities are under the obligation 'to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures' in accordance with Article 7(2) *b*) of the 1980 Hague Child Abduction Convention. Thus, if there is a risk that the taking parent could harm the child, the Central Authority could, depending on the powers given to it by the relevant Contracting State, take provisional measures or cause the competent authority to take such measures. This provision works hand in hand with Article 11 of the 1996 Hague Child Protection Convention which, in cases of urgency, confers jurisdiction to take necessary protective measures on the authorities of the Contracting State where the child is present.

270 In the majority of cases, however, accusations of domestic violence are not made against the taking parent but against the left-behind parent.<sup>313</sup> An immediate safety risk for the taking parent and / or the child will be met by the authorities in the requested State in accordance with that State's procedural law. Measures may for example be taken by the Central Authority and / or the court to avoid revealing the current whereabouts of the victim of domestic violence to the other parent, or to otherwise ensure that an unaccompanied meeting of the parties does not occur.<sup>314</sup>

271 In the course of Hague return proceedings, domestic violence accusations play a role when it comes to deciding whether an exception to the child's return in accordance with Article 13(1) *b*) of the 1980 Hague Child Abduction Convention can be established. According to that Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if it is established that 'there is a grave risk that (the child's) return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. Not just child abuse, but also domestic violence against the taking parent which indirectly affects the child, may be the cause of such a risk. However the exceptions of Article 13, in line with the objectives of the 1980 Convention, are construed narrowly.<sup>315</sup> Whether the conditions for the grave risk exception are fulfilled in a case with domestic violence allegations, will, besides the circumstances of the individual case, also depend on the ability to arrange for protective measures to ensure the safe return<sup>316</sup> of the child and possibly the taking parent to the State of his / her habitual residence.

272 Even though the 1980 Hague Child Abduction Convention deals with the return of the child, the safe return of the taking parent will often be a matter of concern for the court seised with the Hague return proceedings, particularly where the taking parent is the sole primary carer of the child. Arranging for the safe return of the taking parent can be a necessary condition to ordering the child's return, if the separation of parent and child due to the inability of the taking parent to return would expose the child to a grave risk of harm. See also above section 2.8 regarding criminal proceedings as an obstacle to the taking parent's return.

<sup>312</sup> J. Alanen (*op. cit.* note 299), pp. 87-88, note 151.

<sup>313</sup> Art. 7(2) *b*) of the 1980 Hague Child Abduction Convention was drawn up mainly with a view to avoiding another removal of the child. See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), para. 91.

<sup>314</sup> See also para. 277 below.

<sup>315</sup> See E. Pérez-Vera (*ibid.*), p. 434, para. 34; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission (*op. cit.* note 34), No 4.3, p. 12, and the Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*id.*), No 1.4.2, p. 8.

<sup>316</sup> Measures to ensure the safe return can include mirror orders, a safe harbour order or other protective measures. See further the Guide to Good Practice on Enforcement (*op. cit.* note 23), Chapter 9, pp. 35 *et seq.*; see also J.D. Garbolino, *Handling Hague Convention Cases in U.S. Courts* (3rd ed.), Nevada 2000, pp. 79 *et seq.*

- 273 Where it is established that the return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, the court seised with the return application is not obligated to order the return of the child.<sup>317</sup> A non-return decision will, in most cases, ultimately result in a shift of jurisdiction<sup>318</sup> on custody issues to the State of the child's new habitual residence.<sup>319</sup>
- 274 Dealing with domestic violence accusations in Hague return proceedings is a very sensitive issue and cannot, particularly in view of the many facets of cases in which domestic violence is alleged, be generalised. The Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions highlighted the autonomy of the court seised with the return proceedings regarding 'the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) b)), including allegations of domestic violence, (...) having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child'.<sup>320</sup> At the same time, the Special Commission suggested measures to promote greater consistency in the interpretation and application of Article 13(1) b).<sup>321</sup> Following this suggestion the Council decided in April 2012 'to establish a Working Group, composed of a broad range of experts, including judges, Central Authorities and cross-disciplinary experts, to develop a Guide to Good Practice on the interpretation and application of Article 13(1) b) of the 1980 Child Abduction Convention, with a component to provide guidance specifically directed to judicial authorities'.<sup>322</sup>

## 10.2 Safeguards in mediation / Protection of the vulnerable party

- The use of mediation in cases where there is an issue of domestic violence should be considered carefully. Adequate training in assessing the suitability of a case for mediation is necessary.
- Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members or the mediator. The choice between direct and indirect mediation, the mediation venue and the mediation model and method must be adapted to the circumstances of the case.
- Where mediation is considered suitable in a case involving an issue of domestic violence, it needs to be conducted by experienced mediators specially trained to mediate in such circumstances.

<sup>317</sup> The Brussels IIa Regulation, which works hand in hand with the 1980 Hague Child Abduction Convention, contains the additional rule in Art. 11(4) that '(a) court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.

<sup>318</sup> Regarding questions of jurisdiction, see Chapter 13 below; see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention (*op. cit.* note 223) regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention.

<sup>319</sup> According to Art. 11(8) of the Brussels IIa Regulation, the child might have to be returned despite the non-return decision in the event of 'any subsequent judgment (requiring) the return of the child issued by a court having jurisdiction under this Regulation'.

<sup>320</sup> See the Conclusions and Recommendations adopted by Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012) (available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'), Recommendation No 80.

<sup>321</sup> *Ibid.*, Recommendations Nos 81 and 82:

'81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) b) including, but not limited to, allegations of domestic and family violence.  
82. The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) b), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.'

<sup>322</sup> See Conclusions and Recommendations adopted by the 2012 Council (*op. cit.* note 39), Recommendation No 6.



- 275 The suitability of mediation for an international child abduction case in which accusations of domestic violence are raised against one parent needs to be given careful consideration. The person assessing whether the case is suitable for mediation needs to be trained accordingly.<sup>323</sup> Even where no accusations of domestic violence have been made, an assessment of the suitability of the case for mediation needs to take into consideration that domestic violence may nevertheless be involved in a given case.
- 276 The following factors may be of particular relevance when assessing the suitability of a specific case for the available mediation service:<sup>324</sup> the severity and frequency of the domestic violence;<sup>325</sup> the target of the domestic violence; the pattern of violence;<sup>326</sup> the parties' physical and mental health;<sup>327</sup> the likely response of the primary perpetrator;<sup>328</sup> the availability of mediation specifically designed for domestic violence cases; how the mediation service available can address safety issues; whether the parties are represented.<sup>329</sup> It should also be emphasised that if, in the course of initial screening or later in the mediation process, a mediator learns of circumstances that suggest a criminal offence (e.g., sexual abuse of a child), he or she will in many jurisdictions be under an obligation to report to the authorities, for example the police and child protection agencies. This obligation may exist despite the principle of confidentiality of mediation.<sup>330</sup>
- 277 Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members and the mediator. A face-to-face meeting, be it in the course of the mediation or as a preparatory meeting, should only be convened where safety can be ensured. Depending on the circumstances of the case, the assistance of State authorities might be necessary.<sup>331</sup> In other cases, avoiding the risk of the parties meeting unaccompanied may be sufficient. In such cases for example, the chance for the parties to inadvertently meet on their way to the mediation venue should be eliminated; thus separate arrivals and departures should be arranged.<sup>332</sup> Further measures may include an emergency button in the room where the mediation session is to take place. In the course of the mediation session, the parties should never be left alone. In this regard, the use of co-mediation may be particularly helpful. The presence of two experienced mediators will be reassuring for the victim and may help to defuse any tensions. Should one mediator have to leave the session for whatever reason, this also ensures an experienced mediator will remain in the parties' presence. The presence of other persons, such as a lawyer or provider of support, may also be considered where appropriate.<sup>333</sup>
- 278 Where the available mediation service is not equipped to eliminate the safety risks associated with a face-to-face meeting, or if such a meeting proves inappropriate for other reasons, the use of indirect mediation through separate meetings between the mediator with each party (so-called caucus meetings) or the use of modern technology such as a video link or Internet communications may be considered.

323 Regarding the importance of skilled screening procedures, see L. Parkinson, *Family Mediation – Appropriate Dispute Resolution in a new family justice system*, 2nd ed., Family Law 2011, Chapter 3, pp. 76 *et seq.*

324 See also Art. 48 of the Council of Europe *Convention on preventing and combating violence against women and domestic violence of 11 May 2011*, available at < <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> > (last consulted 16 June 2012), which requests State parties to 'take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention'.

325 See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.

326 *Ibid.*

327 *Ibid.*

328 *Ibid.*

329 *Ibid.*

330 Regarding the exceptions to the principle of confidentiality, see para. 211 above.

331 The more severe the circumstances, the less likely is the case's general suitability for mediation.

332 See also L. Parkinson (*loc. cit.* note 323).

333 See, with further references, N. ver Steegh (*op. cit.* note 8), p. 666.

- 279 Once safeguards have been established against the risk of harm in mediation, measures must be taken to guarantee that mediation is not prejudiced by unequal bargaining powers.<sup>334</sup> Mediation needs to be conducted by experienced and specially trained mediators; mediators need to adapt the mediation process to the challenges of each individual case. Safety issues associated with implementing the mediated agreement at a later stage need to be given due consideration.
- 280 In general, close co-operation with the judicial and administrative authorities is conducive to avoiding safety risks.<sup>335</sup>
- 281 Mediators should in general pay attention to and need to be able to recognise<sup>336</sup> signs of domestic violence and / or risks of future violence, including where no accusations have been made by one of the parties, and must be prepared to take the necessary precautions and measures.<sup>337</sup>

### 10.3 Information on protective measures

→ Information should be available regarding the possible protective measures for the parent and child in the jurisdictions concerned.

- 282 Information regarding the possible protective measures which may be taken for the parent and the child in the State of the child's pre-abduction residence, as well as in the State to which the child has been abducted, should be available to inform the discussion in the mediation session. The provision of this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation.<sup>338</sup> In addition, the Country Profiles under the 1980 Hague Child Abduction Convention can be a helpful source of information regarding available protective measures.<sup>339</sup>

## 11 The terms of the mediated agreement – Reality check

→ The terms of the mediated agreement need to be drafted realistically and to take into consideration all related practical issues, especially concerning the arrangement of contact and visitation.

334 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

335 See sections 19.4 g) and h) of the Country Profiles under the 1980 Convention (*supra* note 121) for information on the availability of certain specific safeguards.

336 Regarding the different types of violence and abuse a mediator should be able to recognise and distinguish, for example, see L. Parkinson (*loc. cit.* note 323).

337 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

338 On the role of Central Contact Points for international family mediation in facilitating the provision of information, see section 4.1 above.

339 See section 11.2 of the Country Profiles under the 1980 Convention (*supra* note 121).

- 283 Once an agreed solution is in sight, the mediator has to assist the parties with working out the details of their agreement. The mediator will in many cases be the one who drafts the actual ‘agreement’ or ‘memorandum of understanding’ in accordance with the parties’ wishes.<sup>340</sup>
- 284 As stated above in Chapter 5 (‘Scope of mediation’), mediated agreements in international child abduction cases are likely to include the following points: an agreement on the return or non-return of the child and in the latter case an agreement on where the child is to establish his / her new residence; with whom the child will live; the question of parental responsibilities and their exercise. Furthermore, the agreement is likely to address certain financial issues such as travel expenses, but also, in some cases, issues of child and spousal support.
- 285 It is important that the mediated agreement be drawn up in compliance with the applicable legal framework, so that it is capable of obtaining legal effect in both (all) jurisdictions concerned. In this respect, although it is clearly not the mediator’s role to give legal advice, he or she can refer the parties to the relevant national or international legal framework. In any case, the mediator should draw the parties’ attention to the importance of consulting their specialised legal representatives in this regard, or of otherwise obtaining specialist legal advice on the legal situation in their case.
- 286 Once the agreement has been drafted, it may be advisable to allow ‘a limited time for reflection (...) before signing’.<sup>341</sup> This time should also be used to make necessary legal inquiries.<sup>342</sup>
- 287 The mediated agreement needs to be realistic and as detailed as possible regarding all the obligations and rights to which it refers. This is not only important for a problem-free implementation of the agreement but also with regard to the agreement’s capability of becoming enforceable (see also Chapter 12). For example, if the parents agree on the return of the child, the modalities of the return, including the question of travel costs and with whom the child is to travel back and where the child will stay immediately following the return, need to be addressed.<sup>343</sup> Where the parents are to reside in different States, the cross-border exercise of parental responsibilities needs to be realistically regulated.<sup>344</sup> When drafting cross-border contact arrangements, for example, specific dates and time periods should be included to take account of school holidays, etc. Travel expenses also need to be addressed. It is important to eliminate, in so far as possible, any possible source of misunderstandings and practical obstacles in the use of the contact arrangement. In a case, for example, where a left-behind parent agrees that the child may remain with the taking parent in the State to which the child was taken, provided that his or her contact rights are sufficiently secured, the parents might agree that the taking parent will buy the flight tickets for the child to spend the summer holidays in the prior State of residence with the left-behind parent. The future financial capabilities should be addressed, and to avoid any last minute difficulties with purchasing the tickets, the parents could, for example, agree that a certain amount of money be deposited well in advance of the travel for the left-behind parent to make the travel arrangements.<sup>345</sup>
- 288 Caution is necessary with regard to conditions that go beyond the sphere of influence of the parties. For example, an agreement should not task one of the parties with the withdrawal of criminal proceedings, if, in the relevant legal system concerned, criminal proceedings, once initiated, can only be dismissed by the prosecutor or the court.<sup>346</sup>

<sup>340</sup> See K.K. Kovach (*op. cit.* note 110), at p. 205.

<sup>341</sup> See Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle VI (Agreements reached in mediation):

‘16. In order to define the subject matter, scope and conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure. The parties should be allowed a limited time for reflection, which is agreed on by the parties, after the document has been drawn up and before signing it.’

<sup>342</sup> See Chapter 12 below on rendering the agreement legally binding and enforceable.

<sup>343</sup> Regarding the details which need to be included in a return order, see Chapter 4 of the Guide to Good Practice on Enforcement (*op. cit.* note 23), pp. 21 *et seq.*

<sup>344</sup> See Principles for the Establishment of Mediation Structures in Annex 1 below, Part B.3.

<sup>345</sup> See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

<sup>346</sup> Regarding the special challenge of criminal proceedings, see section 2.8 above.

## 12 Rendering the agreement legally binding and enforceable

- The terms of the mediated agreement need to be drafted in such a manner as to allow for the agreement to obtain legal effect and become enforceable in the relevant jurisdictions.
- It is highly recommended that, before the agreement is finalised, a limited time for reflection be given to the parties to enable them to obtain specialist legal advice on the full legal consequences and on whether the content of their 'provisional agreement' complies with the law applicable in the different legal systems concerned.
- The measures necessary to give legal effect to the agreement and render it enforceable in the relevant jurisdictions should be taken with due speed and before the agreement's implementation.
- Access to information on the relevant procedures in the jurisdictions concerned should be facilitated by Central Authorities or Central Contact Points for international family mediation.
- Co-operation among administrative / judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned.
- Courts are encouraged to make use of national, regional<sup>347</sup> and international judicial networks, such as the International Hague Network of Judges, and to seek the assistance of Central Authorities where appropriate.<sup>348</sup>
- States should, where necessary, examine the desirability of introducing regulatory or legislative provisions to facilitate procedures for rendering mediated agreements enforceable.

289 With a view to its serving as a basis for a sustainable dispute resolution, the agreed solution reached in mediation should meet the requirements for obtaining legal effect in the States concerned and should be rendered legally binding and enforceable in these States before commencing with its practical implementation. The enforceability in both (all) legal systems concerned is particularly crucial where the agreed solution involves the cross-border exercise of parental responsibility. The child concerned needs to be protected from a possible re-abduction in the future, or from any other harm caused through a parent's lack of compliance with the agreement. At the same time, once the parents have agreed, a return of the child should be implemented as speedily as possible to avoid any further confusion or alienation for the child.

290 To start with, the solution reached in mediation should be documented in writing and signed by both parties. Depending on the matters dealt with in the parties' agreement and depending on the applicable law, an agreement might constitute a legally binding contract between the parties from the moment of its conclusion. Many legal systems, however, restrict party autonomy in family law to a certain extent, particularly when it comes to parental responsibility.<sup>349</sup> Here, many States consider that the rights and welfare of the child concerned need to be safeguarded through the involvement of judicial or administrative authorities. Agreements concerning the exercise of parental responsibilities, which are nonetheless encouraged by most of these systems, might, for example, need court approval verifying that they comply with 'the best interests of the child' to obtain legal effect.<sup>350</sup>

<sup>347</sup> An example of a regional network is the European Judicial Network in Civil and Commercial Matters, for further information see < [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm) > (last consulted 16 June 2012).

<sup>348</sup> See the Guide to Good Practice on Enforcement (*op. cit.* note 23), Principle 8.2.

<sup>349</sup> See also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), para. 5.4, p. 23.

<sup>350</sup> For example France, see Arts 376 and 373-2-7 of the Civil Code or Germany, see § 156, para. 2, FamFG (*supra* note 227); see also the responses to Questionnaire II of the Working Party on Mediation in the context of the Malta Process (*supra* note 42); see also M. Lloyd, 'The Status of mediated agreements and their implementation', in *Family mediation in Europe – proceedings*, 4th European Conference on Family Law, Palais de l'Europe, Strasbourg, 1-2 October 1998, Council of Europe Publishing, April 2000, pp. 87-96.

- 291 Furthermore, there may be restrictions to party autonomy regarding other family law matters such as child support. Some legal systems, for example, limit the ability of the parents to contract out of child support obligations arising under the applicable law.
- 292 It should also be noted that a situation may arise where among the different matters dealt with in the mediated agreement some are at the free disposal of the parties and some are not, and that according to the applicable law, the agreement becomes immediately binding on the parties in relation to the former matters, while the latter part of the agreement depends on court approval.<sup>351</sup> This can be an unfortunate situation if the court approval is not obtained (or obtainable) for the remainder of the agreement, since the parties will usually agree on a whole ‘package’ and the partially binding agreement might favour one of the parties.<sup>352</sup>
- 293 Since the legal situation in international family disputes is often complex, it is strongly recommended that, before the mediated agreement is finalised, there be a ‘time-out’ for the parties to obtain specialist legal advice regarding the full legal consequences of what they are about to agree on and whether the content of their ‘provisional agreement’ complies with the law applicable to these matters in the different legal systems concerned. It might be that a parent is not aware that he or she is agreeing to relinquish certain rights, or that the agreement or its practical implementation may lead to a (long-term) change in jurisdiction and the law applicable to certain matters. For example, where a left-behind parent agrees to the relocation of the child and taking parent, this will sooner or later bring about a change of the ‘habitual residence’ of the child,<sup>353</sup> which is likely to result in a change of jurisdiction and applicable law regarding a number of child related issues.<sup>354</sup>
- 294 If all or part of the agreement’s validity depends on court approval, the terms of the agreement should include that its entry into force will be conditional upon the court’s approval being successfully obtained. In these cases it may be advisable to refer to the outcome of mediation as a ‘provisional agreement’ and to reflect this in the title and wording of the document recording the agreed solution. In some legal systems, mediators refer to the immediate outcome of mediation as a ‘memorandum of understanding’ instead of ‘agreement’ to avoid any suggestion that the agreement is binding at that stage.
- 295 It should be emphasised that not every agreement which is legally binding on the parties in one legal system is also automatically enforceable in that legal system. However, in those legal systems where agreements relating to parental responsibility require the approval of judicial or administrative authorities to become legally binding, the measure granting the approval (for example, the inclusion of the terms of the agreement in a court order) will often be at the same time the measure rendering the agreement enforceable in that jurisdiction.<sup>355</sup> On the other hand, a parental agreement which is upon its conclusion legally binding in a legal system may require notarisation, or homologation by a court, in order to render it enforceable, unless the laws of that State regulate otherwise. For the formalities required to render mediated agreements enforceable by Contracting States to the 1980 Hague Child Abduction Convention, the Country Profiles under the 1980 Convention can serve as a useful source of information.<sup>356</sup>

<sup>351</sup> See also para. 41 above.

<sup>352</sup> Of course, problems will only arise where the favoured party would claim his / her rights out of the partial agreement and many legal systems would remedy such a situation but legal proceedings would be necessary.

<sup>353</sup> Provided the child’s habitual residence has not already changed; for further details on the meaning of ‘habitual residence’, see P. McEavey, INCADAT-Case Law Analysis Commentary: Aims and Scope of the Convention – Habitual Residence, available at < [www.incadat.com](http://www.incadat.com) > under ‘Case Law Analysis’.

<sup>354</sup> See Chapter 13 below.

<sup>355</sup> The details will depend on the relevant procedural law.

<sup>356</sup> See section 19.5 b) of the Country Profiles under the 1980 Convention (*supra* note 121). In some States, more than one option exists. The following States indicated that a court approval is necessary to render the agreement enforceable: Argentina, Australia, Belgium, Brazil, Burkina Faso, Canada (Manitoba, Nova Scotia), China (Hong Kong SAR), Costa Rica, Czech Republic, Denmark, Estonia, Finland (by the Social Welfare Board), France, Greece, Honduras, Hungary (by the Guardianship Authority), Ireland, Israel, Latvia, Lithuania, Mauritius, Mexico, Norway, Paraguay, Poland, Romania, Slovenia, Spain, Sweden (by the Social Welfare Board), Switzerland, the United Kingdom (England and Wales, Northern Ireland), the United States of America and Venezuela; notarisation is an option in: Belgium, Burkina Faso, Denmark, Estonia, Hungary, Romania, Slovenia and registration with the court is an option in: Australia, Burkina Faso, Canada (British Columbia, Nova Scotia, Saskatchewan), Estonia, Greece, Honduras (Country Profiles – as at June 2012).



296 As concerns rendering an agreement which has become enforceable (by embodiment in a court order or otherwise) in one legal system (State A), legally binding and enforceable in the relevant other legal system (State B), there are generally two paths which can be considered:

(1) The path of recognition and enforcement in State B:

A court order obtained in State A embodying the agreement may be recognised in State B, either because an international, regional or bi-lateral instrument provides for such recognition or because a foreign court order can otherwise be recognised in that legal system in accordance with State B's law. When it comes actually to enforcing the agreed solution, an additional declaration of enforceability or registration in State B may be necessary. Problems can arise in this scenario when the courts of State B consider that the courts of State A were lacking international jurisdiction to render a decision on the subject matter (for more on the jurisdictional challenges in international child abduction cases, see Chapter 13).

As another option, it is conceivable that rules between State A and State B apply which allow for the recognition in State B of an agreement enforceable in State A without it being embodied in a court order.<sup>357</sup>

(2) The path of taking the agreement itself to State B and making the necessary arrangements to render the agreement binding and enforceable in State B:

The parties could turn to the authorities of State B with their agreement requesting that it be rendered legally binding and enforceable under domestic procedures in State B. This means that they would then proceed regardless of the legal status their agreement has (obtained) in State A. Problems may arise regarding this solution due to jurisdictional issues. For example, it could be that the authorities of State B consider that they lack (international) jurisdiction to turn the agreement into a court order or take other necessary steps to render the agreement binding, because they regard the authorities of State A as having the exclusive jurisdiction to deal with the subject matter(s) covered by the agreement.

297 The ideal situation is one where an international, regional<sup>358</sup> or bi-lateral instrument provides for simplified recognition and enforcement of court orders from one State to the other. The 1996 Hague Child Protection Convention is such an instrument. Under the 1996 Convention, a court order embodying an agreement concerning custody or contact in one Contracting State, constitutes a 'measure of protection' and will as such be recognised by operation of law and enforceable in all Contracting States. This means 'that it will not be necessary to resort to any proceeding in order to obtain (...) recognition'<sup>359</sup> in other Contracting States. When it comes to the actual enforcement of the measure, however, a declaration of enforceability or registration becomes necessary (Art. 26(1)). But the 1996 Convention obliges Contracting States to apply '*a simple and rapid procedure*' in this regard (Art. 26(2), emphasis added). The declaration of enforceability or registration can only be refused when one of the restricted reasons for non-recognition listed in Article 23(2) applies. Reasons for refusal are, for example, that the 'the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for' in the 1996 Convention and that 'the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State'.

<sup>357</sup> See for example Art. 46 of the European Brussels IIa Regulation, whereby 'agreements between the parties that are enforceable in the (European Union) Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments (under the Regulation)'. See also Art. 30(1) of the 2007 Hague Child Support Convention providing that '(a) maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision (...) provided that it is enforceable as a decision in the State of origin'.

<sup>358</sup> Similarly to the 1996 Hague Child Protection Convention, the European Brussels IIa Regulation contains rules on a simplified recognition and enforcement of decisions in matters of parental responsibilities. In addition, Art. 46 of the Brussels IIa Regulation provides for the recognition and enforcement of agreements themselves, provided they are enforceable in the Member State in which they are concluded, see note 357 above.

<sup>359</sup> See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 80), p. 585, para. 119.

- 298 Possible doubts regarding grounds for non-recognition can be dispelled at an early stage by using the procedure of ‘advance recognition’ of Article 24 of the 1996 Hague Child Protection Convention. According to that Article, ‘any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State’. (See the Practical Handbook for further details on the 1996 Convention.<sup>360</sup>)
- 299 It needs to be emphasised that in child abduction cases the jurisdictional situation is very complex.<sup>361</sup> Both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention are based on the idea that, in a child abduction situation, the authorities in the State to which the child was abducted (requested State) shall have the competency to decide on the return of the child but not on the merits of custody.<sup>362</sup> The court seised with the Hague return proceedings in the requested State will therefore have difficulties turning a mediated agreement into a court order if this agreement also covers, besides the question of return, matters of custody or other matters on which the court seised with the Hague proceedings lacks (international) jurisdiction (for further details on the special jurisdictional situation in international child abduction cases, see Chapter 13).
- 300 A further complication to the jurisdictional situation can result from the inclusion of additional matters, such as spousal and child support issues, in the agreement. As a result, the involvement of different authorities, possibly in different States, might become necessary to render the full agreement legally binding and enforceable in the legal systems concerned. Specialist legal advice on which steps to take and in which of the States involved may be needed in such cases.
- 301 Access to information on where to seek specialist legal advice and on steps that are required to render an agreement enforceable in the States concerned could be facilitated by the Central Authority or another body serving as Central Contact Point for international family mediation in the relevant jurisdictions.<sup>363</sup>
- 302 Co-operation between the administrative / judicial authorities of the different States concerned may be necessary when it comes to ensuring the enforceability of the agreement in the different jurisdictions.
- 303 The courts should, to the extent feasible, support the sustainability of the agreed solution by assisting the parties in their efforts to render the agreement legally binding and enforceable in the different legal systems concerned. This may include the use of mirror orders or safe-harbour orders.<sup>364</sup> Furthermore, the courts should, where feasible and appropriate, make use of existing judicial networks<sup>365</sup> and seek the assistance of Central Authorities. A judicial network of particular relevance in this regard is the International Hague Network of Judges specialising in family

<sup>360</sup> *Op. cit.* note 223.

<sup>361</sup> For further details see Chapter 13.

<sup>362</sup> See Art. 16 of the 1980 Convention; Art. 7 of the 1996 Convention.

<sup>363</sup> See the Principles for the Establishment of Mediation Structures in Annex 1 below, Part C (Rendering mediated agreements legally binding). See section 4.1 above for further information on the role of Central Contact Points for international family mediation.

<sup>364</sup> The term ‘mirror order’ refers to an order made by the courts in the requesting State that is identical or similar to (*i.e.*, ‘mirrors’) an order made in the requested State. A ‘safe-harbour order’ is one made by a court in the requesting State often on the application of the left-behind parent with the aim of ensuring the terms of the return. For further details on the use of mirror orders and safe harbour orders in international child abduction cases, see the Guide to Good Practice on Enforcement (*op. cit.* note 23), Chapter 5 (‘Promoting voluntary compliance’) and Chapter 8 (‘Cross-border co-operation to ensure safe return’). See regarding examples also, E. Carl and M. Erb-Klünemann, ‘Integrating Mediation into Court Proceedings in Cross-Border Family Cases’, in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59 *et seq.*, at p. 72; see also K. Nehls, ‘Cross-border family mediation – An innovative approach to a contemporary issue’, in S. Kiesewetter and C.C. Paul (Eds) (*ibid.*), pp. 18 *et seq.*, at p. 27.

<sup>365</sup> Regarding the use of direct judicial communications to ensure legal recognition and enforceability of agreements in international child abduction cases, see the report of two German judges, E. Carl and M. Erb-Klünemann, ‘Integrating Mediation into Court Proceedings in Cross-Border Family Cases’, in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59 *et seq.*, at pp. 72, 73.



matters, which was created<sup>366</sup> to facilitate communications and co-operation between judges at the international level and to assist in ensuring the effective operation of international instruments in the field of child protection, including the 1980 Hague Child Abduction Convention.<sup>367</sup> Through the use of direct judicial communications a judge seized with Hague return proceedings may be able to co-ordinate the support for a parental agreement including matters of custody with the judge competent for custody matters in the State of return.<sup>368</sup>

304 States should facilitate simple procedures through which mediated agreements can, on the request of the parties, be approved and / or rendered enforceable by the competent authority.<sup>369</sup> Where no such procedures exist, States should examine the desirability of introducing regulatory or legislative provisions facilitating such procedures.<sup>370</sup>

### 13 Issues of jurisdiction and applicable law rules

- Issues of jurisdiction and applicable law need to be taken into consideration when drawing up the mediated agreement.
- The judicial and administrative authorities of the requested State and the requesting State should co-operate with each other as far as possible to overcome possible difficulties in rendering an agreement that amicably settles an international child abduction dispute legally binding and enforceable in both States. The use of direct judicial communications may be particularly helpful in this regard.

<sup>366</sup> The network was created following a proposal at the 1998 De Ruwenberg Seminar for Judges on the international protection of children; for more information see < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'. For more information on the International Hague Network of Judges and the functioning of direct judicial communications, see note 128 above.

<sup>367</sup> See the Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference, 15-16 January 2009, available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'; adopted by consensus by more than 140 judges from more than 55 jurisdictions.

<sup>368</sup> See, for example, the statement from an Australian expert at the Sixth Meeting of the Special Commission, 'Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)', drawn up by the Permanent Bureau, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'), at para. 252; see also E. Carl and M. Erb-Klünemann (*op. cit.* note 364), pp. 59 *et seq.*, at p. 72.

<sup>369</sup> Regarding the development in the European Union, see Art. 6 of the European Directive on mediation (*supra* note 5), according to which the European Union Member States are requested to 'ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.' Exceptions mentioned by Art. 6 are cases in which 'either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.' Art. 6 highlights that '(n)othing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with (this Article)'. Regarding the measures taken in the European Union Member States to comply with the Directive, see the European Judicial Atlas (*supra* note 60).

<sup>370</sup> See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), IV (The status of mediated agreements):

'States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.'

- 305 As has been highlighted in Chapter 12, the consideration of jurisdiction and applicable law matters is crucial in international family disputes when it comes to securing the enforceability of mediated agreements in the different States concerned. It may well be that the scope of mediation has to be adapted following this consideration due to the complications which the inclusion of certain additional matters, such as maintenance, would bring.<sup>371</sup>
- 306 Regarding jurisdiction in cross-border family disputes the question of international jurisdiction (*i.e.*, which State has jurisdiction) needs to be distinguished from the question of internal jurisdiction (*i.e.*, which court or authority has jurisdiction on a certain matter within one State). Multilateral treaties containing rules on jurisdiction regularly address only international jurisdiction while leaving the regulation of internal jurisdiction to the individual States.
- 307 With regard to international jurisdiction in international child abduction cases, particular attention needs to be paid to the implications that may result from the combination of the two matters regularly dealt with in mediated agreements in international child abduction cases, which are (1) the question of return or non-return of the child and (2) the regulation of custody and contact rights to be implemented following the return or non-return. It is the wrongful removal or retention itself which creates a special jurisdictional situation in international child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention and / or the 1996 Hague Child Protection Convention. According to a widely applied principle of international jurisdiction it is the court of the child's habitual residence which has jurisdiction to take long-term decisions concerning custody of and contact with a child, as well as decisions on cross-border family relocation. This principle is supported by the 1996 Convention,<sup>372</sup> which works hand in hand with the 1980 Convention, as well as by relevant regional instruments.<sup>373</sup> The principle is based on the consideration that the court of the child's habitual residence is generally the most appropriate forum to decide on the issue of custody since it is the court with the closest connection to the child's regular environment, *i.e.*, the court which can easily assess the child's living conditions and is most suited to make a decision in the best interests of the child. In an abduction situation, the 1980 Convention protects the interests of the child by preventing a parent from establishing 'artificial jurisdictional links on an international level, with a view to obtaining ((sole)) custody of a child'.<sup>374</sup> In this spirit, Article 16 of the 1980 Convention ensures that 'after receiving notice of a wrongful removal or retention of a child', the courts in the requested State cannot 'decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following the receipt of the notice'.
- 308 In the same spirit, reinforcing the 1980 Hague Child Abduction Convention, Article 7 of the 1996 Hague Child Protection Convention provides that, in the case of the wrongful removal or retention of a child, the authorities of the State in which the child had his / her habitual residence before the removal or retention keep their jurisdiction on custody matters until a number of conditions are met.<sup>375</sup>

<sup>371</sup> Nothing prevents the parties from returning to mediation once the child abduction case is settled to deal with these additional matters.

<sup>372</sup> Habitual residence is the main connecting factor used in all the modern Hague Family Conventions, as it is in many regional instruments related to child protection such as the Brussels IIa Regulation.

<sup>373</sup> For example, the Brussels IIa Regulation.

<sup>374</sup> See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), p. 428, para 11.

<sup>375</sup> According to Art. 7(1) of the 1996 Convention

'the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.'

309 As concerns the combination of matters in the parental agreement referred to above, the court seised with the Hague return proceedings will only have jurisdiction to deal with part (1) of this agreement, *i.e.*, the return or non-return, and will lack international jurisdiction to approve part (2) of the agreement on rights of custody and long-term contact. Should the court nonetheless include the full agreement of the parents in its court order with which it terminates the Hague return proceedings, the court order may not be binding on the courts in the requesting State (*i.e.*, the State from which the child was abducted) as far as long-term custody matters are concerned due to the lack of international jurisdiction on those matters.

310 An example illustrates the difficulties these jurisdictional issues may cause in practice:

- *Following severe relationship problems, a young married couple, parents of an eight-year-old child, decide to divorce. The spouses, originally from State B, have been habitually resident in State A since their child's birth. While the divorce proceedings are ongoing in State A, the mother (M) wrongfully removes the child to State B (requested State), fearing she might lose the shared custody of the child. On the request of the father (F), return proceedings under the 1980 Convention are initiated in State B. Meanwhile F is granted the interim sole custody of the child by the court in State A (requesting State). While F is present in State B for the purpose of attending the court hearings, an attempt at mediation is successful. In the course of the mediation sessions the parents develop an elaborate agreement, according to which they agree to shared custody and an alternate residence of the child. They furthermore agree that they will travel back to State A and that M will cover the travel expenses.*

*M and F want to render their agreement legally binding before its implementation. Particularly, since the father has been granted interim sole custody of the child in State A as a consequence of the wrongful removal, the mother wants to have some assurance that the courts in State A will respect the parental agreement.*

*They learn that the court seised with the Hague proceedings in State B can only include the part of the agreement dealing with the return and the modalities of the return into a court order but that the terms relating to the merits of custody cannot be included, or at least not in such a way that they would be binding on the authorities in State A. In particular M is not satisfied with a partial approval of the agreement. M and F therefore consider turning to the authorities in State A having international jurisdiction on the custody matters. However, they hear that the competent court in State A, although likely to approve a parental agreement, will generally insist on the presence of both parties and on hearing the child, as part of the statutory duty for a best interests of the child test in custody matters. But M is not willing to return to State A with the child until she is reassured that the agreement will be respected by the authorities of State A. ■*

311 The practical difficulties that may result from the special jurisdictional situation in international child abduction cases were discussed in some detail at Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention in June 2011.<sup>376</sup> A further elaboration on the issue can also be found in Preliminary Document No 13 of November 2011,<sup>377</sup> drawn up in preparation for Part II of the Sixth Special Commission Meeting held in January 2012, where the matter was

<sup>376</sup> See Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission, Prel. Doc. No 14 of November 2011 (*op. cit.* note 368), at paras 247 *et seq.*

<sup>377</sup> See 'Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions', drawn up by the Permanent Bureau, Prel. Doc. No 13 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < [www.hcch.net](http://www.hcch.net) > under 'Child Abduction Section'), in particular paras 29 *et seq.*

revisited in the greater context of discussing a possible need for a simplification of recognition and enforcement of agreements in family law.<sup>378</sup>

- 312 In the current legal situation, the sustainability of an agreed solution reached in an international child abduction case will to a large extent depend on co-operation among the judicial authorities in the requested State and those in the requesting State in assisting the parties in their efforts to render the agreement legally binding and enforceable in both States. As mentioned in Chapter 12, there are a number of measures that both the court seized with the return proceedings and the courts in the requesting State can take to support the agreement (for more on mirror orders and safe-harbour orders, etc., see above). The use of direct judicial communications can be of particular assistance in these cases.<sup>379</sup>
- 313 To overcome the jurisdictional problems described above, the transfer of jurisdiction under Articles 8 and 9 of the 1996 Hague Child Protection Convention can also be considered if the two States concerned are Contracting States to the 1996 Convention. (For further details on the transfer of jurisdiction, see the Practical Handbook on the 1996 Convention.)
- 314 In view of the complexity mentioned above of rendering agreements in international child abduction cases legally binding, it is highly recommended that the parents obtain specialist legal advice regarding their case. Central Authorities should support the parties and the courts as much as possible with information and support their efforts to overcome jurisdictional obstacles to rendering the mediated agreement legally binding and enforceable in both the requested and requesting States.
- 315 In addition to jurisdictional matters, questions of applicable law can play an important role in mediation in international family law. The agreement reached in mediation needs to be compatible with the applicable law in order to serve as a viable basis for the dispute resolution. The parties to an international family dispute have to be made aware that the law applicable to certain subject matters dealt with in the mediation is not necessarily the law of the State in which the mediation is taking place. They need to know that there is even a possibility that different States' laws will apply to the different subject matters discussed in mediation.
- 316 In an international child abduction case, for example, where the mediation is taking place in the requested State (*i.e.*, the State to which the child has been taken) alongside the Hague return proceedings, the substantive law applicable to the merits of custody will regularly not be the law of that State but quite likely the law of the requesting State (*i.e.*, the State of habitual residence of the child immediately before the abduction). Of course, a generalisation in this regard is difficult, since the applicable law situation in the particular case depends on international, regional or bilateral treaties in force in the relevant States and, in the absence of such treaties, the relevant national conflict of laws rules. If the 1996 Hague Child Protection Convention is applicable in the case, the court having jurisdiction on the merits of custody in the immediate child abduction situation (which, as discussed above, is a court in the requesting State) will in accordance with the 1996 Convention as a general principle apply its own law (see Art. 15 of the 1996 Convention). In this situation the provisions of the mediated agreement, in so far as they concern matters of custody and long-term contact, will therefore have to be compatible with the substantive law of the State of the child's habitual residence (see the Practical Handbook for further details on the 1996 Convention).

<sup>378</sup> Following a Recommendation of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions (see Conclusions and Recommendations of Part II of the Sixth Meeting of the Special Commission, *op. cit.* note 320, Recommendation No 77), the 2012 Council mandated the Hague Conference to 'establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention' indicating that '(s)uch work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area', see Conclusions and Recommendations adopted by the 2012 Council (*op. cit.* note 39), Recommendation No 7.

<sup>379</sup> See note 368 above; for further information on direct judicial communications, see note 128 above.

317 As regards other matters dealt with in the mediated agreement, for example child support or spousal maintenance provisions, the rules concerning jurisdiction and applicable law may vary. Depending on the circumstances of the case and the private international law rules applicable to the case, it may be a court other than that competent for custody matters which has jurisdiction for maintenance matters and it may be a substantive law other than that applicable to the custody matters which governs questions of maintenance. This is an added complication, again pointing to the need for the parties to have specialist legal advice regarding their individual case.

## 14 The use of mediation to prevent child abductions

→ Promoting voluntary agreements and facilitating mediation in relation to issues of custody or contact / access may help to prevent subsequent abductions.<sup>380</sup>

→ The advantages of providing specialist mediation for couples in cross-cultural relationships may be considered.<sup>381</sup>

318 Recognising that the breakdown of a relationship between persons from different States lies at the heart of many international child abduction cases, ‘securing a voluntary agreement at a stage when parents are separating or discussing issues of custody or contact / access is a useful preventive measure’.<sup>382</sup>

319 For example, if one parent wishes to relocate to another State following separation from the partner, introducing mediation at an early stage may be particularly helpful. Specialist mediation can enable the parents to better understand each other’s point of view and find an agreed solution taking account of their child’s needs. The outcomes may be as varied as the circumstances of each individual case, including the relocation of both parents to the new State, both parents remaining in the same State or the relocation of one parent with the contact rights of the other parent being sufficiently secured.

320 At the same time, the use of mediation in securing that contact arrangements, both within the boundaries of one State or cross-border, are respected can assist in preventing situations that may lead to international child abduction. For further details regarding situations where there may be a heightened risk of child abduction, see the Guide to Good Practice on Preventive Measures,<sup>383</sup> at paragraph 2.1.

321 Facilitating the provision of information on mediation and the measures that are necessary to render a mediated agreement enforceable in the two jurisdictions in question through Central Authorities or Central Contact Points on international family mediation will help to promote mediation as a measure for the prevention of child abduction.<sup>384</sup>

322 Mediation of course remains just one of many possibilities. Access to judicial proceedings for relocation should not be made conditional upon attendance of the parties in mediation sessions.<sup>385</sup>

<sup>380</sup> See Principles taken from the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), para. 2.1, p. 15.

<sup>381</sup> See Principles taken from the Guide to Good Practice on Preventive Measures, *ibid.*

<sup>382</sup> *Ibid.*

<sup>383</sup> *Ibid.*

<sup>384</sup> On the role of Central Authorities and other bodies in facilitating the provision of this information, see section 4.1 above.

<sup>385</sup> See the Washington Declaration on International Family Relocation (*supra* note 160).



## 15 Other processes to bring about agreed solutions

- Aside from mediation, the use of other processes to bring about agreed solutions should be encouraged in international family disputes concerning children.
- Processes to bring about agreed solutions available for national cases should only be considered for use in international family disputes if adaptation to the special needs of international disputes is possible.
- States should provide information on the processes to bring about agreed solutions which are available in their jurisdiction for international child abduction cases.

- 323 This Guide seeks to encourage the use of processes to bring about agreed solutions to settle amicably international family disputes involving children.
- 324 Aside from mediation, many other processes to bring about agreed solutions have been developed and are successfully applied to family disputes in different countries.<sup>386</sup> These include ‘conciliation’, ‘parenting co-ordination’, ‘early neutral evaluation’, and models of conflict resolution advocacy such as the ‘collaborative law’ or ‘co-operative law’ approaches.
- 325 ‘Conciliation’, often conducted in the course of judicial proceedings by the sitting judge, is one of the more directive dispute resolution processes in this list. As pointed out above in the Terminology section, conciliation is sometimes confused with mediation. In mediation, the neutral third party cannot be a person who is in a position to make a decision for the parties; the mediator only facilitates the parties’ communication, assisting them with finding a self-accountable resolution of their dispute. In contrast, in conciliation, the neutral third party regularly has a much greater influence on the solution of the conflict.<sup>387</sup> Conciliation is used on a regular basis in many countries in judicial proceedings concerning family disputes, especially in divorce proceedings and proceedings concerning parental responsibility.<sup>388</sup> Conciliation by the judge seised can easily be applied in Hague return proceedings, where considered appropriate and feasible, to bring about a court settlement, without risking delay.
- 326 In the United States of America, some jurisdictions offer programmes of ‘parenting co-ordination’ for high-conflict custody and access cases where parents have, on a recurring basis, already demonstrated their inability or unwillingness to comply with court orders or parental agreements.<sup>389</sup>
- ‘Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with prior approval of the parties and / or the court, making decisions within the scope of the court order or appointment contract.’<sup>390</sup>

386 For more information on the alternative dispute resolution processes available in the different Contracting States to the 1980 Hague Child Abduction Convention, see Chapter 20 of the Country Profiles under the 1980 Convention (*supra* note 121).

387 For more details on the distinction between mediation and conciliation, see the Terminology section above, ‘Mediation’.

388 For example, in Morocco, before a court decides on a divorce ‘re’-conciliation of the spouses needs to be attempted, see Arts 81 *et seq.* of the Moroccan Family Code (*Code de la Famille – Bulletin Officiel No 5358 du 2 ramadan 1426*, 6 October 2005, p. 667), available at < [www.justice.gov.ma](http://www.justice.gov.ma) >. Similarly, in Italy, the attempt of reconciliation between spouses is compulsory in separation and divorce proceedings, see Art. 708 of the Code of Civil Procedure and Arts 1 and 4.7 of the Italian Divorce Act (*Legge 1 December 1970, No 898, Disciplina dei casi di scioglimento del matrimonio*, in *Gazzetta Ufficiale n. 306*, 3 December 1970).

389 See N. ver Steegh (*op. cit.* note 8), pp. 663, 664.

390 See ‘Guidelines for Parenting Coordination’, developed by the Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, May 2005, available at < <http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AFCCGuidelinesforParentingcoordinationnew.pdf> > (last consulted 14 June 2012).



- 327 The parenting co-ordinator is appointed by the court competent for the custody proceedings. ‘Parenting co-ordination’ was established following a recommendation of an interdisciplinary conference on high-conflict custody disputes funded by the American Bar Association in 2000.
- 328 A further means encouraging the agreed solution of family disputes is ‘early neutral evaluation’,<sup>391</sup> by which the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.<sup>392</sup> This process has become available, for example, in some jurisdictions of the United States of America, where the ‘early neutral evaluation’ sessions last two to three hours, are conducted by one or more experts and are confidential.<sup>393</sup>
- 329 The promotion of processes to bring about agreed solutions in different legal systems is also reflected in the changing approach of lawyers to family law advocacy. Today, lawyers tend to focus more on finding agreements as the best possible outcomes for their clients.
- 330 The first of two interesting processes that should be mentioned in this regard is the ‘collaborative law’ model. According to this model, which is in use in a number of jurisdictions,<sup>394</sup> the parties are assisted by ‘collaborative lawyers’ who use interest based problem solving negotiation techniques to resolve the dispute without going to court.<sup>395</sup> Where no agreement is found and the matter has to be resolved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation; the parties thus need new representation in such case. In some jurisdictions, such as in some states of the United States of America, the collaborative law model has successfully been used for quite some time. Some of these legal systems have meanwhile introduced legislation, or an ‘ethical opinion’ on ‘collaborative law’.<sup>396</sup>
- 331 The second model of amicable conflict resolution advocacy is that of ‘co-operative law’. The ‘co-operative law’ model follows the principles of the ‘collaborative law’ model, except for the representatives’ disqualification when the matter has to be brought before a court.<sup>397</sup>
- 332 The use of processes that are available to bring about agreed solutions of national family disputes should be considered in international family disputes. But these processes must be adapted to the special challenges of international family disputes, and in particular to the specific challenges of international child abduction cases, as set out above in relation to mediation. For example, the use of the collaborative law model in international child abduction cases might not be advisable, where the parties risk needing a second pair of representatives if rendering the agreement reached in this process binding includes going to court and their representatives being obliged to resign at that stage.
- 333 The good practices set forth in this Guide in relation to mediation should be adapted to these other processes.
- 334 States are encouraged to make available within their jurisdictions information on processes to bring about agreed solutions which can be applied in international child abduction cases. This information could be provided through the Central Authorities and the Central Contact Points for international family mediation.<sup>398</sup>

<sup>391</sup> For further information see, *inter alia*, N. ver Steegh (*op. cit.* note 8), p. 663.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.* Early neutral evaluation is also available in Canada (Manitoba), see section 20 a) of the Country Profiles under the 1980 Convention (*supra* note 121).

<sup>394</sup> The collaborative law model is currently used, *inter alia*, in Canada (Alberta, British Columbia, Manitoba, Nova Scotia, Saskatchewan), Israel, the United Kingdom (England and Wales; Northern Ireland) and the United States of America, see section 20 a) of the Country Profiles under the 1980 Convention (*supra* note 121).

<sup>395</sup> For further details see, *inter alia*, N. ver Steegh (*op. cit.* note 8), p. 667.

<sup>396</sup> *Ibid.*, pp. 667, 668.

<sup>397</sup> *Ibid.*, p. 668.

<sup>398</sup> On the role of Central Authorities and other bodies in facilitating the provision of this information, see section 4.1 above.

## 16 The use of mediation and similar processes to bring about an agreed resolution in non-Hague Convention cases

- The use of mediation and similar processes to bring about agreed solutions should also be encouraged in international family disputes concerning children, and especially cases of child abduction to which the 1980 Hague Child Abduction Convention or other equivalent instruments do not apply.
- States should promote the establishment of mediation structures for such cases, as set out in the Principles for the Establishment of Mediation Structures in the context of the Malta Process.<sup>399</sup> In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation and other related services, on the promotion of good practices regarding specialised training for international family mediation, and on the process of international mediation. At the same time, assistance with rendering mediated agreements binding in the legal systems concerned should be provided.
- Where needed, countries should ‘examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements’.<sup>400</sup>

- 335 Where international family disputes concerning children involve two States between which the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention or another relevant international or regional legal framework is not in force, mediation or other processes to bring about agreed solutions may be the only recourse and the only way to help the children concerned ‘to maintain on a regular basis (...) personal relations and direct contacts with both parents’, a right promoted by the UNCRC.<sup>401</sup>
- 336 Of course, the non-applicability of relevant regional or international instruments does not prejudice the parents’ legal remedies under national law. However, in cases where an international child abduction occurred or another cross-border dispute concerning child custody and contact is ongoing, the lack of an applicable regional or international legal framework regularly leads to conflicting decisions in the different jurisdictions concerned, which is often a dead-end for a legal solution to the conflict.
- 337 As set out above,<sup>402</sup> the Working Party on Mediation in the context of the Malta Process developed Principles for the Establishment of Mediation Structures in the context of the Malta Process. States should promote the establishment of mediation structures as set forth in these Principles. In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation services and other relevant information. Furthermore, States should promote good practices regarding the training of mediators for international family mediation and regarding the process of international mediation.
- 338 The good practices set forth in this Guide regarding mediation in international child abduction cases under the 1980 Hague Child Abduction Convention are equally applicable to such cases. As in international child abduction cases within the scope of the 1980 Convention, mediation needs to be conducted with the greatest care and the mediated agreement needs to be drafted with a view to its being compatible with and rendered enforceable in the jurisdictions in question. Time is also of the essence where no regional or international legal framework is applicable in international abduction cases; contact between the child and the left-behind parent should be restored as quickly as possible to avoid alienation.

<sup>399</sup> See Annex I below.

<sup>400</sup> *Ibid.*

<sup>401</sup> See its Art. 10(2).

<sup>402</sup> See paras 14, 112 *et seq.*

- 339 On balance, mediation in international child abduction cases in the absence of an applicable regional or international legal framework is conducted under very special circumstances. There is no fall-back to a solution through judicial proceedings if mediation fails, or when the mediated agreement is rendered enforceable in the relevant jurisdictions but something goes wrong with its practical implementation. It is crucial, therefore, that any agreed solution arrived at in these cases be made legally binding and rendered enforceable in the different legal systems concerned before commencing its practical implementation. In this manner, mediation can overcome the conflicting situation of the different legal systems concerned; the mediated agreement itself then serves as a basis for establishing a uniform legal opinion on the case in the different legal systems concerned.
- 340 All possible assistance with rendering their mediated agreement binding and enforceable in the relevant legal systems should be given to the parties to a cross-border family conflict. The provision of information on what steps are needed to give legal effect to an agreement should be facilitated by a central body, such as a Central Contact Point for international family mediation.<sup>403</sup> Where needed, States should ‘examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements’.<sup>404</sup>
- 341 Mediators in international family disputes on child custody and contact to which no international or regional legal framework applies should be aware of the extent of their responsibility. They must draw the parties’ attention to the legal implications of non-applicability of relevant regional or international legal instruments, and to the need to obtain specialist legal advice as well as rendering the agreement enforceable in the relevant legal systems before commencing with its practical implementation. The parties need to be made aware of the special implications of the lack of supranational rules on recognition and enforcement regarding custody and contact decisions for the future. They have to understand that, even if their agreement has been rendered enforceable in both (all) jurisdictions concerned following the mediation, changes in circumstances may affect the agreement’s enforceability in the future. Any adaptation of the agreement’s content will have to be acknowledged by both (all) legal systems, a process which will require the parties’ co-operation.

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<sup>403</sup> For further details on the role of Central Contract Points for international mediation, see the Principles for the Establishment of Mediation Structures in Annex 1 below and also section 4.1 above.

<sup>404</sup> See the Principles for the Establishment of Mediation Structures (*ibid.*).

# Annexes

## Annex I

### **PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS**

drawn up by the Working Party with the assistance of the Permanent Bureau

## A CENTRAL CONTACT POINT

States should establish / designate a Central Contact Point for international family mediation which should undertake, either directly or through an intermediary, the following tasks,

- Serve as contact point for individuals and at the same time as network point for mediators working in cross-border family disputes.
- Provide information about family mediation services available in that country, such as:
  - > List of family mediators, including contact details and information about their training, language skills and experiences;
  - > List of organisations providing mediation services in international family disputes;
  - > Information on costs of mediation;
  - > Information on the mediation models used / available; and
  - > Information on how mediation is conducted and what topics may be covered in mediation.
- Provide information to assist with locating the other parent / the child within the country concerned.
- Provide information on where to obtain advice on family law and legal procedures.
- Provide information on how to give the mediated agreement binding effect.
- Provide information on the enforcement of the mediated agreement.
- Provide information about any support available to ensure the long-term viability of the mediated agreement.
- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.
- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.

The information should be provided in the official language of that State as well as in either English or French.

The Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone-number, e-mail address and names of responsible person(s) as well as information on what languages they speak.

Requests for information or assistance addressed to the Central Contact Point should be processed expeditiously.

Where feasible, the Central Contact Point should display relevant information on mediation services on a website in the official language and in either English or French. Where a Contact Point cannot provide this service, the Permanent Bureau could make the information received by the Central Contact Point available online.



## B MEDIATION

### 1 Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation)
- Significant experience in cross-cultural international family disputes
- Knowledge and understanding of relevant international and regional legal instruments
- Access to a relevant network of contacts (both domestic and international)
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions
- Access to administrative and professional support
- A structured and professional approach to administration, record keeping, and evaluation of services
- Access to the relevant resources (material / communications, etc) in the context of international family mediation
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system
- Language competency

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

### 2 Mediation Process

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent
- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child

- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice

### 3 Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

## C RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.

## Annex II

### **EXPLANATORY MEMORANDUM ON THE PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS**

drawn up by the Working Party with the assistance of the Permanent Bureau

## BACKGROUND

At its meeting held on 31 March – 2 April 2009, the Council on General Affairs and Policy of the Hague Conference on Private International Law authorised, in the context of the Malta Process, the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of, or contact with, children, including cases of unilateral removal of a child to another State, where the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* do not apply.

The recommendation to establish such a Working Party derived from the Third Judicial Conference on Cross-Frontier Family Law Issues held in St. Julian's, Malta, 23–26 March 2009.

In June 2009, a small number of Contracting States to the 1980 Hague Child Abduction Convention and non-Contracting States, selected on the basis of demographic factors and differing legal traditions, were invited to designate an expert. These States were Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. In addition, a small number of independent mediation experts was invited to join the Working Party.

The Working Party held two telephone meetings, one on 30 July 2009 and one on 29 October 2009, as well as one in-person meeting on 11–12 May 2010 in Ottawa, Canada. The meetings were co-chaired by Ms Lillian Thomsen from Canada and Justice Tassaduq Hussain Jilani from Pakistan. At all these meetings simultaneous interpretation between English, French and Arabic was available. Two questionnaires on existing mediation structures and on enforceability of mediated agreements were circulated in preparation of the Working Party telephone meetings, responses to which are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under 'Work in progress' then 'Child Abduction'.

In the first telephone meeting, the Working Party concluded that the establishment of Central Contact Points in each country facilitating information on available mediation services in the respective jurisdictions would be important. Following the second telephone meeting, the Working Party commenced work on 'Draft Principles' for the establishment of mediation structures which were concluded after an in depth discussion at the in-person meeting in Canada on 11–12 May 2010 and subsequent consultations with the experts who could not attend the meeting in Canada.

### The Principles for the establishment of mediation structures in the context of the Malta Process

The 'Principles' were drawn up to establish effective mediation structures for cross-border family disputes over children involving States that are not a party to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention or other relevant instruments. In the absence of an applicable international or regional legal framework, mediation or similar means of consensual dispute resolution are often the only way of finding a solution enabling the children concerned to maintain continuing contact with both their parents.

It has to be noted that the establishment of structures for cross-border family mediation will be equally relevant for cross border family disputes falling within the scope of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Both Conventions promote the amicable resolution of the family conflict through mediation or similar means. The Principles may therefore also be useful in supplementing the international legal framework established by the Conventions.

#### The 'Principles'

The 'Principles' call for the establishment of a Central Contact Point, which facilitates the provision of information, *inter alia*, on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information.

#### PART A

Part A of the 'Principles' states which information should be provided and how the information should be made accessible through the Central Contact Points.

The information on mediation services in international family law should include, first of all, lists of mediators or mediation organisations providing such services. The lists should contain information on the mediator's training, language skills and experience, as well as the contact details. The Central Contact Point should furthermore facilitate information on costs of mediation, which should include mediation fees as well as other connected costs. In addition the Central Contact Point should make information available on the mediation process itself, *i.e.*, the mediation models used / available, how mediation is conducted and what topics may be covered in mediation. The information should be as detailed as possible; information on the availability of co-mediation, as well as that of specific forms of co-mediation, such as the bi-national mediation, should be included.

The Central Contact Point should further provide information to assist with locating the other parent / the child within the country concerned. Likewise information should be provided on where to obtain advice on family law and legal procedures, on how to render a mediated agreement binding and how to enforce it. In view of the often limited means of the parties to a family dispute, details on costs should be included; attention should be drawn to pro-bono services or services offering low cost specialist legal advice, where available. The Central Contact Point should also provide information about any support available to ensure the long-term viability of the mediated agreement.

The Central Contact Point should improve and consolidate cross-border co-operation regarding the amicable settlement of international family disputes by promoting co-operation between various experts through networking, training programmes and the exchange of best practices. Finally subject to the principle of confidentiality, the Central Contact Point should gather and make publicly available detailed statistics on the cases dealt with.

## PART B

In Part B, the 'Principles' refer to (1) certain standards regarding the identification of international mediation services by the Central Contact Points, (2) the mediation process and (3) the mediated agreement.

Under Point B (1) the 'Principles' set out a number of characteristics of mediators or mediation organisations, which Central Contact Points should consider, when identifying and listing international mediation services. At the same time, the 'Principles' recognise that many States are still in an early stage of the development of international mediation services in family matters and that some of the characteristics listed are aspirational. It is, however, hoped that the States implementing the 'Principles' will encourage the incremental development of mediation services complying with these characteristics.

Point B (2) lists a number of broad general principles, which, subject to the laws applicable to the mediation process, should be adhered to in international family mediation. Recognising that these principles may have a slightly different interpretation in different legal systems and with a view to allowing for the development of good practices, the document refrains from attaching fixed definitions to these general principles. It should be noted that the Guide to Good Practice under the 1980 Hague Child Abduction Convention, which is currently being prepared, will deal in much greater detail with good practice regarding these general principles.

Point B (3) highlights certain important aspects to be taken into consideration, when it comes to the mediated agreement, in order to allow for it to be rendered binding in the legal systems concerned. For details on good practice regarding the drafting of mediated agreement reference is again made to the forthcoming the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention.

## PART C

Part C recognises the importance of rendering a mediated agreement binding or enforceable in all the legal systems concerned before its implementation. It also highlights the need for close co-operation with the legal representatives of the parties. At the same time, the Central Contact Point is requested to support the parties with information on the relevant procedures.

**Final Note**

The Working Party wished to have included in this Explanatory Memorandum a statement of its view that Non-Party States should give careful consideration to the advantages of ratification of, or accession to, the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.



The Hague Conference on Private International Law

Permanent Bureau

6, Scheveningseweg

2517 KT The Hague

The Netherlands

Telephone: +31 70 363 3303

Fax: +31 70 360 4867

E-mail: [secretariat@hcch.net](mailto:secretariat@hcch.net)

Website: [www.hcch.net](http://www.hcch.net)





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# The Judges' Newsletter

on International Child Protection

## Special focus

The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

10-17 October 2017

A publication of the Hague Conference on Private International Law

[www.hcch.net](http://www.hcch.net)



*Participants to the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10-17 October 2017). The Hague Academy of International Law (Peace Palace), The Hague.*

## Foreword

### The continuation of the Judges' Newsletter

The Permanent Bureau is pleased to publish the XXIst Volume of the Judges' *Newsletter* with a special focus on the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 10-17 October 2017 (hereinafter, "the 2017 Special Commission").

The Permanent Bureau is also delighted to report to its readers that "[t]he [2017] Special Commission acknowledges the value and usefulness of the information provided in The Judges' Newsletter"<sup>1</sup> and furthermore "[t]he [2017] Special Commission supports the continued electronic publication of The Judges' Newsletter, subject to available resources, to be edited in-house".<sup>2</sup>

After an absence of almost four years, it would have been a missed opportunity not to publish anything on the Seventh Meeting of the Special Commission. Instead of drawing up a formal report in the form of a Preliminary Document to the attention of the Council on General Affairs and Policy, preference was given to the publication of an informal report of the 2017 Special Commission as a "special focus" of the Judges' *Newsletter*. That is in line with the Conclusions and Recommendations of the 2017 Special Commission according to which "States and members of the [International Hague Network of Judges] are invited to share with the Permanent Bureau topics for 'special focus' that they would like to see addressed in future issues of The Judges' Newsletter".<sup>3</sup> Additionally, and contrary to Preliminary Documents, the Judges' Newsletter includes pictures for those who could not attend the meeting and enjoys a wider distribution.

We already have ideas for our "special focus" in future publications of the Judges' *Newsletter* but would welcome any additional ideas from States and members of the International Hague Network of Judges (hereinafter, "IHNJ"). For example, future "special focuses" could cover the 20th Anniversary in 2018 of the IHNJ, recent case law under Article 11 of the 1996 Convention, description of implementation measures in relation to Articles 24 and 26 of the 1996 Convention, case law, practice and description of implementation measures in relation to Articles 8 and 9 of the 1996 Convention and Article 15 of the Brussels II a Regulation,<sup>4</sup> the next meeting of the Malta Process, to name a few.

At a minimum, every volume of the Judges' *Newsletter* should include recent developments and experiences in relation to direct judicial communications with a view to promoting their use across the IHNJ.

Any contributions and / or suggestions for relevant topics to be addressed in future volumes of The Judges' *Newsletter* should be sent directly to the following e-mail address: < secretariat@hcch.nl > with the subject line "The Judges' Newsletter".

With regard to "timely information", "[t]he Special Commission notes however that the current format of The Judges' Newsletter is not adequate to provide timely information".<sup>5</sup> In that respect, "[t]he Special Commission supports the development of an IHNJ specialised section on the HCCH website. This section would constitute a dedicated platform providing information relevant to the IHNJ".<sup>6</sup> Once, that specialised section is operational it could be used, for example, to announce new designations to the IHNJ, draw attention to recently posted case law on INCADAT, provide information on past judicial conferences and general information on direct judicial communications. Subject to available resources, it is our hope to see in the future, as supported by the Special Commission, "the creation of a secure portal for the members of the IHNJ. The secure portal would serve as an electronic platform to foster communication and dialogue among the members of the Network".<sup>7</sup> But that is for later.

For the moment, subject to available resources, we will endeavor to publish the Judges' *Newsletter* on a regular basis and create an IHNJ specialised section on the HCCH website. The publication of this Volume of the Judges' *Newsletter* would not have been possible without the assistance of current and former interns respectively, Julie Pheline, Phillip Adnett and Shi Ing Tay to which we are most grateful, and members of the Family Law Team. Most importantly, this publication would not have been possible without the very generous contributions of Francisco Javier Forcada Miranda, Serge Léonard, Martin Menne, Nigel Lowe, Victoria Stephens and Graciele Tagle de Ferreyra. We look forward to reading from other members of the IHNJ, members of Central Authorities under the Hague Children Conventions, academics and practitioners.

We hope you enjoy reading this Volume of Judges' *Newsletter* and we look forward to receiving your comments and suggestions.

The editors,

Philippe Lortie  
First Secretary

Frédéric Breger  
Legal Officer

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- 1 "Conclusions and Recommendations adopted by the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (10-17 October 2017)", C&R No 71 [hereinafter, "C&R of the 2017 SC"], available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Special Commission meetings" and "7<sup>th</sup> Special Commission meeting (2017)".
  - 2 C&R No 72 of the 2017 SC.
  - 3 *Ibid.*
  - 4 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
  - 5 C&R No 71 of the 2017 SC.
  - 6 C&R No 73 of the 2017 SC.
  - 7 C&R No 74 of the 2017 SC.



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## Special Focus

The Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10-17 October 2017)



*Participants to the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10-17 October 2017). The Hague Academy of International Law (Peace Palace), The Hague.*

### 1. The 2015 Statistical Survey

*By Nigel Lowe QC (Hon), Emeritus Professor of Law (Cardiff University) & Victoria Stephens, Freelance Research Consultant (Lyon, France)*

A fourth statistical survey into the operation of the 1980 Convention has been conducted by Professor Nigel Lowe and Victoria Stephens, in consultation with the Permanent Bureau and the International Centre for Missing and Exploited Children (ICMEC). ICMEC generously funded the project and provided support throughout. The provisional report was formally presented to the Seventh Meeting of the Special Commission in October 2017. This report is an updated summary of the main overall findings.

Like previous surveys, the 2015 Survey is based upon the response to a detailed questionnaire sent to every Central Authority designed to collect information about the number of applications, the parties involved in the abduction, the outcome of the applications, and the length of time it took to reach the outcome. Details were sought of every application *received* in 2015 regardless of when, or even if, an outcome was reached. To be comparable with the pre-

vious surveys the cut-off date for outcomes was 18 months after the last possible application could have been made, namely, 30<sup>th</sup> June 2017. Although the questionnaire was essentially the same as before, for the first time information was collected via the INCASTAT online database ([www.incastat.net](http://www.incastat.net)) developed thanks to generous funding from the Government of Canada.

Replies were received from 76 of the then 93 Contracting States, providing detailed information on 2,270 incoming return applications and 382 incoming access applications. We estimate that overall there were a maximum of 2,335 return (86%) and 395 access (14%) applications made to Central Authorities under the 1980 Convention. In other words, the 2015 Survey is estimated to have captured 97% of all applications.

Making a direct comparison with the 2008 Survey, there was a 3% increase in return applications but a 3% decrease in access applications. This is in distinct contrast to the 2008 Survey which found a 45% increase in return applications and a 40% increase in access applications from 2003, and to the 2003 Survey which found a 16% increase in return applications and 8% in access applications from 1999.

Although many Central Authorities received fewer applications in 2015, busy Authorities, such as the United States of America, England and Wales and Germany, continued to receive significantly more applications.

Looking first at return applications, 73% of taking persons were mothers, a higher proportion than the 69% recorded in 2008, 68% in 2003 and 69% in 1999. In 2015, 24% of the taking persons were fathers and the remaining 3% comprised grandparents, institutions or other relatives. Where known, 80% of taking persons were the "primary carer" or "joint primary carer" of the child (91% of taking mothers and 61% of taking fathers). Analysing the data further, 67% of the taking mothers were joint primary carers as against 37% in 2008, while 52% of taking fathers were joint primary carers as against 20% in 2008. This finding reflects a growing trend of joint parenting. As earlier surveys had exploded the myth that all abducting mothers were primary carers and all abducting fathers were non-primary carers, so the 2015 Survey goes some way at least to dispel the notion that most abducting mothers are sole primary carers. 58% of taking persons (comprising 56% mothers and 64% fathers) had the same nationality as the requested State and might be presumed to be going home.

The majority of applications (70%) involved a single child and most (78%) were under 10 years old (the average age was 6.8 years, as against 6.4 years in 2008 and 6.3 years in 2003). 53% of the children were male and 47% female.

The overall return rate was 45%, in line with the 46% recorded in 2008 but lower than the 51% in 2003 and 50% in 1999. This return rate comprised 17% voluntary returns and 28% judicial returns. A further 3% concluded with access being agreed or ordered (the same as in 2008 and 2003).

12% of applications ended in a judicial refusal (less than the 15% in 2008 and 13% in 2003, though higher than the 11% in 1999). 14% were withdrawn compared with 18% in 2008. 6% of applications were still pending at the cut-off date of 30 June 2017. This is lowest such proportion so far recorded and compares with 8% in 2008, 9% both in 2003 and 1999. There was a decrease in the rate of rejection by the Central Authorities under Article 27 with 3% of applications ending in this way in 2015 (compared with 5% in 2008, 6% in 2003 and 11% in 1999).

Of the cases decided in court, 65% ended with a judicial return order (compared with 61% in 2008, 66% in 2003 and 74% in 1999), 6% with access (compared with 5% both in 2008 and 2003) and 28% were refused (reversing an upward trend compared with 34% in 2008, 29% in 2003 and

26% in 1999). Furthermore, more cases were appealed, 31% as against 24% in 2008 (22% in 2003 and 14% in 1999). In 67% of these cases the same outcome was reached on appeal as at first instance, compared with 80% in 2008.

Analysing the refusals in a little more detail, there were in total of 243 refusals and in 185 of these we have information on the reasons. Some cases (30) were refused for more than one reason. If all reasons are combined, the most frequently relied upon grounds for refusal were Article 13(1)(b) (the grave risk of harm exception) (47 applications, 25%) and the child not being habitually resident in the requested State (46 applications, 25%). Article 12 was a reason for refusal in 32 applications (17%) and the child's objections in 27 applications (15%).

In proportional terms, the 2015 findings are evidence, particularly in comparison with 2008, of a notable shift in the grounds for refusals with increasing reliance being placed on non-habitual residence in the requesting State and a decline in reliance on Article 13(1)(b) and on the child's objections. In fact, the proportion of refusals based on the child's non-habitual residence has consistently risen from 17% in 1999, 19% in 2003, 20% in 2008 to 25% in 2015. On the other hand, the 25% of refusals based on Article 13(1)(b), though markedly lower than the 34% in 2008, is more in line with the 26% both in 2003 and 1999. So far as the child objection exception is concerned, at 15%, the 2015 finding is the lowest proportion yet recorded and may be compared with 22% in 2008, 18% in 2003 and the 21% in 1999. None of the four surveys found any significant reliance upon Article 20.

In 2015, applications were generally resolved more quickly, compared with the 2008 Survey. The average time taken to reach a decision of judicial return was 158 days (compared with 166 days in 2008, 125 days in 2003 and 107 in 1999) and a judicial refusal took an average of 245 days (compared with 286 days in 2008, 233 days in 2003 and 147 days in 1999). For applications resulting in a voluntary return the average time taken was 108 days, compared with 121 days in 2008, 98 days in 2003 and 84 days in 1999.

So far as access applications were concerned, 73% of respondents were mothers (79% both in 2008 and 2003 and 86% in 1999) and 58% had the same nationality as the requested State compared with 50% in 2008, 53% in 2003 and 40% in 1999. The majority (75%) of applications concerned a single child. The overall average age of a child involved was 8 years (compared with 7.8 years in 2008 and 7.9 years in 2003) and 51% of children were female and 49% male.

The overall rate at which access was agreed or ordered was 27%, compared with 21% in 2008, 33% in 2003 and 43% in 1999. 19% of applications were withdrawn (31% in 2008, 22% in 2003 and 26% in 1999), 17% pending and 31% ending in reasons described as "other". 4% were rejected and 2% judicially refused. Of the 50 applications ending in an order for access, 68% were made under the 1980 Convention and 32% under domestic law. In 2008, these figures were 45% and 55%, respectively. Information on the nature of orders for refusal was only available in two applications – one order made under the 1980 Convention and one under domestic law. This reflects the different interpretations of Article 21.

Access applications took longer to resolve than return applications. The average time taken to reach a final outcome was 254 days overall, 97 days if there was a voluntary agreement for access, 291 days if access was judicially ordered and 266 days if access was refused. These timings are considerably faster than those in 2008 when the overall average was 339 days, 309 days where there was a voluntary agreement, 357 days where access was judicially ordered and 276 days if access was judicially refused.

The overall findings of the 2015 Survey are encouraging. That, however, is not to say that the 1980 Convention is working well in all respects. The access provisions clearly need re-visiting. Although the speedier disposals of return applications as evidenced by the 2015 Survey is a positive development, further improvements are required if the goal of prompt disposals of applications is to be truly met.

More detail can be found in the revised report (posted on the HCCH website ([www.hcch.net](http://www.hcch.net)) under "Child Abduction" then "Statistics"), which comprises a Global Report, three Regional Reports and a number of National Reports.

Finally, we would like to express our thanks to the Central Authority staff who spent so much time in completing the questionnaire and answering our subsequent queries. We are also indebted to ICMEC for their additional assistance in inputting data into INCASTAT.

## 2. Table of Conclusions and Recommendations of previous meetings of the Special Commission

At the beginning of the meeting of the 2017 Special Commission, the Permanent Bureau of the Hague Conference introduced a "Table of Conclusions and Recommendations of previous Meetings of the Special Commission (SC) on the 1980 Child Abduction Convention and the 1996 Child Protection Convention" (Prel. Doc. No 6).<sup>8</sup> The objective of this document is "to provide Contracting States with a compilation of Conclusions and Recommendations (C&R) from past Special Commission Meetings that are still relevant today". The document was very useful in the context of the 2017 Special Commission, as it ensured that all experts were on the same page with regard to issues already discussed, and concluded at previous meetings of the Special Commission. As a result, issues already resolved previously were not reopened and current issues were discussed further, or for the first time. At the end of the Special Commission, new Conclusions and Recommendations were adopted especially in relation to the 1996 Convention. Those new Conclusions and Recommendations that would be relevant for the future will be added to Preliminary Document No 6. The Permanent Bureau reminded experts that this document is also an extremely useful tool for the new and old Contracting States with regard to their implementation of the 1980 and 1996 Conventions and for their daily application and practical operation. Contracting States, Central Authorities, judges and even, in some cases, legal practitioners should regularly refer to the "Table of Conclusions and Recommendations of previous Meetings of the Special Commission (SC) on the 1980 Child Abduction Convention and the 1996 Child Protection Convention".

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8 "Table of Conclusions and Recommendations of previous Meetings of the Special Commission (SC) on the 1980 Child Abduction Convention and the 1996 Child Protection Convention (1989 (1st SC), 1993 (2nd SC), 1997 (3rd SC), 2001 (4th SC), 2002 (follow-up SC), 2006 (5th SC), 2011-2012 (6th SC))", Prel. Doc. No 6 of July 2017 for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction and the 1996 Child Protection Convention (available on the HCCH website, see path indicated in note 1).

### 3. Addressing delays under the 1980 Convention

#### Introduction

Given the centrality of expeditious procedures to the effective operation of the 1980 Convention, achieving prompt action has repeatedly been addressed at meetings of the Special Commission on the practical operation of the 1980 Convention, including at its Seventh Meeting in October 2017. Prompt return has also been the subject of good practices developed by Contracting States over the years and collected by the Hague Conference. In preparation for the 2017 Special Commission, the Permanent Bureau prepared a number of documents to assist with the discussion of this subject, namely, Preliminary Documents Nos 10 A, 10 B and 10 C of August 2017, respectively dealing with: (A) *Delays in the return process*; (B) *Delays in the operation of the 1980 Convention – a compilation of existing resources*; and, (C) *Fact Sheets on swift procedures in the operation of the 1980 Convention* (available on the HCCH website at < www.hcch.net > under “Child Abduction” then “Special Commission meetings” and “7<sup>th</sup> Special Commission meeting (2017)”). The text that follows consists of extracts from Preliminary Document No 10 A.

The prompt return of abducted children is essential to the effective operation of the 1980 Convention. Each day that the child remains abducted from his / her place of habitual residence has repercussions for the child and contributes to the escalation of the conflict between the parents, the eroding of contact between the child and the left-behind parent (if it has not been severed altogether), and the child's integration into the place to which he / she has been abducted. The passage of time may cause the child to suffer once again severe emotional instability at the time of return.

Besides the harm that delays in the resolution of cases can cause to the child and the parents, delays also make it more difficult for judges to administer the 1980 Convention, as the passing of time complicates the assessment and application of key concepts, such as habitual residence custody, grave risk, and settlement of the child.

The drafters of the 1980 Convention established an urgent mechanism for return, which can only meet the 1980 Convention's goals if applied efficiently, without significant delays. Article 11 of the 1980 Convention suggests that there is a presumption of a case being delayed if a decision on return is not made within six weeks from the date of initiation of the proceedings. Nonetheless, delays in return

continue in many Contracting States. Such delays have significant human rights implications and in some cases can constitute violations of States' treaty obligations contained in human rights conventions.

#### 1980 Convention requirements for prompt procedures

The 1980 Convention in several places emphasises the need for the rapid return of children who have been wrongfully removed or retained. The first object of the 1980 Convention set forth in Article 1 is “to secure the *prompt return* of children wrongfully removed to or retained in any Contracting State” (Art. 1(a)). As mentioned above, Article 11 establishes a benchmark of *six weeks* as the time frame within which a decision on return should be made. The need for the expeditious return of abducted children is stated in a number of additional provisions: “[...] to ensure their *prompt return* to the State of their habitual residence [...]” (Preamble, third paragraph); “[...] they shall use the *most expeditious* procedures available” (Art. 2); “[...] to secure the *prompt return* of children [...]” (Art. 7); and, “[...] it shall directly and *without delay* transmit the application [...]” (Art. 9).

#### Statistics

The Statistical Analysis of Applications Made in 2015 under the 1980 Convention (hereinafter, “2015 Survey”),<sup>9</sup> the results of which were presented at the 2017 Special Commission, notes the critical importance of timing with regard to the successful operation of the Convention. The 2015 Survey documents a trend of increasing delays in the operation of the 1980 Convention between 1999 and 2008, with some reversal in that trend during the period between 2008 and 2015. Some of the relevant findings:

*The mean number of days taken to reach a final conclusion from the date the application was received by the requested Central Authority*

	1999	2003	2008	2015
Voluntary return	84	98	121	108
Judicial return	107	125	166	158
Judicial refusal	147	233	286	244

*Percentage of applications taking over 300 days to resolve*

1999	2003	2008	2015
5%	12%	21%	15%



Other statistics reveal that the overall reduction in the time needed to reach a final conclusion can in general be attributed to more efficient judicial procedures (although in some States, the Central Authorities dealt with applications very quickly). However, improvement is still needed, as indicated in the following:

*Percentage of cases resulting in a return order that were resolved in 90 days or less from the date the application was received by the requested Central Authority*

1999	2003	2008	2015
59%	51%	43%	36%

Appeals, which add a substantial amount of time to the return process, are increasing. However, there has been significant improvement in the time needed to resolve appeals:

*The average number of days to conclude a return application decided on appeal*

	2008	2015
Judicial return by consent	280	167
Judicial return not by consent	281	249
Judicial refusal	369	286

### **Good practices to ensure prompt procedures**

To determine how some States are achieving swift returns, the Permanent Bureau examined the Country Profiles for the 1980 Convention<sup>10</sup> for a selected number of States that have had success in this regard.<sup>11</sup> Common features of the practice of those States are as follows:

#### *a. At the Central Authority phase:*

- Sufficient resources allotted to Central Authorities, with the presence of qualified, and if the volume of cases requires, dedicated Central Authority staff who deal only with 1980 Convention applications and related issues.
- Acceptance of the requesting State's application form or the Hague Conference Model Application Form.
- Acceptance of return applications sent electronically, allowing the originals (if and when needed) to be sent subsequently by mail.
- Where information in the application is incomplete, beginning to process the application while informing the requesting State of the additional information that is needed.
- To avoid delays where efforts are made to obtain the

voluntary return of the child, either: (1) initiating court proceedings at the same time as the voluntary return efforts, or (2) starting court proceedings after a relatively short deadline, if voluntary return efforts are not successful.

- Providing regular training to Central Authority staff, including updates on legal developments related to the 1980 Convention.

#### *b. At the judicial phase:*

- "Concentration of the jurisdiction" of courts in respect of applications under the 1980 Convention.
- The judges who decide return applications are specialists in family law, and in some cases international child abduction.
- Either requiring or recommending legal representation in return proceedings.
- The availability of reduced rate or free legal assistance, most often based upon eligibility.
- The availability of such legal assistance also for appeals and enforcement proceedings (this can be subject to an assessment of the likelihood of success of an appeal for which the assistance is sought).
- Adopting either legislation or procedural rules to ensure that judicial and administrative authorities act expeditiously in return proceedings.
- Where the child is to be heard, having procedures in place to prevent this from delaying the process unnecessarily, for example: determining whether hearing the child is desirable at an early stage in the proceedings; making such arrangements on an urgent basis; or, scheduling the child's testimony to be given in conjunction with the hearing on the return application.
- Appeal at the first level being available by right, with expedited procedures.
- Designating at least one judge for the IHNJ.
- Training of judges including participation in judicial seminars.

#### *c. At the enforcement phase:*

- Not allowing the merits of the proceedings for return to be reviewed in enforcement proceedings.
- The availability of coercive measures (which vary by State) to enforce a return order.

### **Mediation**

Mediation is an important tool in the return process, as it can result in agreement between the taking parent and the left-behind parent on the return of the child to the State of

habitual residence without the need for a litigated decision. At the same time, there is a risk that mediation efforts, if not managed carefully, can unnecessarily delay the return process. A balance needs to be found between exploring the possibility of a mediated outcome while ensuring that return is achieved in an expedient manner.

The Guide to Good Practice on Mediation underscores that "Immediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced".<sup>12</sup> Mediation should be suggested at an early stage, and its suitability should be assessed before attempting it.

Recognising that States employ a variety of models or methods for mediation, the Guide does not recommend a particular model or method as being superior to others. For illustrative purposes, following are features of the cross-border mediation process in the Netherlands:

- Each case has two specialised mediators, a lawyer and a psychologist.
- The cross-border mediation is conducted by the Mediation Bureau, which is associated with the International Child Abduction Centre.
- The Central Authority initially sends a letter to the abducting parent notifying him or her of the return application and requesting co-operation in the child's voluntary return. That letter also recommends mediation as an option for resolving the matter.
- The abducting parent has two weeks to respond.
- The Central Authority then addresses a letter to the left-behind parent informing him or her of the letter sent to the abducting parent. Again, mediation is recommended.
- The possibility of mediation is repeated during the pre-trial hearing.
- There is a maximum period of two weeks between the pre-trial review and the hearing before a judicial panel.
- The court will not approve additional time for the mediation process.
- The mediation consists of three sessions, each of three hours, over the span of two days.
- The first session is for preliminary talks / caucus; the second is for seeking solutions and drafting a concept agreement; at the third, the agreement (if reached) is finalised and signed by the parents.
- The Ministry of Security and Justice will pay for most or all of the cost of the mediation.
- In legal aid cases, the Legal Aid Board also contributes.

## Conclusion

The 2017 Special Commission adopted the following Conclusions and Recommendations with regard to addressing delays under the 1980 Convention:

"3. The Special Commission acknowledges that globally there is still a severe problem of delays that affect the efficient operation of the Convention.

4. The Special Commission acknowledges that some States have made progress in reducing delays and encourages States to review their procedures (including, where applicable, at the Central Authority, judicial, enforcement and mediation / ADR phases) in order to identify possible sources of delay and implement the adjustments needed to secure shorter time frames consistent with Articles 2 and 11 of the Convention.

5. The Special Commission welcomes Preliminary Documents Nos 10 A, 10 B and 10 C, which present procedures that have been implemented by States to reduce delays. It invites the Permanent Bureau to complete and amend them in the light of the comments agreed upon at the Meeting. The final version of these documents should be uploaded on the HCCH website and recommended as helpful tools for consultation by State authorities that are reviewing their implementing measures."

9 "A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I – Global Report", prepared by Prof. Nigel Lowe and Victoria Stephens, Prel. Doc. No 11 A of February 2018 (revised) for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction and the 1996 Child Protection Convention, available on the HCCH website (see path indicated in note 1).

10 See the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Country Profiles".

11 Australia, Austria, Canada (Ontario and Quebec), Chile, Germany, Netherlands, New Zealand, United Kingdom (England and Wales), and Uruguay. Fact sheets for each of these States identifying practices that contribute to maintaining expedient procedures (Prel. Doc. No 10 C of August 2017 for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions) can be found on the HCCH website (see path indicated in note 1).

12 Permanent Bureau of the Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation*, The Hague, 2012, p. 27 (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Guides to Good Practice").

#### 4. The operation of Article 15 of the 1980 Convention

During the 2017 Special Commission, experts discussed the use of the Article 15 mechanism of the 1980 Convention, by which a decision or determination can be obtained from the State of habitual residence of the child that the removal or retention was wrongful within the meaning of the Convention. Various experiences with the application of the provision were shared, with some participants explaining, for example, that the Article 15 mechanism is used often in their jurisdictions, while others indicated that it is only rarely done. Regardless of the frequency of its use, many States underlined the risk of incurring undue delays in cases in which the mechanism is improperly applied. In its Conclusions and Recommendations, the Special Commission thus encourages discretion in the use of the mechanism and consideration of other procedures, such as the use of Articles 8(2)(f) and 14 of the 1980 Convention as well as direct judicial communications, which may make it unnecessary to rely on Article 15. In the light of the discussion on the risk of incurring delays, the Special Commission furthermore "invites Contracting States to ensure expeditious and effective practices and procedures, including through legislation, for any Article 15 decision or determination, where such mechanisms are available."<sup>13</sup> In order to ensure the availability of sufficient resources providing relevant information on the Article 15 mechanism, the Special Commission recommends the inclusion of more detailed information on Article 15 in an amended version of the Country Profile of the 1980 Convention.<sup>14</sup> It further recommends that an Information Document on the use of Article 15 be considered, which might be drawn up with the assistance of a small Working Group, if necessary.

<sup>13</sup> C&R No 6 of the 2017 SC.

<sup>14</sup> C&R No 7 of the 2017 SC.

#### 5. Revised Forms for Return and Access applications under the 1980 Convention

During the 2017 Special Commission, the Permanent Bureau presented Preliminary Document No 12 on the modernisation of the standardised Return Application Form and on the development of a standardised Access Application Form under the 1980 Convention. Mindful of the fact that standardised forms are key to a smooth co-operation between Central Authorities involved in a child abduction case, Conclusions and Recommendations adopted at previous meetings of the Special Commission have urged the Permanent Bureau to modernise the standardised Return Application Form under the 1980 Convention as well as to develop a standardised Access Application Form.

The Permanent Bureau invited States to provide comments on specific issues of the Return and Access Forms. In particular, States were asked as to whether the Form should contain details of a single child or several children of the same family; States were further invited to comment as to whether the Forms should provide the option for electronic online completion or at least provide for active cells and to give consideration to the possibility of making the Forms available in multiple languages.

States overall welcomed the work of the Permanent Bureau and acknowledged the utility of such forms for the operation of the 1980 Convention. A majority of experts expressed their preference for a single form for all children of the same family, and for the production of these forms in all the languages of the Contracting States, as opposed to a multilingual form. The possibility of being able to fill out the form electronically was favourably received by a number of States, but the question of the electronic transmission of these forms was still open for discussion.

An expert further stressed that the use of such forms should not become mandatory while others expressed reservations regarding the provisions on custody, criminal charges and child health, and noted that these should be drafted with caution.

The Special Commission invited the finalisation, if necessary with the assistance of a Working Group, of the proposed forms in the light of comments provided by States and invited States to share any further comments on Preliminary Document No 12 with the Permanent Bureau.<sup>15</sup>

<sup>15</sup> See C&R No 9 of the 2017 SC.



## 6. European Court of Human Rights Case Law - *X v. Latvia*

During the 2017 Special Commission, further to the *Neulinger and Shuruk v. Switzerland*<sup>16</sup> case of 2010 discussed at its Sixth Meeting, the Permanent Bureau noted the *X v. Latvia*<sup>17</sup> decision rendered in 2013 by the European Court of Human Rights (hereinafter, "ECtHR"). The case concerned the removal of a child from Australia to Latvia by her mother in July 2008 and in respect of whom a return order had been issued by the Latvian courts in January 2009. Before the ECtHR, the mother argued that the Latvian courts had not properly assessed the best interests of the child in this situation. The ECtHR ruled that the Latvian courts violated Article 8 of the *European Convention on Human Rights of 1950* (hereinafter, "ECHR"), which protects the right to respect for private and family life, in failing to take account of various relevant factors in assessing the best interests of the child.

The Permanent Bureau recalled the discussions on the *Neulinger and Shuruk* case held at the Sixth Meeting of the Special Commission (Part I) in 2011, further to which Conclusions & Recommendations Nos 48 and 49 were adopted which read as follows:

"48. The Special Commission notes the serious concerns which have been expressed in relation to language used by the court in its recent judgments in *Neulinger and Shuruk v. Switzerland* (Grand Chamber, No 41615/07, 6 July 2010) and *Raban v. Romania* (No 25437/08, 26 October 2010) in so far as it might be read "as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation" (per the President of the European Court of Human Rights, extra-judicially [...]).

49. The Special Commission notes the recent extrajudicial statement made by the President of the European Court of Human Rights (see above) in which he states that the decision in *Neulinger and Shuruk v. Switzerland* does not signal a change of direction for the court in the area of child abduction, and that the logic of the Hague Convention is that a child who has been abducted should be returned to the State of his / her habitual residence and it is only there that his / her situation should be reviewed in full."

Some States noted that the approach taken by the Court in the *X v. Latvia* decision was more consistent with the spirit of the 1980 Convention, while expressing concerns that this decision still referred to the *Neulinger* decision. Eventually, the Special Commission adopted Conclusion & Recommendation No 17 and highlighted the "subsequent developments" presented in *X v. Latvia* regarding the interpretation of the 1980 Convention, especially the declarations of the ECtHR under the title "General Principles" in which the Grand Chamber of the ECtHR stated, *inter alia*, that "in the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention [...]".<sup>18</sup>

16 *Neulinger and Shuruk v. Switzerland*, No 41615/07, ECtHR, 6 July 2010.

17 *X v. Latvia* [Grand Chamber], No 27853/09, ECtHR, 26 November 2013.

18 *Ibid.*, para. 101. References are made there to Arts 12, 13 and 20 of the 1980 Convention. See also para. 107 where the Grand Chamber stressed that these "exceptions must be interpreted strictly".

## 7. Benefits and use of the 1996 Convention in relation to the 1980 Convention

During the 2017 Special Commission, the Permanent Bureau introduced the agenda item on the benefits and use of the 1996 Convention in relation to the 1980 Convention by outlining the necessity of coordinating the application of the two Conventions. The 1996 Convention does not amend or substitute the mechanism established by the 1980 Convention for dealing with situations of international child abduction (see Art. 50 of the 1996 Convention). Instead, the 1996 Convention supplements and strengthens the 1980 Convention in certain respects. This means that a number of its provisions can be useful as a complement to the mechanism of the 1980 Convention. The Permanent Bureau highlighted the importance for States already Parties to the 1980 Convention of becoming States Parties to the 1996 Convention. In order to provide more clarity to the discussions, it was decided to divide the agenda item into eight sub-topics: (1) Habitual residence, (2) Rules on applicable law, (3) Access and contact, (4) Mediation, (5) Urgent measures of protection, including to facilitate safe return, (6) Recognition and enforcement of measures of protection including in the case of return and relocation, (7) Transfer of jurisdiction, (8) Central Authority post-return assistance.

### Habitual residence

As a general point in relation to the 1996 Convention and international child abduction, the Permanent Bureau noted that the jurisdictional rules set out in Chapter II of the 1996 Convention create a common approach to jurisdiction which provides certainty to parties and thereby may discourage attempts at forum shopping through international child abduction.

The 1996 Convention supplements and reinforces the 1980 Convention by providing an explicit framework for jurisdiction, including in exceptional cases where the return of the child is refused or return is not requested. The Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the Contracting State of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It does this by ensuring that the Contracting State of the child's habitual residence retains jurisdiction until certain conditions have been fulfilled (see Art. 7 of the 1996 Convention). The rule in Article 5 of the 1996 Convention which designates the child's habitual residence as the primary basis for the allocation of jurisdiction encourages parents to litigate (or to reach an agreement on) custody, access / contact and relocation issues in the Contracting State where the child currently lives, rather than removing the child to a second jurisdiction before seeking a determination of these issues.

### Rules on applicable law

The Permanent Bureau presented the topic of parental responsibility by alluding to a case of child abduction where the determination of rights of custody was made with reference to the law of the child's former State of habitual residence. For example, when there are three States involved, the former State of habitual residence (*i.e.*, State of birth), the other two States being the current State of habitual residence and the State of refuge. For example, Article 16(2) of the 1996 Convention provides that "[t]he attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect". An agreement may have taken effect in the former State of habitual residence. Furthermore, Article 16(3) provides that "[p]arental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State".

### Access and contact

Regarding the issue of access and contact in child abduction cases, the Permanent Bureau indicated that the 1996 Convention provides for more sophisticated mechanisms for access and contact than the 1980 Convention does. For example, Article 35 of the 1996 Convention is dedicated specifically to co-operation in international access / contact cases. Article 35 provides that the competent authorities of one Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under the 1996 Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis. Article 35 also provides a mechanism for a parent who lives in a different Contracting State than the child to apply to the authorities in his or her own State for them to gather information and evidence and make a finding on the suitability of that parent to exercise access / contact and the conditions under which such access / contact is to be exercised. The Article also gives discretion to the authorities who have jurisdiction to adjourn the access / contact proceedings pending the outcome of such a request. It is emphasised in the Convention that this adjournment to wait for the receipt of such information may be particularly appropriate when the competent authorities are considering the restriction or termination of access / contact rights granted in the State of the child's former habitual residence.

### Mediation

Mediation is a subject matter regulated by Article 7(c) of the 1980 Convention and Article 31(b) of the 1996 Convention. The Permanent Bureau elaborated on the usefulness of reaching an agreement under those two Articles, noting that the mediation agreement would therefore benefit from the provisions of the 1996 Convention which would facilitate its recognition and enforcement in another State.

### Urgent measures of protection, including to facilitate safe return

The Permanent Bureau outlined the importance of urgent measures of protection under Article 11 to ensure contact between the child and the left-behind parent but also to protect the child upon return. Noting the usefulness of the 1996 Convention in supporting the 1980 Convention to ensure the safe return of the child, an expert from the United Kingdom shared the interpretation given by his State's Supreme Court on Article 13(1)(b) of the 1980 Convention. The Court stated that this Article implies an obligation to seek

assurance that protective measures will be implemented in the State of return and stressed the value of direct judicial communications in this context.

**Recognition and enforcement of measures of protection including in the case of return and relocation (Arts 23, 24 and 26 of the 1996 Convention)**

The Permanent Bureau explained that relocation is useful when it comes to preventing child abduction. Indeed, the Permanent Bureau indicated that when the possibility of relocation is provided by a court then the chances of having the child abducted by one of the parents would decrease. The Permanent Bureau noted that, in this field, direct judicial communications are helpful especially where there is a need to recognise and enforce access rights after a decision on family relocation was rendered.

**Transfer of jurisdiction (Arts 8 and 9 of the 1996 Convention)**

The Permanent Bureau stressed that in cases where an agreement is concluded in a State the authorities of which do not have jurisdiction to render decisions on the merits of custody, a problem could arise with regards to the possibility of having this agreement recognised and enforced. For instance, this would be the case when an agreement on the merits of custody is presented to the authorities of the State of refuge (*i.e.*, the State where the child has been abducted to). In this type of case, it would be advisable for the authorities of that State to request the authorities in the State of habitual residence of the child that they be authorised to exercise jurisdiction in accordance with Article 9 of the 1996 Convention.

**Central Authority post-return assistance**

The Permanent Bureau indicated the possibility, under Article 32(a) of the 1996 Convention, of requesting a report on the child's situation after his/her return. The Permanent Bureau stressed the importance of this provision which ensures the effectiveness of protective measures. The Permanent Bureau also highlighted the fact that the use of the mechanism provided for under Article 32(a) is not limited to Central Authorities and can be extended to courts and other competent authorities under the 1996 Convention. Several States emphasised the non-mandatory nature of the requests made under Article 32(a) and cautioned that such requests should not become systematic.

## 8. The application of the 1996 Convention to unaccompanied and separated children

One of the most challenging discussions that took place during the 2017 Special Commission dealt with the application of the 1996 Convention to unaccompanied and separated children, as presented in Preliminary Document No 7. It is important to note that Article 6(1) of the 1996 Convention provides that "[f]or refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5 [of the Convention]" (*i.e.*, to take measures directed to the protection of the child's person or property). In addition, Article 6(2) provides that "[t]he provisions of the preceding paragraph also apply to children whose habitual residence cannot be established". Furthermore, it is important to remember that competent authorities have jurisdiction to take urgent measures of protection (Art. 11) and provisional measures of protection (Art. 12) based on the mere presence of the child in their territory. Finally, under the 1996 Convention, Central Authorities could, among other things, assist with discovering the whereabouts of a child (Art. 31(c)) and facilitate the placement of a child in another Contracting State (Art. 33). It goes without saying that measures of protection ordered for these children would have to respect the immigration laws of the different States concerned.

In his opening remarks during the meeting, the Secretary General underlined the importance of this topic, which was addressed during the meeting of the Special Commission for the first time. The ongoing global migration crisis and the widespread, tragic and urgent nature of the topic was the impetus for its inclusion on the agenda. Preliminary Document No 7 provided an overview of the relevant law, as well as the measures of protection and the jurisdiction and co-operation mechanisms that may apply to unaccompanied and separated children under the 1996 Convention. The presentation of the document recalled its aim, which was to improve co-operation between child protection and immigration authorities at both the international and the national level. It was also an opportunity to demonstrate the flexibility of the 1996 Convention, which can be applied to unaccompanied and separated children. In addition, the Permanent Bureau reminded the Special Commission that the UN Committee on the Rights of the Child (UNCRC Committee) in its General Comment No 6 recommended that States become a Party to the 1996 Convention.

A significant number of States (out of the 62 who attended the meeting of the Special Commission) thanked the Permanent Bureau for the opportunity to address this issue. One State underlined the non-mandatory nature of the practices described in the Preliminary Document No 7 and two other States indicated that States should apply their own national law if the latter appeared to be more favourable for the children than applying the 1996 Convention.

Regarding the question as to whether the 1996 Convention should apply to unaccompanied and separated children, a majority of States took the opportunity to affirm that the 1996 Convention is indeed applicable to cases involving unaccompanied and separated children. Furthermore, the European Union indicated that the Convention should apply to all such children who are present in the European Union but who do not have their habitual residence in a European Union Member State. Three observers, the UNCRC Committee, the International Social Service and the International Association of Women Judges highlighted the importance of the 1996 Convention and its mechanisms for the protection of unaccompanied and separated children. On the other hand, two States underlined that matters concerning unaccompanied and separated children are principally issues of public law rather than private international law.

The discussion continued on the future of Preliminary Document No 7 and whether it required modification or amendment, or the drafting of a new document related to unaccompanied and separated children. A majority of States highlighted the importance of having a document on this issue and were in favour of amending and modifying the existing document to meet the different views of the States. Three of these States mentioned the possibility of having a shorter document. Four emphasised the need for an opportunity to provide comments on the new version of Preliminary Document No 7 before distributing it. The majority of States agreed that the current version of Preliminary Document No 7 could be removed from the publicly accessible part of the HCCH website and transferred to the Secure Portal, while a new version would be circulated to States for their comments. However, one observer was opposed to removing the document from the publicly accessible part of the website since it raises awareness about private international law tools that can be used to tackle challenging issues related to immigration.

Towards the end of the session, the First Secretary read a message from UNICEF, which could not attend the meeting but fully supported Preliminary Document No 7 and the use of the 1996 Convention for the protection of unaccom-

panied and separated children.

The 2017 Special Commission, on this issue of applying the 1996 Convention to unaccompanied and separated children, concluded that "a number of States expressed support for the general direction of Preliminary Document No 7, while other States expressed concerns with regard to the general direction and / or some of the substance of the document". In addition, regarding the modification of the document "the Special Commission recognises the need to clarify the application of the 1996 Convention to refugee children, and children who, due to disturbances occurring in their country, are internationally displaced. To this end, Preliminary Document No 7 is to be removed from the publicly accessible part of the HCCH website and replaced, taking into account the comments received and any further comments to be received (by the end of 2017 at the latest). A new draft will then be circulated for comments to Members and Contracting States with a view to a timely finalisation."

## 9. Draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention

The Chair of the 2017 Special Commission introduced the discussions on the draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention and noted that the development of the Guide had been underway for a number of years. She further stressed the increasing reliance on the exceptions to return, including Article 13(1)(b). She noted the clear statement in the Explanatory Report that the 1980 Convention rests on the principle that it is in the best interests of the child not to be removed from its place of habitual residence. This principle gives way, however, in the case of an abduction, where there is a grave risk that ordering return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The Chair of the Working Group then addressed the Special Commission. She acknowledged that there was a short time period in which comments on the draft had been sought and she complimented States Parties and those individuals who had made submissions on their willingness to engage so thoughtfully with the process and provide detailed responses. She acknowledged that the submissions encompassed a range of views which would ultimately need to be reconciled before the draft Guide is completed. She informed the Special Commission that the Working Group had met in the preceding weekend and discussed the responses and issues they raised. She ad-



vised that the Working Group acknowledged that much more work on the Guide would be necessary and hoped for endorsement of an ongoing process of re-drafting and consultation and invited comments from experts with that timeframe in mind.

The Chair of the Working group then presented the three main outstanding issues which had been distilled by the Working Group related to the draft Guide, and invited the experts to comment.

Firstly, the Special Commission was asked to determine whether matters ancillary to the grave risk exception (e.g., contact with the left-behind parent and mediation) should be included in the draft Guide. The Working Group was of the view that they should be included. The majority of experts attending the 2017 Special Commission echoed this view.

The second issue to be resolved was whether the case scenarios found in Part IV of the draft Guide should be integrated in the relevant sections throughout the Guide, as opposed to being contained in a designated part. In that respect, a large number of experts expressed their wish for the draft Guide to be shorter, more concise, and substantially reduced in order to encourage its use in practice. If the case scenarios found in Part IV of the draft Guide were to be integrated in the relevant sections throughout the Guide, this could reduce duplication and as a result the Guide could be shorter.

Finally, experts were asked whether the background information on the dynamics of domestic violence and relevant international norms in this area contained in Annex 3 should be included in the body of the draft Guide or in a separate document. A few experts suggested that Annex 3 should be deleted but that its main elements should be included in the body of the draft Guide in a concise and



*Celebrating the Honourable Chief Justice Diana Bryant's retirement during the Seventh Meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (10-17 October 2017). The Hague Academy of International Law (Peace Palace), The Hague.*

balanced manner, and always placed in the context of the 1980 Convention and the fundamental elements of the Article 13(1)(b) exception. On the other hand, a few experts considered that these issues relating to domestic violence should be set out in a separate document. A number of experts also noted that the draft Guide should spell out more clearly that domestic violence is not the only ground for non-return under Article 13(1)(b).

In the end, the Special Commission concluded and recommended the following: "The Special Commission welcomes the work of the Working Group and the progress made on the draft Guide to date, and invites the Working Group to continue its work with a view to the finalisation of the Guide. The Special Commission recommends that priority be given to this work."

## 10. Third meeting of the Experts' Group on recognition and enforcement of mediated agreements in family matters

From 14 to 16 June 2017, the Experts' Group on cross-border recognition and enforcement of agreements in family disputes involving children met at the offices of the Permanent Bureau in The Hague for the third time. The meeting was attended by 28 experts and members of the Permanent Bureau under the chairmanship of Prof. Paul Beaumont from the University of Aberdeen.

At its first meeting in December 2013, the Group discussed the nature and extent of the legal challenges arising in the context of recognition and enforcement of voluntary agreements reached in the course of international child disputes. The Group acknowledged the increase in mobility of families and the need for the agreements to be "portable". The Group also noted the important role party autonomy plays in international family law and the value of providing tailor-made and comprehensive solutions that are likely to be respected by the parties. The discussions of the second meeting of the Experts' Group focused on the responses to a questionnaire circulated by the Permanent Bureau to private practitioners, judges, academics, government officials and Central Authorities' personnel with a view to assessing the desirability and feasibility of both a binding and non-binding instrument.

The Group concluded that there is a need to explore further the development of a non-binding navigation tool that could assist those who apply existing Hague Family Law Conventions to agreements in family matters. Cognisant of the difficulties that "package agreements" (i.e., family

agreements related to custody, access, relocation and/or child support and which may include spousal support and other financial matters, such as property issues) encounter when they "travel" across borders, especially where their scope goes beyond the provisions of the existing Hague Family Law Conventions, the Group also concluded that the development of a binding legal instrument could help to secure the recognition and enforcement of such agreements.

In 2016, the Council on General Affairs and Policy of the Conference decided to task the Permanent Bureau, in consultation with the Experts' Group, to develop a non-binding "navigation tool" to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Conventions. The result of this work would further help to assess the desirability and feasibility of developing a new binding instrument.

At the third meeting, the discussions on the draft "navigation tool" highlighted that, while the existing Hague Family Law Conventions do facilitate the cross-border recognition and enforcement of these agreements to a certain extent, they do not address the specific issue of "package agreements" nor provide a simple, certain or efficient means for their enforcement. The Group recognised that very often the matters covered require the simultaneous application of more than one Hague Family Law Convention while some elements of those package agreements are not within the scope of any of the existing Hague Family Law Conventions, which creates difficulties for the enforcement of package agreements.

Against this background, the Experts' Group proposed three Conclusions and Recommendations for the attention of the 2017 Special Commission and which underlie the approach taken in the draft navigation tool.

The proposed Conclusions and Recommendations read as follows:

"(1) Competent authorities in the State of habitual residence of the child, when a Hague 1980 Convention child abduction case is pending in another Contracting State, should be ready to swiftly give force of law to a family agreement between the parties after taking due account of the best interests of the child.

(2) Where the parties make a family agreement which includes the non-return of a child in a Hague

1980 Convention case, the competent authorities in the State of habitual residence of the child should react swiftly, and in principle favourably, to a request under the 1996 Convention for a transfer of jurisdiction to the competent authorities in the place where the child is present.

(3) Costs associated with measures of protection such as contact / visiting expenses do fall within the scope of the 1996 Convention and/or the 2007 Convention."

Of the three Conclusions and Recommendations, the 2017 Special Commission only adopted a revised version of Conclusion and Recommendation No 3.<sup>19</sup>

Moreover, the comments made by experts at the meeting (mostly from States Parties both to the 1980 and 1996 Conventions) revealed a notable divergence in determining the moment when the habitual residence of the child shifts in the case of a non-return agreement following an application for return under the 1980 Convention.

Some States expressed the view that the agreement reached by the parties not to return a child in a 1980 Convention case would bear the consequence that the habitual residence of the child immediately shifts to the requested State (*i.e.*, the State where the child is present). Other States expressed reservations with regard to this interpretation and noted that the agreement not to return the child, while it would inevitably influence the determination of the child's habitual residence, could not be regarded as



*Participants in the third meeting of the Experts' Group on cross-border recognition and enforcement of agreements in family disputes involving children, 14-16 June 2017, Permanent Bureau, The Hague.*



the decisive element for the purposes of determining the child's habitual residence.

In light of these discussions, it was decided, upon a suggestion made by the Chair and in consultation with the members of the Experts' Group, to propose to Council on General Affairs and Policy that the Experts' Group be convened for a fourth meeting in late 2018. Subject to the outcome of this discussion, the Experts' Group may revise the draft navigation tool and revisit its conclusions regarding the desirability and feasibility of developing a new binding instrument. This proposal will be brought to the 2018 meeting of the Council on General Affairs and Policy.

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19 "The Special Commission takes note of the finding of the Experts' Group that, depending on the individual circumstances of the case, the applicable law or the wording of the agreement or decision, the travel expenses associated with the exercise of cross-border access / contact may fall within the scope of the 1996 Convention." See C&R No 53 of the 2017 SC.

## 11. Recognition and enforcement of protection orders

During the 2017 Special Commission, the Permanent Bureau presented the status of the Project on the recognition and enforcement of foreign civil protection orders and recalled that, as recognised by past meetings of the Special Commission, the protection of the child under the 1980 Convention sometimes equally required the protection of an accompanying parent upon return to the State of habitual residence. The Permanent Bureau further recalled that, during Part I of its Sixth Meeting, the Special Commission welcomed the decision of the 2011 Council on General Affairs and Policy of the Conference to add the topic of the recognition of foreign civil protection orders to the Organisation's agenda.

Referring to the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Convention held on 12 June 2017 at the University of Westminster in London,<sup>20</sup> the Permanent Bureau noted that there exists a need for the development of an international instrument for the recognition of foreign protection orders. While the 1996 Convention can prove beneficial in the context of the safe return of a child, *e.g.*, by providing for the automatic recognition and enforcement of measures of protection, it does not purport to deal with the protection of the child's carer. It

was further noted at the Westminster meeting that 1980 Convention proceedings are restricted to the parties, usually the parents. There are many situations where protection orders are required in respect of other actors and in particular extended family members. Thus, only a new international instrument could provide for those areas of protections, in addition to orders under the 1996 Convention. The Permanent Bureau also informed the 2017 Special Commission that the preparation of a short note for the 2018 meeting of the Council on General Affairs and Policy was underway.

A number of delegations intervened on the subject. An expert from the European Union indicated that the EU had already expressed its doubts about the Project, which were linked to the fact that a directive on criminal protection orders and a regulation on civil protection orders already addressed these issues within the EU since January 2015. The majority of participants acknowledged the importance of the work carried out in this area and supported the Protection Orders Project. In particular, an expert from Canada reiterated the support of her country for the Project and believed that the recognition of foreign civil protection orders could be useful in child abduction cases. An expert from Venezuela underlined the importance of this matter with a view to ensuring the safe return of the child and suggested that information on the availability of protective measures in each State be included in the Country Profile for the 1980 Convention. The expert also highlighted the relevance of direct judicial communications for ensuring the safe return of the child. Finally, the Special Commission welcomed the report on preliminary work already undertaken as well as the continued exploration of further work on the recognition and enforcement of foreign protection orders at the international level.<sup>21</sup>

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20 See "Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention, 12 June 2017, The University of Westminster, London", Info. Doc. No 6 of August 2017 for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction and the 1996 Child Protection Convention, available on the HCCH website (see path indicated in note 1).

21 C&R No 55 of the 2017 SC.

## 12. Launch of the improved INCADAT

On 16 October 2017, during the 2017 Special Commission, an improved INCADAT (International Child Abduction Database) website was officially launched by Mr. Christian Höhn, Head of the German Central Authority for the 1980 Convention. The technical refurbishment of the database and website was enabled by generous financial assistance provided by Germany and Miles & Stockbridge P.C.

A number of improvements feature on the new INCADAT website (which can be accessed at < [www.incadat.com](http://www.incadat.com) >) that are designed to enhance its principle functions. The system is now able to search the full content of all international child abduction decisions contained in the database, and to generate relevance-based search results where users choose to search by keyword. The search criteria that were available in previous versions of INCADAT can also still be used. The website is more user-friendly, as it is now supported by a range of mobile devices and has a re-designed layout, including an overview of news on the 1980 Convention from HCCH. In addition, a number of critical changes to the content management system of the website will help to significantly streamline the editorial workflow for the uploading of new cases.

The Special Commission welcomed the launch and "further supports the consolidation of a global network of INCADAT correspondents to ensure a wide geographic coverage for the database, and encourages all States to designate a correspondent for this purpose". In the coming months, the Permanent Bureau will be consolidating the network of INCADAT correspondents as part of its overall objective to ensure the database is as up-to-date as possible.

## 13. New Contracting States to the 1996 Convention

Since 2015, six States have joined the 1996 Convention, namely: Italy, Serbia, Norway, Turkey, Cuba and, most recently, Honduras for which the Convention will enter into force on the 1<sup>st</sup> of August 2018. In addition, Argentina and Canada have signed the Convention on 11 June 2015 and 23 May 2017 respectively.

## 14. Country Profiles for the 1980 and 1996 Conventions

### Development of an electronic Country Profile for the 1980 Convention

With a view to facilitating the continuous updating of the Country Profiles for the 1980 Convention, the Permanent Bureau asked the 2017 Special Commission whether it would support the development of an electronic Country Profile similar to the one that had been created for the 2007 Child Support Convention. This electronic Country Profile would allow States to directly update their data online and would also enable the automatic and simplified extraction of data *e.g.*, for comparative research purposes. The Permanent Bureau emphasised the importance of having up-to-date Country Profiles of Contracting States to the 1980 Convention by pointing out to the correlation between the continuous updating of Country Profiles and acceptances of accessions to the Convention.

The 2017 Special Commission concluded and recommended as follows:

"77. The Special Commission urges Contracting States that have not yet done so to complete a Country Profile for the 1980 Convention as soon as possible. With a view to facilitating its completion and its updating, as well as facilitating the extraction of information, the Special Commission recognises the value of developing, subject to supplementary voluntary contributions, an electronic Country Profile ("e-Country Profile") for the 1980 Convention."

### Development of a future Country Profile for the 1996 Convention

The Permanent Bureau noted that it was important, in the context of the 1996 Convention, for States to dispose of information on the services offered by the authorities of each Contracting State, as such services varied between States with different legal traditions. Country Profiles for the 1996 Convention would provide valuable information on jurisdictions connected by the Convention, such as the type of information that could be requested from competent authorities, available procedures, applicable time limits and the types of protective measure available. The Permanent Bureau insisted that this would have significant added value for the operation of the Convention.

A number of delegations supported the development of a Country Profile. They indicated that the issue of funding for

such a project should be left open for the moment. The experts further stated that such profiles should be sufficiently detailed to be useful, indicating the average time-frame for different stages of appeal and how, *e.g.*, requests regarding cross-border placement of a child under Article 33 of the 1996 Convention are dealt with.

In its Conclusion and Recommendation No 45, the 2017 Special Commission recommended the development of a Country Profile by the Permanent Bureau in consultation with Contracting States to the 1996 Convention and Members of the Organisation.



*Members of the team that organised the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10-17 October 2017). The Meeting was co-Chaired by Ms Leslie Kaufman (First Senior Deputy to the State Attorney, Office of the State Attorney, Department of International Affairs, Ministry of Justice, Israel) for the parts of the Special Commission on the 1980 Convention and by Ms Joëlle Schickel-Küng (Cheffe de l'Unité droit international privé, Office Fédéral de la Justice, Switzerland) for the parts of the Special Commission on the 1996 Convention. The Hague Academy of International Law (Peace Palace), The Hague.*

## Direct Judicial Communications

### 1. Dialogue of Judges - European Liaison Judges and Judges of the International Hague Network of Judges

*This article is an abridged, updated version of the "Dialogue of Judges – Verbindungsrichter und internationale Richternetzwerke",<sup>22</sup> by Dr. Martin Menne, Appellate Judge in Family Matters, Kammergericht Berlin/Berlin Appellate Court and German Liaison Judge within the European Judicial Network in Civil and Commercial Matters*

Direct communications between judges have gained significant importance in the recent judicial practice, in particular in the field of international family law as well as international insolvency law. This article takes as a starting point the substantive problems that judges face in their daily practice and goes on to discuss existing solutions. The article further seeks to provide an insight on direct judicial communications practice in Germany as well as recent developments in certain States' legislations.

#### I. Starting point: practical issues

The increasing mobility of families across borders has given rise to a growth in the number of cases in family courts with a connecting factor to a foreign country and thus has become part of judges' and courts' daily practice. The recent trend in private international family law shows a decline of nationality, as the traditional connecting factor, and an increased consideration of habitual residence. This change of trend has resulted in many cases where foreign law was to be applied. However, the most frequent practical difficulties that judges face in family court practice are not issues of determination or interpretation of foreign law; rather they occur in other areas which are illustrated in the following practical cases.

#### **Case scenario 1: German Federal Constitutional Court ("Bundesverfassungsgericht") – Examination of the records of the Romanian adoption authority in Timișoara**

*In this case, the applicant argued that he had been adopted in 1970 by the defendant and her late husband in Romania when he was 13 years old. To support his claim, he produced as evidence an order for adoption issued by the Mayor's office in Timișoara (Romania) and filed the recognition thereof with the*

*first instance court in Frankfurt (Germany). The motive was a dispute over the claimant's right to a compulsory portion of the deceased husband's inheritance. The portion as she contested the validity of the adoption order. A scrutiny of the Romanian adoption, access to which had already been granted to the court by the competent authority in Timișoara, would have allowed to establish with certainty the nullity of the adoption order. The first instance court in Frankfurt decided to base its decision on the sole evidence of the adoption order. The respondent initiated a constitutional recourse where she raised the lack of investigation, arguing that the first instance court should have examined the validity of the Romanian order for adoption.<sup>23</sup>*

#### **Case scenario 2: Swiss Federal Court ("Bundesgericht") – Impending arrest for contempt of court in Pennsylvania (USA) in a child abduction case between the United States of America and Switzerland**

*A return application under the 1980 Hague Convention was pending before the Swiss Federal Court. The mother was the primary carer to the young child and was still breastfeeding him. In the course of proceedings, it was found that the Court of Common Pleas in the Centre County in Bellefonte (Pennsylvania) had granted the father temporary sole custody for the child while holding the mother in contempt of court because of repeated violations of court orders; as a result, a return to the US would expose the mother to the execution of a pending arrest warrant for contempt of court. The Federal Judges in Lausanne deemed that the subsequent separation of the child from his mother would amount to a grave risk of harm in the sense of Article 13(1)(b) of the 1980 Hague Convention.<sup>24</sup>*

#### **Case scenario 3: First instance court ("Amtsgericht") in Freiberg (Sachsen/Germany) – Inadmissibility of the petition for divorce of a Pakistani-Romanian couple on the grounds of a pending divorce procedure abroad**

*A Romanian wife who was living with her two minor children had filed a petition for divorce from her husband, a national of Pakistan. In the course of proceedings, it was argued that divorce proceedings had been commenced in France and in Spain, where the spouses were found to have been habitually resident. The husband claimed that divorce proceedings had been commenced in Spain. The wife indicated that*



she had applied for legal aid in France in order to initiate divorce proceedings. She further contended that she had applied for a protection order, alleging to have suffered domestic violence. The counsels of the parties were not able to clarify the situation. The first instance court asked whether the divorce proceedings would be inadmissible because of pending divorce proceedings abroad.<sup>25</sup>

**Case scenario 4: First instance court ("Amtsgericht") Marienberg (Sachsen/Germany) – Divorce request by a Lebanese asylum seekers couple**

Following the advice of the family judge in the first instance court in Marienberg, a counsel contacted the liaison judge of the International Hague Network of Judges. The counsel indicated that he represented a Lebanese asylum seekers couple in divorce proceedings. Both of them lived in Sachsen but they had separated. The spouses had arrived from Lebanon with their three children where they religiously married in 2004. Later on the marriage was confirmed by a Lebanese court. After a few years, the mother filed a petition for divorce. As the wife did not possess a marriage certificate, the counsel sought advice from the liaison judge on the issues of jurisdiction and applicable law, as well as on the validity of the marriage.

## II. Possible approaches to solve the issues

There are different solutions to overcome these difficulties:

### 1. In family law

#### a. Central Authorities

Central Authorities can provide a useful platform to foster communication and co-operation between judges. While the possible courses of action of these Central Authorities are primarily dependent on the international instrument from which they derive their powers, they usually play an important role when it comes to exchanging information about the situation of a child or about ongoing proceedings in another State.

*In the 1st case scenario, a scrutiny of the records of the competent authority for adoption in Romania would have been possible if the German judge dealing with the recognition of the adoption order issued in Romania had turned to the German Central Authority for Adoption; the latter could have tried to gain access to the orders for adoption issued by the Mayor's office in Timișoara with the assistance of the Romanian Central Authority under the 1993 Hague Inter-country Adoption Convention.*

However, while there undoubtedly exists fruitful co-operation between judges and Central Authorities, this co-operation does not fall under the so-called "dialogue of judges"; rather, the Central Authority process can be described as a judicial administrative proceeding.

#### b. Judicial networks

The situation is somewhat different when judicial co-operation is channelled through a **judicial network**. The most important judicial network is the European Judicial Network in Civil and Commercial Matters (hereinafter, the "EJN")<sup>26</sup> whose object is to enhance cross-border co-operation between EU Member States in civil and commercial matters with an international element. The members of the Network provide support to courts and authorities in the Member States with a view to settling cross-border disputes and assisting with the practical implementation of European Community law.

The EJN rests on the belief that cross-border informal personal contacts based on mutual trust between members of the Network can effectively contribute to overcome challenges arising from (family) matters involving a cross-border element.

In Germany, the EJN consists of:

- o The contact points of the Network;
- o Central bodies and Central Authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial co-operation in civil and commercial matters;
- o The French liaison magistrate ("*magistrat de liaison*") in the German Federal Ministry of Justice and Consumer Protection;
- o The German liaison magistrate in the French Ministry of Justice;
- o The liaison judges of the EJN.

*In the 1st case scenario, the German Federal Constitutional Court emphasised the role of the members of the EJN with regard to facilitating judicial co-operation and contributing to the smooth carrying out of judicial proceedings with cross-border elements. In practice, this means that both the first instance court in Frankfurt (Case scenario No 1) and the first instance court in Freiberg (Case scenario No 3) could have requested support and assistance from the contact point or the EJN liaison judge.*

*This option could however not be envisaged in case scenarios Nos 2 (child abduction case between Switzerland and*

*the US) and 4 (divorce of a Lebanese couple) as the EJM is solely meant to facilitate judicial co-operation between Member States of the European Union (with the exception of Denmark).*

In order to establish a proper dialogue of judges, it is pivotal that courts in the above-mentioned cases turn to a liaison judge. There exist two kinds of liaison judges in Germany:

i. Liaison judges of the EJM

In Germany, four judges have been designated in the context of the EJM. They are "sitting" family judges that take on the additional duties of a liaison judge on top of their regular duties as family judges – a task for which they do not receive any compensation. These four liaison judges are disseminated across Germany so as to evenly cover German courts.<sup>27</sup>

Liaison judges provide assistance to judges in their jurisdiction dealing with cross-border legal (family) disputes. They can only assist in relation to a concrete individual case. They are tasked to provide information on the process taking place abroad and to respond to general enquiries (however, always in relation to a concrete individual case) on the judicial practice or legal system of the foreign country.

Liaison judges occasionally act as contact point for the judges in their country and assist them with the resolution of cross-border (family) disputes. The threshold for an informal exchange of views between colleagues from the judiciary is much lower than with formal requests addressed to an executive body and thus prompts judges to seek assistance through this channel.

*In case scenario No 3, the German liaison judge contacted by e-mail the French and German liaison magistrates, respectively in the German Federal Ministry of Justice and in the French Ministry of Justice. The French liaison officer turned to the Tribunal de grande instance in Créteil which confirmed after a few days that the Romanian wife had indeed applied for legal aid in order to file a petition for divorce. The French court indicated however that, in line with the rules of French civil procedure, the case had been removed from the register in May 2014 since no proceedings had been initiated. As a result, the proceedings were barred by limitation after a period of two years with the consequence that, in May 2016, no lis pendens in France was barring the divorce proceedings initiated in Germany. In order to clarify the legal situation in Spain, the German liaison judge turned to the Spanish EJM liaison judge, a judge in*

*Zaragoza. After a couple of days, the latter confirmed by e-mail that the Pakistani husband had indeed applied for legal aid in 2011 in order to contest a request for a protection order filed by the wife with the first instance court of Santa Coloma de Gramanet (Spain). The EJM liaison judge communicated the name of the competent judge in the first instance court to the German family judge in order for her to contact him directly and clarify whether there was a case of lis pendens in Spain that would constitute a bar to the divorce proceedings in Germany.*

*A similar approach could have been envisaged in case scenario No 1 (Recognition of the Romanian adoption order); the liaison judge could have clarified whether direct contact with the adoption authority in Romania could be established or could have referred the court to the Federal Contact Point of the EJM.*

ii. Liaison judges of the International Hague Network of Judges

The International Hague Network of Judges (hereinafter, the "IHNJ") is a worldwide, rapidly growing network; to date, it encompasses 125 judges from 81 jurisdictions.<sup>28</sup> Germany currently has two judges as members of the Network. The purpose of the Network is limited to judicial co-operation and direct judicial communications in child / child abduction matters in relation to the 1980 Hague Convention or to the 1996 Hague Convention.

The practical role of Hague Network Judges is to facilitate direct cross-border communications between judges and courts in concrete child abduction cases with a view to removing practical obstacles to return, to help to ensure that the prompt return may be effected in safe and secure conditions for the child. Their role may comprise the provision of information on foreign law, in particular where assistance is needed as regards the interpretation of foreign law concepts.<sup>29</sup>

*In case scenario No 2 (US-Switzerland child abduction case), the investigating Swiss judge contacted the competent judge in the Court of Common Pleas in the Centre County in Bellefonte (Pennsylvania/USA). Contact with the US court was directly established by the Swiss judge as there was no liaison judge appointed in 2009 in Switzerland. Only in 2013 were two Swiss judges appointed as members of the IHNJ. The US and Swiss judges clarified whether the temporary order granting sole physical custody of the child to the father could be set aside and whether there was certainty that the pending arrest warrant for contempt of court would not be executed if the mother were to return to the US. After having heard the parties and upon approval by the*



*US judge that these two conditions could be satisfied, the Swiss Federal Court ordered the return of the child to the US within 30 days.*

It is worthy to recall that liaison judges, whether they have been appointed under the auspices of the EJM or the IHNJ, can only respond to queries from other members of the judiciary in relation to a concrete case. Queries from third parties (e.g., lawyers) do not fall within their purview. The reason for this being that judges are not supposed to give advice: this is a prerogative of lawyers.<sup>30</sup> Therefore in case scenario No 4 (divorce of the Lebanese asylum seekers couple) the question posed by the counsel of one of the asylum seekers could not be answered by the liaison judge.

In cases involving a State that is not yet a Party to the 1980 Hague Convention, and where a liaison judge has not yet been designated, consideration should however be given to the possibility to use the channel of the IHNJ to facilitate direct judicial communications. This is of special importance for Lebanon or other Arab States being part of the Malta Process: the Malta Process (an HCCH initiative) is a dialogue between Contracting States to the 1980 Hague Convention and the 1996 Hague Convention and non-Contracting States with Sharia-based or Sharia-influenced legal systems. It aims at improving State co-operation in order to assist with the resolution of difficult cross-border family law disputes in situations where the relevant international legal framework is not applicable. It seeks in particular to improve child protection between the relevant States by ensuring that the child's right to continued contact with both parents is supported (even though they live in different States) and by combating international child abduction. In particular, where the dispute concerns a State that is a Party to the Malta Process, judges should be encouraged to reach out to the Network judges.<sup>31</sup>

## **2. In other areas of law**

There exist other areas of law, such as international insolvency law, where the use of direct judicial communications would prove necessary. In the context of a global market and of the growing interdependence of commercial relationships, insolvency of companies has no borders. In order to effectively implement insolvency liability and to co-ordinate insolvency proceedings across States, the co-operation of all parties involved in the process is necessary. The practice of cross-border insolvency disputes needs to be shaped by direct judicial communications between insolvency courts as well as between courts and liquidators involved in insolvency proceedings taking place in a foreign jurisdiction.

A parallel may be drawn between the use of direct judicial communications in the context of international insolvency cases and in the context of international family law; the practice of direct judicial communications in the latter area has however not yet developed to the same extent. It should be noted that Germany has not yet developed a domestic soft law instrument for family court practice with a view to promoting and developing good practices in the area of cross-border judicial co-operation.

### **III. Current topics of discussion**

#### **1. Competency to initiate judicial co-operation across borders**

An important question is whether there exists a legal basis for direct judicial communications, and whether such communications are actually permitted under the current legal framework.

From a public international law perspective, it seems that the mere request from a judge to a foreign judge with a view to assessing whether the latter is willing to share information and, where possible, to co-operate would not breach the sovereignty of his / her State.

Furthermore, several international instruments encourage the use of direct judicial communications. For instance, Article 15, paragraph 6, of the Brussels II a Regulation<sup>32</sup> provides for (direct and indirect) cross-border judicial co-operation in a case of transfer of jurisdiction;<sup>33</sup> with this provision, it is assumed that judges are permitted to communicate with judges from another Member State of the European Union to consult on the opportunity of a transfer of jurisdiction.

This premise is even more clearly supported in Recommendation 5.1 of the Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications which provides: "The Hague Network Judge will encourage members of the judiciary in his / her jurisdiction to engage, where appropriate, in direct judicial communications".

#### **2. The absence of a legal framework in German international family law**

However the question as to where the right to direct judicial communications is regulated, remains unanswered. As such, there exists no clear legal framework in German family law for the co-operation between judges of the IHNJ or for direct judicial communications; the legal basis is

rather to be found in a multitude of recommendations and decisions, but also in customary practice. It is sometimes argued that the inquisitorial nature of family procedure rules in Germany justifies the use of direct judicial communications. The most important directive for family court practice are the Conclusions and Recommendations of the joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks.<sup>34</sup>

This current lack of clarity in the legal framework has prompted criticism of the German and Austrian family law practice and called for the necessity to develop rules establishing a clear legal basis for direct judicial communications; this idea found a large support from the members of the IHNJ at the meeting of the IHNJ in Hong Kong in November 2015.<sup>35</sup>

### 3. Legal framework for Direct Judicial Communications in European and German insolvency law

A comparison between German family law on the one hand and European and German international insolvency law on the other hand reveals that the legal framework for direct judicial communications is far more advanced under the latter. The current legal framework for insolvency law explicitly gives judges the possibility to communicate and exchange information with a foreign court.<sup>36</sup> The recast of the EU Regulation on insolvency proceedings goes even further by providing that, where insolvency proceedings in relation with the same debtor are conducted before the courts of different Member States, these courts shall co-operate.<sup>37</sup>

European law further regulates how judicial co-operation should be achieved and to what areas it could extend. The insolvency courts are bound to respect the processual rights of the parties and the confidentiality of the information shared; they are further bound to agree on the appointment of liquidators, the communication of information or the co-ordination of the surveillance of the business operations made by the debtor.

### 4. Instances of legislation in foreign family law

The legal framework for direct judicial communications in certain States is also more advanced than the framework that currently exists in Germany.

**Spain**, for instance, recently enacted a comprehensive legislation on international judicial co-operation in civil mat-

ters. The law provides in its Preamble for a general authorisation to Spanish judges to make use of direct judicial communications under the conditions that they respect the law of the foreign State, that the rights of the parties are respected and that the judicial independency be respected. At the same time, the code of civil procedure was completed with a new chapter on the procedure for international child abduction further to which judges can seek assistance from Central Authorities, judges of the EJM, judges of the IHNJ and from international liaison magistrates in order to facilitate direct judicial communications at the enforcement stage.<sup>38</sup>

In **Switzerland**, Article 10 of the Federal Act on international co-operation in relation to International Child Abduction and the Hague Conventions on the protection of children and adults,<sup>39</sup> provides that courts, in cases of international child abduction, shall co-operate on child welfare and child care matters with the competent authorities of the State where the child was habitually resident before the abduction. The preparatory works emphasise the importance of communicating with authorities on-site in cross-border cases with a view to securing the return of the child in line with his / her best interests and of making use of all available resources.

In the **United States of America**, the 1997 Uniform Child Custody Jurisdiction and Enforcement Act allows courts in different states to communicate with each other in matters related to child care.<sup>40</sup>

In **Canada**, the Canadian Judicial Council has adopted a comprehensive set of recommendations on direct judicial communications, providing guidance as to how they should be channelled and implemented.

### 5. Towards a German legal framework for direct judicial communications?

*Mallory Völker* and *Wolfgang Vomberg* propose to add a new Article 26a to the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction<sup>41</sup> that would allow for direct judicial communications between judges;<sup>42</sup> it would further allow for judicial communications channelled, in part or completely, through Central Authorities, IHNJ liaison judges and contact points of the EJM.

The proposal to include this provision under Article 26 (which pertains to the judge's powers of investigation – "inquiry *ex officio*") is relevant as direct judicial communications specifically aim at gathering necessary information

and asserting facts that will help the judge to reach a decision in cross-border cases. Direct judicial communications in cross-border family procedures are to prevent the risk that parallel procedures (domestically and abroad) result in contradictory decisions.

Consideration ought to be given to completing a general legal basis with sub-statutory provisions, such as a legislative decree or guidelines (or handouts). The benefit of having soft law in this area cannot be argued. The practice of insolvency law has played a decisive role in the acceptance and dissemination of direct judicial communications, while providing for security in the use thereof. Soft law would be the appropriate solution to regulate direct judicial communications; in particular, as to when direct judicial communications can be used, how they should be conducted, in what language they should take place and how the results of direct judicial communications shall be used for the purposes of the process. Provisions on the organisational framework of liaison judges could be included: e.g., the precise tasks and competences of liaison judges, how they are appointed, the preferred limitation to "sitting judges", and the respect of judicial independency. The adoption of soft law rules would certainly prevent the risk of containing direct judicial communications in a too narrow framework which would prevent any possibility to adapt them in the future.

#### IV. Conclusion

The practice has reacted to the internationalisation of family relations by elaborating innovative instruments, such as liaison judges and international networks of judges with a view to addressing the new challenges. It is now crucial to strengthen the existing instruments, to better disseminate them and to give them an appropriate place in daily family court practice in order to create the conditions for judicial cross-border communication and co-operation.

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- 22 M. Menne, "Dialogue of Judges – Verbindungsrichter und internationale Richternetzwerke", in *Juristenzeitung*, Mohr Siebeck publishers, Tübingen, *JZ* 2017, p. 332-341. Sincere thanks are given for the permission to reprint this article.
- 23 German Federal Constitutional Court, order of 14 September 2015 – 1 BvR 1321/13, *FamRZ* 2016, p. 26.
- 24 Swiss Federal Court, Judgement of 16 April 2009 – 5A\_105/2009, *FamPra.ch* 2009, p. 791.
- 25 Freiberg Local Court, file No 1 F 452/15 (unpublished).
- 26 The legal basis of the Network is a decision of the European Council establishing a European Judicial Network in civil and commercial matters: Decision No 2001/470/EC of Council of 28 May 2001 as amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009.

- 27 See for details Brieger, *DRiZ* 2017, pp. 98-99; Menne, [2016] *IFL* 175, pp. 181-183.
- 28 As of 6 December 2017. The full list of members of the IHNJ can be accessed on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Members of the International Hague Network of Judges".
- 29 See for details Brieger/Erb-Klünemann, *FamRZ* 2016, pp. 962-963; Bähler, *FamPra.ch* 2014, pp. 359-372.
- 30 Art. 3 of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*).
- 31 Conclusions & Recommendations Nos 8-10 of the 4<sup>th</sup> Malta Conference on Cross-Frontier Child Protection and Family Law (May 2016) (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "Cross-border family mediation" and "Malta Process").
- 32 *Supra*, note 4.
- 33 A similar procedure is available under Arts 8 and 9 of the 1996 Child Protection Convention.
- 34 The Conclusions and Recommendations of that meeting are available at < <https://www.hcch.net/en/news-archive/details/?varevent=158> >.
- 35 See "Conclusions and Recommendations of the Meeting of the International Hague Network of Judges (11-13 November 2015)", C&R Nos 15, 18 and 19, available on the HCCH website at < <https://www.hcch.net/en/news-archive/details/?varevent=440> >.
- 36 Art. 348, para. 2, of the German insolvency law (*Insolvenzordnung*) provides for a general authorisation further to which German insolvency courts can cooperate and share information with a foreign insolvency court in cross-border cases that do not fall within the realm of the Council Regulation on insolvency proceedings.
- 37 Art. 42 of the Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) reads: "In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings."
- 38 See for details Forcada Miranda, *Comunicaciones Judiciales Directas Y Cooperacion Juridica Internacional*. Universidad Nacional de Educación a Distancia Madrid, Tesis Doctoral Año 2017, available at < <http://espacio.uned.es/fez/> >; Forcada, [2016] *IFL* p. 11-12.
- 39 *Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen* (BG-KKE).
- 40 Sections 105 and 110 of the Uniform Child Custody Jurisdiction and Enforcement Act combined allow courts to engage in direct judicial communications with sovereign States.
- 41 *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)*
- 42 See Völker/Vomberg, in: DFGT (ed.), 20. Deutscher Familiengerichtstag Brühl 2013, 2014, pp. 149 and following; Völker/Clausius, *Sorge- und Umgangsrecht* (2016), para. 11, N. 156.

## 2. Direct judicial communications and international judicial co-operation

*The present article draws on the introduction of the recently published Ph.D. thesis of Mr Francisco Javier Forcada Miranda, member of the IHNJ for Spain since 2009, "Comunicaciones judiciales directas y cooperación jurídica internacional. Una propuesta de guía práctica española para casos específicos a la luz de los trabajos de la Conferencia de La Haya de derecho internacional privado. (2017)". The thesis written in Spanish is available under the following link < [http://e-spacio.uned.es/fez/view/tesisuned:ED\\_Pg\\_DeryCSoc-Fjforcada](http://e-spacio.uned.es/fez/view/tesisuned:ED_Pg_DeryCSoc-Fjforcada) >.*

Direct judicial communications constitute an innovative tool for international judicial co-operation which is on its way to becoming a useful technique of increasing prevalence in the field of cross-border co-operation.

Where sitting judges from different jurisdictions directly engage in communications about a specific case, the need emerges to determine whether there is a legal or non-legal basis for the communication, its purpose, scope, the safeguards that should be established, and the transparency, certainty, predictability and legality of the entire communication process.

All these issues, which similarly arise in other direct judicial communications not related to specific cases, should be the subject of a thorough analysis and research—something that to this day had not been undertaken in such a comprehensive manner.

### **Direct judicial communications in common law and civil law countries**

The current status of the issue varies widely around the world and the countries from civil law and common law traditions have adopted very different approaches thereto.

In common law jurisdictions, direct judicial communications emerged quite some time ago (common law jurisdictions were pioneers in this regard) and in the absence of specific legal provisions, with a view to approaching the practical aspects of co-operation between common law judges dealing with cross-border cases. In order to facilitate the logistics of direct judicial communications, protocols and practical guides were thus developed over time, and continue to be developed, to provide judges with guidelines concerning the practical and theoretical aspects of direct judicial communications.

In civil law jurisdictions, because the phenomenon is much more recent and linked to globalisation and technological developments, a very different approach was taken. The search for a legal basis enabling and regulating the issue is of greater importance, although in both legal traditions and in various States, it is assumed that no legal basis is required to engage in direct judicial communications.

The increasing connectedness and the use of this kind of communications by courts and judges—from both the common law and civil law traditions—has provided worldwide justification for studying this international co-operation tool in greater detail.

To this day, only a few international organisations have addressed the issue. The United Nations, the European Union and the Council of Europe only addressed it indirectly, while the Hague Conference has addressed it thoroughly and with commitment.

Even though the effective use of direct judicial communications in specific cases remains limited in numbers, there are increasingly more States that promote and provide a direct legal basis for them, and more protocols and practical guides are increasingly available with a view to encouraging and regulating their use.

This is largely due to the attention received by so-called judicial activism, the work of domestic and international judicial co-operation networks, and the work conducted by courts and judges from different jurisdictions at national and international meetings and conferences. The conclusions and recommendations adopted at such events have provided an invaluable basis for progress in the field.

Direct judicial communications are used for co-operation purposes in criminal cases and even in cases of mutual legal assistance, where they have had the most significant implementation difficulties. However, the strength and relevance of direct judicial communications in civil and commercial matters should not be overlooked, especially with regard to cross-border insolvency and family law matters involving children.

In both these fields direct judicial communications constitute a useful tool that contributes to the efficiency and expediency of court proceedings, as they constitute a flexible, swift and secure way of ensuring co-operation. There are seemingly no substantive or procedural obstacles to the use of direct judicial communications in other jurisdictions, provided established procedural principles and safeguards are respected and the rights of



the parties observed.

While direct judicial communications in Spain were grounded in EU legislation and some Conventions drafted under the auspices of the Hague Conference, the topic has acquired new relevance since 2015, when it was regulated in the Law on International Legal Cooperation in Civil Matters [*Ley de cooperación jurídica internacional en material civil* (LCJIMC in the Spanish acronym)], of 30 July 2015, at Article 4; and the Law on Civil Procedure [*Ley de Enjuiciamiento Civil* (LEC in the Spanish acronym)] at Article 778.4, following the amendment made by Law 15/2015, of 2 July, on voluntary jurisdiction.

The **preliminary chapter** of Mr Forcada's thesis places direct judicial communications in the field of international legal co-operation. After covering international legal co-operation and its link with private international law—especially within the European Union—an analysis is conducted on the evolution of communications between various types of authorities leading up to cross-border judicial communications, going through traditional and modern techniques for co-operation and communication between authorities.

Placing direct judicial communications within the field of international legal co-operation facilitates presenting their role in overcoming the deficiencies and limitations of certain international instruments. This serves to show that direct judicial communications have been and are vital in the search of operative solutions—in particular in the area of cross-border family law—to address the current challenges that traditional international legal co-operation instruments are unable to overcome.

**Part I** of the thesis is concerned with defining the boundaries of the concept of direct judicial communications, delimiting their scope of application, analysing their advantages and disadvantages and evaluating the bases for their use.

The first three chapters study the concept of direct judicial communications from various perspectives, and what has been and may be their scope of application, both from a general and a more specialised approach. In both cases, practical examples are provided and the advantages and disadvantages of their actual implementation in the field of international legal co-operation are evaluated.

Regarding the bases enabling direct judicial communications, the issue of their legal bases is addressed thoroughly, including non-legal or informal bases, in order to unravel which are, or should be, the appropriate bases in

light of the various ways in which direct judicial communications can be practised. The thesis provides examples both from the common law tradition as well as those extracted from the works of the Hague Conference.

A first approach to legislative texts is provided through the study of the UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997 and the Maxwell Protocol, EU regulations on the subject matter, and how these have been incorporated in the regulatory framework of national and international judicial networks.

### **Towards the development of a legislative framework**

**Part II** of the thesis addresses the development of a legislative framework through the work conducted by certain international organisations, which allows for in-depth research into national legal bases and an analysis into possible legislative avenues discussed at the Hague Conference and the Council of Europe.

All of the above provides an introduction to the study of the national legal framework for direct judicial communications in 48 States around the world, with a particular added reference to their regulation in Spain.

The thesis provides an analysis of a total of 49 States (including Spain) having national legal direct and indirect legal bases for direct judicial communications. In addition, indication is provided as to which States have national guides or protocols concerning direct judicial communications, as well as which States have no domestic legislation on the topic.

It further provides an extensive analysis of the legislative inception of direct judicial communications in Spain with the LCJIMC and LEC, and the contrast between the former and current legal frameworks. In the conclusion of this part, the need for further regulation following the entry into force of the LCJIMC is invoked.

**Part III** of the thesis is dedicated to the consolidation of legislative work and developments, by analysing the relevance of questionnaires and statistics, national and international conferences, and the study of the IHNJ, as well as the work of the Spanish Network Judge, in particular regarding the use and development of direct judicial communications, providing statistical data previously unpublished.

The actual utility of direct judicial communications is evidenced by the statistical data available and the question-

naires from which this information was obtained, basically conducted in the ambit of the Hague Conference, for Special Commission meetings, meetings of members of the IHNJ, as well as the Ibero-American Judicial Summit and the International Judicial Co-operation Protocol developed in the context of the latter.

The need for direct judicial communications between sitting judges of different jurisdictions, both in the context of specific cases and in relation to general aspects, is a recurrent theme in various national and international conferences.

As a conclusion to Part III, the past and current development of the IHNJ is presented, as well as the work conducted by Mr Forcada since his designation as the Spanish Network Judge in January 2009, in particular, the work relative to the implementation of direct judicial communications in specific cases. The statistical information presented in the thesis is new and evidences how international co-operation tasks are actually effected and how direct judicial communications are practised. It aims at presenting the role of the Spanish liaison judge, his work, its statistical aspects, and to assess his operative role in the practise and use of direct judicial communications, as well as information and elements unpublished until now.

#### **The proposal for a practical guide for the use and development of direct judicial communications**

**Part IV** of the thesis focuses on one of its main objectives: providing a formal proposal for a Spanish practical guide for the use and development of direct judicial communications in specific cases, consisting of an explanatory report and the above-mentioned Spanish practical guide.

The thesis gives special attention to questions related to the safeguards for direct judicial communications—both at the EU and the Hague Conference—and to questions related to data protection and the preservation of the independence and impartiality of the judges involved. Other issues such as the technologies used for the communication are also covered.

From a methodological perspective, the thesis does not only cover the contributions of the Hague Conference, the EU and the Council of Europe on the subject matter under study, but also focuses on the assessment of questionnaires and the conclusions drawn from the most relevant national and international conferences as well as from a survey directly conducted by the author of the thesis to specific members of the IHNJ, from whose responses

valuable information was obtained.

The outcomes obtained are rendered particularly valuable thanks to the compilation of examples of national legislation on direct judicial communications provided by 49 States. The thesis also provides a compilation and analysis of various similar protocols and instruments developed at a global scale to regulate direct judicial communications. The thesis further benefits from study of the work conducted by Mr Forcada throughout over seven years, in particular, on the use of direct judicial communications.

The thesis is intended to be conducive to the advancement of the current knowledge on its subject matter resulting from various factors. Its intention is to carry out a comprehensive study into all aspects related to direct judicial communications and to collect information that was until now scattered, thus offering experts a global and systematic view. Furthermore, there was until now no complete study of ad hoc Spanish legislation, in particular of Article 4 of the LCJIMC, and the information presented in this thesis on the inception of this legislation had not yet been published. In addition, the thesis analyses and provides a proposal on future steps and the need for further legislative measures.

Finally, the thesis presents a proposal for a Spanish practical guide on the use and development of direct judicial communications in specific cases, with a detailed analysis of some of the most important questions related to this interesting yet unknown—in particular to the greater public—aspect of international judicial co-operation. Unless a regulatory framework is developed for the recent Spanish domestic legal provisions for direct judicial communications, pursuant to the above-mentioned Article 4 of the LCJIMC, Spanish judges could be discouraged from using this tool to the detriment of a swifter and more effective international judicial co-operation in specific cases.

From this perspective, it is understood that the drafting and implementation of a practical guide such as the one proposed in the thesis of Mr Forcada would contribute to promoting the use of these communications and help ensure compliance of current legislation, providing transparency and certainty to the communication process.



## 1996 Child Protection Convention

### Protecting children beyond borders. In support of multi-disciplinary and international child protection

*By Serge Leonard, avocat, legal consultant to the Delegate General for rights of the child in the Wallonia-Brussels Federation.*

The purpose of this presentation is to consider the options for international child protection and the desirability of promoting multi-disciplinary practices across borders. Many children are involved in cross-border disputes. Families are increasingly international, and so are children. The purpose of international child protection instruments, of the Brussels II a Regulation,<sup>43</sup> is to deal with these situations, to provide solutions to them in circumstances that can vary greatly, such as litigation relating to parental authority (wrongful removal), international adoption, international foster care, or international protective measures. In response, the countries party to the Hague Conventions relating to international protection of children have established Central Authorities in each country. The assignment of these domestic administrative authorities is to cooperate among themselves and to set up an international child protection system. I do not intend to review the various Hague Conventions or the Brussels II a Regulation in detail. I propose to draw inspiration from the 1996 Hague Child Protection Convention. That Convention was ratified by the Belgian State in May 2014, and entered into force on 1 September 2014. It undoubtedly enhances the field of child protection, in particular as regards cross-border situations, by providing for confirmation of existing practices implemented by other international instruments (such as Art. 56(1) of the Brussels II a Regulation: "Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the Central Authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.") In addition, as civil issues relate in particular to delegations of parental authority and guardianship, the Convention has enabled / facilitated the establishment and handling of protective measures, measures for assistance to children in need (e.g., placement, fostering, kafala). These situations are not exceptional. In Belgium, many children are placed pursuant to rulings issued by French authorities. The

Grand-Duchy of Luxembourg also places minors within the field of assistance to youth (children at risk), and indeed minors having committed criminal offenses. In addition, pursuant to kafala, many children are entrusted to families residing in Belgium. Dealing with these situations, however, involves a psycho-socio-legal aspect extending far beyond a strictly legal approach. The assignment of the aforementioned Central Authorities includes in particular ascertaining the proper application of the international instruments. Interpreting the interests of the child to be moved should not, however, be restricted to a strictly legal interpretation, and requires a combination of information. Certain Central Authorities have appropriate infrastructure or request assistance from other agencies, or even NGOs. This is not true, however, of all Central Authorities.

It must be admitted that there remain reluctance, obstacles, and many professionals hesitate to contemplate international protective measures even though the child's interests ought to require them. With respect to assistance to children in need (abuse, serious neglect, sexual abuse) in cross-border situations (e.g., parents residing in a different country from the child), many professionals sometimes object to a cross-border removal and fear a lack of consistency or safeguards, or a scattering of information as to the child's care. In response to these fears, the professionals prefer to retain the case. On the other hand, in certain situations, international protective measures are implemented without observing international law. Many children from third countries are accordingly placed in Belgium in disregard of the relevant procedures.

The implementation on an international basis of child-protective practices accordingly remains difficult. As mentioned above, there are many obstacles and they can appear legitimate. It seems to me, however, that they are also due to the way in which we view borders.

1. A territorial border is frequently viewed as the boundary beyond which the child-protection measure will cease to be applicable as a matter of domestic public policy. Yet the concept of public policy blends into the expression of the State's sovereignty. The unchanging international case-law holds that any protective measure is a matter for the State where the child resides. Since a Boll ruling, in a dispute between the Dutch Government and the Swedish Government, the International Court of Justice has specified that child-protection measures are matters of *ordre public*,

thereby laying down a principle of primacy of jurisdiction for the authorities of the child's residence over those of the State of which it is a national.<sup>44</sup>

This means that protective measures are domestic measures of the State where the child resides, and that no State may interfere in the domestic matters of a State dealing with protective measures for a minor located on its territory. It follows that no public authority may export protective measures to another country, nor may it interfere in another country's domestic affairs. In other words, once a country decides to request an international protective measure and the host country consents to transfer of the situation, the country transferring the case relinquishes control over the situation. Accordingly, no child-protection model prevails over another, and States need also to trust one another. This trust involves the establishment of practices of cross-border co-operation.

2. A border is frequently and mistakenly presented as a guarantee of professionalism. As mentioned above, in principle, protective measures are territorial, meaning that the authorities, whether judicial or governmental, with jurisdiction to take them may not apply any other law than their own. Certain professionals' fears extend beyond such legal matters, however. For instance, a child's proposed move to another country may be challenged because certain professionals fear a loss of information and inconsistency in the child's care. A move beyond a border can lead to loss of information. As an illustration, professionals approached and involved in a cross-border situation may not necessarily be aware of what has been done in the third country (where the child was located previously), and not necessarily aware of the child's situation. Before organising a move and removal of the child abroad, the professionals located in the country of the child's residence are often faced with a dilemma and fear the taking of inconsistent measures for dealing with the child's care in the host country. These professionals may be reluctant to transfer the child's case to another country.

3. Finally, as mentioned above, in the absence of psychosocio-legal institutional support, many children are placed in foreign countries without an opportunity for review and co-operation between the countries as to the grounds for the placement, as to the project's consistency, or as to the quality of care. For instance, a foreign authority may decide to place a child in a foreign country and approach directly a private institution that might receive the child. This, however, is a contractual relationship between a foreign public agency and a private institution.

The internationalisation of children should accordingly cause us to challenge our views and our social practices. As mentioned above, the practical realities, the professional and institutional practices may in fact militate against implementation of those treaties even though the child's interests seem best served by international removal. In dealing with these obstructions, I suggest a few prospects. It seems to me to be important, first, to return to basics:

- The United Nations Convention on the Rights of the Child ("UNCRC") tends to treat children as having rights and to make the child's interests prevail over any other consideration. This instrument was adopted under the aegis of the United Nations on 20 November 1989, and has been ratified by almost all countries in the world. It is important, therefore, to consider the situation of cross-border children against the background of this essential foundation.

- It is obviously important to develop information about the Conventions of the Hague Conference through awareness-building and training campaigns, through meetings to review their operation in practice, the organisation of conferences, the circulation of newsletters, etc. It is also important to develop awareness of Central Authorities in States Parties to the Hague Conventions, and of the manner of their operation.

- The growing international nature of families, and of situations in which children may be in need of protection, should cause us to overhaul our professional practices. We are at a crossroads, between a unilateral order of States and a more interactive and egalitarian international order, involving greater participation. The genius of the Hague Conference is to have imagined it. The international law arising out of the Conference is basically co-operative in nature. It takes account of the principle of equality between States and the diversity of systems. It imposes on each Contracting State an obligation to designate a Central Authority acting as a contact point for the purposes of co-operation between States Parties. The emergence of these new international practices ought accordingly to favour the development of more collaborative and cooperative professional practices, and lead us to imagine practices based on respect for differences, plurality and diversity. In this respect, the practice of international mediation is obviously to be encouraged.

- International child protection should accordingly not be restricted to strictly legal and administrative processes. The Central Authorities have without doubt developed considerable expertise with respect to international law,

but are rarely provided with psycho-social infrastructure. Yet child-protection measures require a combination of knowledge. The cross-border removal of a child implies a prior review of the child's interest to determine whether the child's interest, and its mental well-being, are supported by the cross-border move. This review is a psycho-social matter. In addition, a State hosting a displaced child also needs to review whether the foster parents and hosting institutions meet the child's needs and interests. This review with respect to hosting is also a matter for multi-disciplinary review. This is already clear to certain States, such as Switzerland in particular, which has set up a federal Central Authority and cantonal Central Authorities. In brief, the federal Central Authority is established mainly as an expert in international law, to ascertain the validity of foreign acts, and international co-operation between States. The cantonal Central Authorities, on the other hand, are in charge of assisting individuals and of child protection. Thus their remit is of a more social nature and based on a multi-disciplinary approach. Switzerland has selected a public institutional model, but this multi-disciplinary support can be implemented by a private social agency, an international point of contact, a non-profit entity, a non-governmental organisation.

- The dangers of failure to comply with international law deserve due attention. Certain foreign countries place children in Belgium. These practices can be permitted, provided, however, that they comply with international and EU law. If they fail to comply with the relevant procedures, these foreign placements can involve serious harmful consequences for the child. Such placements are sometimes organised in private institutions away from any control and any standard for approval. The absence of standards for approval with respect to infrastructure and pedagogical care can cause very serious risks for the child. In addition, the social services' failure to collaborate amongst themselves also raises issues, such as what to do when a child runs away from an institution, engages in criminal or hazardous behaviour, and the host country has no information about the child's situation.

- Addressing the issue of institutional and professional obstructions allows the provision of solutions. The fear of a loss of consistency regarding the child's protection and the fear of scattering of the information relating to the child can be dealt with if there is an international multi-disciplinary infrastructure, an international network of child-protection professionals. The establishment of such infrastructure provides professionals with safeguards as to requirements of professionalism and consistent tracking of the children's care.

In conclusion, the establishment of international practice among child-protection professionals must make us question anew our professional practices, on the basis of values founded in internationalism, in a collaborative and multi-disciplinary approach to the work. The development of such a project also requires institutional support. Finally, it seems important to me to point out once again that the child's development requires respect for its caregivers regardless of its international situation. International severance of a child's links to caregivers may affect its mental health, and refusal to contemplate child protection beyond borders can be detrimental. The international circumstances, the advent of the UNCRC, and of the Hague Conventions, require us to provide a reply.

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43 *Supra*, note 4.

44 *Boll, Netherlands v. Sweden*, judgment of 28 November 1958, ICJ Reports 1958, p. 55. For commentary, see in particular: H. Batiffol and Ph. Francescakis : "L'arrêt Boll de la Cour Internationale de Justice et sa contribution à la théorie du droit international", *Revue de droit international* (1959) 259.

## International Child Protection Conference

### International Family Law Conference 2016: The Future of Family Justice: International and Multi-Disciplinary Pathways

*By Shi Ing Tay, former intern at the Permanent Bureau of the Hague Conference.*

The International Family Law Conference 2016 took place in Singapore on 29 and 30 September 2016, as part of the International Family Justice Week. The Conference, which was jointly organised by the Family Justice Courts of Singapore, the Law Society of Singapore and the Singapore Academy of Law with the support of the Ministry of Social and Family Development, attracted more than 400 participants both locally and from overseas, including members of the judiciary, policy-makers, practitioners, academics and professionals from the social science domain. The central theme of the Conference, *The Future of Family Justice: International and Multi-Disciplinary Pathways*, was considered from a variety of perspectives by distinguished speakers from various jurisdictions, who provided elucidating insights into pertinent family justice issues facing the world today.

#### Opening Address by Chief Justice Sundaresh Menon, Supreme Court of Singapore

In his opening address, Chief Justice Sundaresh Menon expounded on the underlying philosophy that is driving the ongoing transformation of the Singapore family justice system, which is to change the court from a competitive battleground to a forum where sustainable solutions can be reached. He also noted the increasing complexities of delivering justice in a modern, globalised world, e.g. the challenges of deciding on issues of relocation and child abduction when a transnational marriage breaks down. In this regard, he considered that the 1980 Hague Convention seeks to ensure the prompt return of children to their State of habitual residence, which will then determine substantive custody issues. This was affirmed in the Court of Appeal decision of *BDU v. BDT* [2014] 2 SLR 725, wherein the abducting parent had resisted a return application by relying on the Article 13(1)(b) exception in the 1980 Hague Convention. The Court of Appeal was of the view that the Article 13(1)(b) exception should not be invoked lightly, and ultimately ordered the return of the child, subject to both parents providing specific undertakings.

Chief Justice Sundaresh Menon also emphasised the importance of sustaining international conversation on issues that are pertinent to family justice. He referred to various initiatives that have been developed to further this cause, including:

- the Working Group of the Council of ASEAN Chief Justices on Family Disputes involving Children, which facilitates interaction and dialogue on family matters amongst judiciaries in the region;
- the International Advisory Council to Singapore, which was established by the Chief Justice and brings together leading thinkers in the world in the field of family justice, in order to discuss and share perspectives on the latest developments in family law and practice; and
- the IHNJ.

The keynote address, delivered by the Honourable Chief Justice Diana Bryant AO, traced the development and evolution of Australia's family justice system in the 40 years since the birth of the Family Court in 1976.

#### Plenary Session 1: Family Justice Systems Around the World and the Challenges

The Honourable Judge of Appeal, Justice Judith Prakash chaired the first plenary session, titled "*Family Justice Systems Around the World and the Challenges*". Distinguished speakers provided their perspectives on the challenges that are facing family justice systems around the world, including in Germany, England and Wales, Hong Kong (SAR), and Singapore. The following issues were discussed:

- Increased numbers of litigants-in-person and how or to what extent judges should assist such persons;
- Increased incidence of cases involving cross-border issues, e.g. the reciprocal enforcement of maintenance orders and international child abduction;
- The incorporation of multi-disciplinary pathways, including through the use of child-inclusive mediation where appropriate, conducting judicial interviews with the child, engaging child representatives, and referring cases to parental co-ordinators;
- The possibility of mediating disputes which involve allegations of domestic violence, provided there be a careful assessment of the parties' capacities to participate in mediation and to ensure that there is no

power imbalance, as well as to secure the safety of all parties before, during, and after the mediation; and

- The methods by which the child may be heard, e.g. through a child representative who conveys the child's wishes and keeps the child informed of the process, or through the appointment of a neutral person who focuses on communicating the subjective wishes of the child to the court while also making an objective assessment of what would be in the child's best interests.

### **Plenary Session 2: International Frameworks Relating to Separating Couples**

The second plenary session, titled "*International Frameworks Relating to Separating Couples*", was chaired by Professor Anselmo Reyes, Representative of the Hague Conference (Regional Office for Asia and the Pacific). The central focus of the presentations was on the interpretation and application of the Hague Conventions, namely the 1980 Child Abduction Convention and the 1996 Child Protection Convention. Several speakers recalled that the foundation of the 1980 Convention is based on mutual trust between the Contracting Parties to the Convention, that Central Authorities would be faithful to the letter and the spirit of the Convention and ensure prompt return of the child, save for the exceptional situations that are provided for under the Convention.

#### *Observations in relation to the interpretation and application of the Hague Conventions:*

- An overly liberal interpretation of the exceptions in the 1980 Convention undermines the objectives of the Convention;
- There should be close case management of return proceedings in the requested State in order to ensure that the return proceedings are determined expeditiously;
- Direct judicial communications through the IHNJ is a useful tool;
- Where there are concerns of domestic violence, the court of the requested State could consider putting in place measures to protect the child upon return. Such protection would be enhanced with widespread ratification of the 1996 Convention;
- Reference was made to Article 11 of the 1996 Convention, which provides that the State in whose territory the child or property belonging to the child is present has the jurisdiction to take urgent measures of protection. Such orders are capable of being recognised and enforced under the Convention; and

- Co-operation between the Central Authorities of Contracting States, which is expressly provided for in the 1996 Convention, as well as ensuring the recognition and enforcement of measures directed at the protection of the child, would promote certainty.

#### *Ongoing efforts undertaken by the Hague Conference*

- The Honourable Chief Justice Diana Bryant AO, Chair of the *Working Group on Article 13(1)(b) of the 1980 Convention* elaborated on the efforts of the Working Group in developing a Guide to Good Practice, which will explain and clarify the situations in which the Article 13(1)(b) exception may commonly be invoked;
- Ms Maja Groff, Senior Legal Officer of the Permanent Bureau of the Hague Conference, noted the ongoing discussions on whether new legislative work should be undertaken to ensure the cross-border recognition and enforcement of protection orders which would assist in ensuring "safe return" under the 1980 Convention (this project was welcomed by the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions). She also elaborated on the success of the Malta Process, which is a continuing dialogue between the Contracting States to the 1980 Convention and/or 1996 Convention and non-Contracting States whose legal systems are based on or influenced by Islamic law.

### **Plenary Session 3: International Mediation in Cross-Border Family Disputes**

The central focus of the third plenary session was on the challenges relating to international mediation and the enforceability of mediated agreements across borders.

With regards to the enforceability of mediated agreements, Professor Paul Beaumont, Chair of the *Experts' Group on cross-border recognition and enforcement of agreements in family disputes involving childrens*, elaborated on the recent efforts that were undertaken to evaluate the extent to which mediated agreements can be enforced under the existing Hague Conventions, and to determine whether a new instrument should be negotiated. The following matters were considered:

- Article 16 of the 1980 Convention, which imposes restrictions on the jurisdiction of a court hearing a return application to decide on the merits of custody rights until return is refused under the Convention, may hinder a successful mediation outcome. However, experience shows that judges and practitioners have practical ways



to go around and address the Article 16 issue;

- Although Article 10 of the 1996 Convention provides for some degree of party autonomy, only the aspects of the agreement that relate to parental responsibility would circulate under the Convention. As such, this may not be a holistic solution since parties usually conclude "package agreements" which deal with all aspects of the dispute, not just on issues of parental responsibility;
- Article 30 of the 2007 Child Support Convention provides for the recognition and enforcement of maintenance arrangements;
- An ideal solution would be to allow parents to confer jurisdiction exclusively on one court to incorporate the "package agreement" into a consent order, and to provide that such orders be recognised and enforced overseas.

#### **Day Two: Keynote Address by Mr Tan Chuan-Jin, Minister for Social and Family Development, Singapore**

Three key strategies in keeping families-in-crisis together highlighted by Minister Tan Chuan-Jin:

- (1) going upstream and enhancing preventive efforts;
- (2) delivering timely services in a child-centric manner; and,
- (3) ensuring that social and justice systems are future ready.

#### **Plenary Session 4: The Role of Social Science and Family Law**

The Honourable Judicial Commissioner Debbie Ong chaired the fourth plenary session, titled "*The Role of Social Science and Family Law*". During the session, it was acknowledged that evidence-based social science research could be used to better inform judges and practitioners working within the family justice system, provided that such research is credible. With regards to Hague return proceedings, certain gaps in social science research were identified, including research on protective abductions and the wellbeing of children post-return.

#### **Session 5A: Family Violence and Child Abuse**

District Judge Shobha Nair chaired the session titled "*Family Violence and Child Abuse*", where distinguished speakers discussed the challenges that courts face in dealing with domestic violence issues. Concerns were raised as to the following:

- The need to establish the impact of exposure to domestic violence on children, and to correctly gauge/understand the seriousness of the effects of

such exposure;

- Undertakings for return/mirror orders in cross-border circumstances are not being enforced;
- Lack of assurance that mediated agreements will be enforced;
- Lack of experience/knowledge of counsel and judges dealing with Hague return cases.

#### **Session 5B: Multi-Disciplinary Approaches to Family Mediation**

The use of multi-disciplinary approaches in family mediation was explored in a session chaired by Ms Sophia Ang, Director for Counselling and Psychological Services in the Family Justice Courts of Singapore. It was believed that adopting a multi-disciplinary approach to family mediation and collaborative family law practice will benefit parents and children alike. Examples of multi-disciplinary models include:

- Child-focused mediation model: mediator to assist and encourage parents to focus on their children's needs in deciding parenting arrangements, with the aim of creating parenting plans / mediated agreements that positively support children's needs;
- Child inclusive mediation model, which seeks to include the child's voice through trained child consultants who work with the children of separating parents.

#### **Plenary Session 6: The Future of Family Justice: The Evolving Role of Family Practice and Ethics**

In the final plenary session, distinguished speakers considered the evolving nature of family justice systems and how family lawyers can adapt their practices to meet new challenges. It was noted that family justice systems have evolved to include the use of multi-disciplinary approaches, dispute resolution processes which go beyond traditional litigation, and various methods in order to ensure that the child's voice is heard. It was also foreseen that technological advancements could also play a role in the evolving nature of family practice, e.g. use of technology to determine the range of possible settlement options with regards to division of property. In relation to ethical considerations, it was suggested that the paramount consideration of lawyers should be the best interests of the child, over and above the duties owed to their clients.



## Concluding Remarks: Family Justice in a World without Borders

The Honourable Judicial Commissioner Valerie Thean, Presiding Judge of the Family Justice Courts of Singapore, concluded the successful conference by emphasising the need for global solutions to international family justice issues, including through promoting dialogue and consensus between States.

## News from Argentina

### Implementation law for the 1980 Convention in the Province of Córdoba (Argentina)

*By Graciela Tagle de Ferreyra, Member of the International Hague Network of Judges of Argentina*

"On December 21, 2016, the Legislature of the Province of Córdoba passed Procedural Law No. 10419 for the application of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, which was enacted on 27 January 2017. I drafted the law, and an ad hoc committee was established to analyse it, with whose favourable opinion it reached the Legislature. The law provides, amongst other things, for "concentration of jurisdiction" and "devolutive effect in appeal proceedings of cases in which there are sufficient reasons to so grant it."

Concentration of jurisdiction was established by the High Court of Justice of the Province in a particular number of courts based on their location and territorial proximity with the purpose of processing return and rights of access applications under the 1980 Hague Child Abduction Convention and the 1989 Inter-American Convention on the International Return of Children. It also provides for an operating schedule and continuous training for judges, public prosecutors, defenders and officials. The first case in which this law was applied concerned a request for access rights in a case with France. Less than a month after the request for access rights was lodged, and once the parties and the children had been heard by the judge, interim contact was agreed upon, which was given force of law by the court."

## Members of the IHNJ

Since the last issue of the *Judges' Newsletter* in June 2014, there has been a significant turnover in membership of the IHNJ. A great deal of judges, who have contributed enormously to the expansion of the Network since, have subsequently left the Network and been replaced by new judges who bring with them their own unique experience.<sup>45</sup>

Each and every one of those departed members contributed greatly to the Network, bringing experience of their own legal systems and helping grow the Hague international child protection mission.

We would like to express our condolences to the family of Justice Evelyn Roxana Nuñez Franco from El Salvador, who passed away on 20 July 2014. Her contributions to both domestic and international family law will be sorely missed.

We further convey our sincere gratitude to the following judges who have left the Network since June 2014. Their work was always been invaluable and we wish them well in their current endeavours.

**AUSTRALIA**

The Honourable Chief Justice Diana BRYANT, Appeal Division, Family Court of Australia, Melbourne (13/10/2017)

**CANADA**

The Honourable Justice Jacques CHAMBERLAND, Court of Appeal of Quebec (*Cour d'appel du Québec*), Montreal (Civil Law) (22/11/2016)

The Honourable Justice Robyn M. DIAMOND, Court of Queen's Bench of Manitoba, Winnipeg (Common Law) (22/11/2016)

**DENMARK**

Judge Bodil TOFTEMANN, City Court of Copenhagen (*Københavns Byret*), Copenhagen (29/01/2015)

Judge Kirsten SCHMIDT, City Court of Copenhagen (*Københavns Byret*), Copenhagen (01/01/2017)

**FINLAND**

Justice Elisabeth BYGGLIN, Helsinki Court of Appeal (*Helsingin Hovioikeus*), Helsinki (03/10/2017)

**FRANCE**

Judge Isabelle GUYON-RENARD, Deputy Judge of the First Civil Chamber of the Court of Cassation (*Conseiller référendaire à la première chambre civile de la Cour de cassation*), Paris (13/06/2017)

**HUNGARY**

Judge dr Márta GYENGE-NAGY, Judge of the Szeged Municipal Court, Szeged (19/08/2015)

**IRELAND**

The Honourable Ms Justice Mary FINLAY GEOGHEGAN, The High Court, Dublin (22/01/2018)

**ISRAEL**

The Honourable Judge Benzion GREENBERGER, District Court of Jerusalem, Jerusalem (31/12/2017)

**KOREA, REPUBLIC OF**

Judge Yongshin CHUNG, Judge, Seoul Family Court, Seoul (27/09/2016)

Judge Inwoo SONG, Presiding Judge, Seoul Family Court, Seoul (12/08/2015)

**NORWAY**

Judge Anne Marie SELVAAG, Trondheim District Court, Trondheim (18/10/2013)

Judge Torunn Elise KVISBERG, PhD, Sør – Gudbrandsdal District Court, Lillehammer (18/10/2013)

**PAKISTAN**

The Honourable Mr Justice Tassaduq Hussain JILLANI, Judge, Supreme Court of Pakistan, Islamabad (22/12/2016)

The Honourable Mr Justice Umar Ata BANDIAL, Judge, Supreme Court of Pakistan, Lahore (02/08/2016)

**PANAMA**

Lic. Edgar TORRES SAMUDIO, Court of Children and Adolescents of the Chiriquí Judicial Circuit (*Uzgado de Niñez y Adolescencia del Circuito Judicial de Chiriquí*), Chiriquí (31/05/2016)

**SERBIA**

Judge Djurdja NESKOVIC, Judge of the High Court, Belgrade (28/04/2015)

Judge Maja MARINKOVIC, First County Court, Belgrade (28/04/2015)

**SINGAPORE**

Judicial Commissioner (JC) Valerie THEAN, Presiding Judge, Family Justice Courts, Singapore (13/09/2017)

**SLOVENIA**

Judge Tadeja JELOVŠEK, District Court Judge (specialised in family law), District Court of Ljubljana, Ljubljana (12/12/2017)

**SOUTH AFRICA**

The Honourable Mrs Justice Belinda VAN HEERDEN, Supreme Court of Appeal, Bloemfontein (05/08/2014)

**TURKEY**

Dr. Süleyman MORTAŞ, Judge at the Supreme Court of Turkey, Ankara (22/08/2016)

**UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND***For England and Wales*

Lady Justice Jill BLACK, DBE, Judge of the Court of Appeal, The Royal Courts of Justice, London (13/11/2017)

*For Northern Ireland*

The Honourable Mr Justice Ben STEPHENS, The Royal Courts of Justice, Belfast (30/09/2014)

*Scotland*

Sheriff Deirdre MacNEILL, Sheriff Court House, Edinburgh (24/03/2016)

*For British Overseas Territories**Bermuda*

Mrs Norma WADE-MILLER, Puisne Judge, Supreme Court of Bermuda, Hamilton (04/07/2016)

**UNITED STATES OF AMERICA**

The Honourable Justice James GARBOLINO, Former Presiding Judge, Superior Court of California, Roseville (31/12/2015)

**VENEZUELA**

Judge Carmen ELVIGIA PORRAS DE ROA, Magistrate, Vice-President of the Social Chamber of Cassation and Coordinator of the National Jurisdiction for the Protection of Children and Adolescents, Supreme Court of Justice (*Magistrada, Vicepresidenta de la Sala de casación Social y Coordinadora Nacional de la Jurisdicción de Protección de Niños, Niñas y Adolescentes, Tribunal Supremo de Justicia*), Caracas (14/07/2015)

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Finally, we are delighted to inform you that judges from the following countries have been designated since the last publication of the Judges' Newsletter, and have already made valuable contributions to the international protection of children. Many of the judges represent jurisdictions that had not previously participated in the IHNJ, namely: Andorra, Aruba (The Netherlands), Barbados, Curaçao (The Netherlands), Fiji, Guyana, Japan, Kazakhstan, Latvia, Lithuania, Macao SAR (China), Sint Maarten (The Netherlands), Sri Lanka, Suriname, Thailand, Turkey and the Organisation of Eastern Caribbean States (OECS) (representing Anguilla, Antigua and Barbuda, the British Virgin Islands, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines).

**ANDORRA**

The Honourable David MOYNAT ROSSEL, Judge for Children and Adolescents, Civil Chamber; President of the Court of First Instance of Andorra (Batllia), The Higher Council of Justice, Andorra La Vella (18/03/2014)

**AUSTRALIA**

The Honourable Chief Justice John PASCOE, AC CVO, Chief Judge, Family Court of Australia, Chief Justice's Chambers, Sydney (10/11/2017)

**BARBADOS**

The Honourable Sir Marston C.D. GIBSON K.A., Chief Justice, Supreme Court of Barbados, St. Michael (15/07/2016)

The Honourable Madam Justice Jacqueline CORNELIUS, Judge of the High Court, St. Michael (15/07/2016)

**CANADA**

The Honourable Justice Marianne RIVOALEN, Associate Chief Justice, Family Division, Court of Queen's Bench of Manitoba, Winnipeg (Common Law) (22/11/2016)

The Honourable Justice Laurence I. O'NEIL, Associate Chief Justice, Family Division, Supreme Court of Nova Scotia, Halifax (Common Law) (22/11/2016)

The Honourable Justice Louis LACOURSIÈRE, Superior Court of Quebec, Montreal (Civil Law) (22/11/2016)

**CAPE VERDE**

The Honourable Magistrate Ary Allison SPENCER SANTOS, District Court Judge, District Court of São Vicente, São Vicente (03/08/2016)

**CHINA***For Macao, Special Administrative Region (SAR)*

The Honourable Judge Shen LI, Family and Juvenile Court of the Lower Court, Macao SAR (31/01/2018)

The Honourable Judge Leong MEI IAN, Family and Juvenile Court of the Lower Court, Macao SAR (31/01/2018)

**COLOMBIA**

Doctor Jaime LONDOÑO SALAZAR, Magistrate, Civil Family Division, Superior Court of the Judicial District of Cundinamarca (*Magistrado de la Sala Civil Familia del Tribunal Superior del Distrito Judicial de Cundinamarca*), Bogotá (26/03/2015)

**DENMARK**

Judge Kirsten SCHMIDT, City Court of Copenhagen (*Københavns Byret*), Copenhagen (01/02/2015)

Judge Harald MICKLANDER, City Court of Copenhagen (*Københavns Byret*), Copenhagen (17/01/2017)

**EL SALVADOR**

Chief Judge Alex David MARROQUIN MARTINEZ, Judge of the Family Court of Appeal for Children and Adolescents, San Salvador (31/01/2017)

Judge María de los Ángeles FIGUEROA MELÉNDEZ, Judge of First Instance for Children and Adolescents, San Salvador (31/01/2017)

**FIJI**

The Honourable Madam Justice Anjala WATI, Family Court of Fiji, Suva (09/08/2017)

The Honourable Mr Justice Sunil SHARMA, High Court of Fiji, Lautoka (09/08/2017)

**FINLAND**

Justice Heli SANKARI, Judge of the Court of Appeal Helsinki Court of Appeal, Helsinki (03/10/2017)

**FRANCE**

Judge Dominique SALVARY, Judge at the Court of Appeal of Paris, (*Conseillère à la Cour d'appel de Paris*), Paris (13/06/2017)

**GUINEA, REPUBLIC OF**

Judge N'Faly SYLLA, Magistrate, President of the Court for Children and Adolescents of Conakry, Conakry (16/02/2017)

**GUYANA**

Madam Chief Justice Yonette CUMMINGS-EDWARDS, Judge of the Court of Appeal, Supreme Court of Judicature of Guyana, Georgetown (18/07/2016)

Madam Justice Roxanne GEORGE, Judge of the High Court, Supreme Court of Judicature of Guyana, Georgetown (18/07/2016)

**HUNGARY**

Judge Adrienn VÁRAI-JEGES, Judge of the National Office for the Judiciary, Budapest (19/08/2015)

**IRELAND**

The Honourable Ms Justice Leonie REYNOLDS, The High Court, Dublin (22/01/2018)

**ISRAEL**

The Honourable Judge Zvi WEIZMAN, Central District Court of Lod, Lod (31/01/2018)

**ITALY**

Judge Daniela BACCHETTA, Judge, Department for Juvenile Justice, Ministry of Justice, Rome (24/10/2017)

**JAPAN**

Judge Hironori WANAMI, Director, Co-ordination Division, Personnel Affairs Bureau, General Secretariat, Supreme Court of Japan, Tokyo (27/05/2015)

Judge Yoshiaki ISHII, Director, Second Division, Family Bureau, General Secretariat, Supreme Court of Japan, Tokyo (27/05/2015)

Judge Tomoko SAWAMURA, Director, First Division, Family Bureau, General Secretariat, Supreme Court of Japan, Tokyo (27/04/2017)

**KAZAKHSTAN**

Judge Galiya AK-KUOVA, Supervisory Collegium for Civil and Administrative Cases, Supreme Court of Kazakhstan, Astana (18/09/2014)

**KOREA, REPUBLIC OF**

Judge Sungwoo KIM, Presiding Judge, Seoul Family Court, Seoul (12/08/2015)

Judge Sunmi LEE, Judge, Seoul Family Court, Seoul (27/09/2016)

**LATVIA**

Judge Viktors PRUDŅIKOVŠ, Riga City North District Court, Riga (14/08/2014)

**LITHUANIA**

Judge Gediminas SAGATYS, The Supreme Court of Lithuania, Civil Division, Vilnius (10/06/2016)

**MEXICO**

Mtro. José Roberto de Jesús TREVIÑO SOSA, Second Judge for the Oral Family Trials, First Judicial District of the State of Nuevo Leon (*Juez Segundo de Juicio Familiar Oral, Primer Distrito Judicial del Estado de Nuevo León*), Monterrey (16/11/2015)

**NETHERLANDS**For Aruba

Justice Mrs N. ENGELBRECHT, Court of First Instance of Aruba, Oranjestad (24/08/2016)

For Curaçao

Justice Mrs U.D.I. GIRIGORI-LUYDENS, Court of First Instance of Curaçao, Willemstad (24/08/2016)

For Sint Maarten

Justice M.J. DE KORT, Court of First Instance of Sint Maarten, Philipsburg (24/08/2016)

**NORWAY**

Judge Bjørn FEYLING, Olso District Court, Oslo (04/10/2016)

Judge Per GAMMELGÅRD, Oslo District Court, Oslo (04/10/2016)

#### **ORGANISATION OF EASTERN CARIBBEAN STATES (OECS)**

*(representing Anguilla, Antigua and Barbuda, the British Virgin Islands, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines)*

Justice Margaret PRICE-FINDLAY, Resident High Court Judge, Eastern Caribbean Supreme Court, St. Georges, Grenada (20/06/2014)

#### **PAKISTAN**

The Honourable Mr Justice Umar Ata BANDIAL, Judge, Supreme Court of Pakistan, Islamabad (22/12/2016)

The Honourable Mr Justice Faisal ARAB, Judge, Supreme Court of Pakistan, Islamabad (02/08/2017)

#### **PANAMA**

The Honourable Chief Judge Efrén C. TELLO C., Chief Judge of the Appeals Court for Children and Adolescents (*Magistrado, Presidente del Tribunal Superior de Niñez y Adolescencia*), Ancón, Panama City (03/05/2016)

Lic. Margarita CAMARGO, Judge, Court for Children and Adolescents of the Chiriquí Judicial Circuit (*Juez de Niñez y Adolescencia del Circuito Judicial de Chiriquí*), Chiriquí (03/05/2016)

#### **SERBIA**

The Honourable Judge Jelena BOGDANOVIĆ RUŽIĆ, Judge in the Higher Court in Belgrade, Belgrade (28/04/2015)

#### **SINGAPORE**

The Honorable Justice Debbie ONG, Judge of the Supreme Court of Singapore; Presiding Judge, Family Justice Courts, Singapore (13/09/2017)

#### **SLOVENIA**

Judge Nadja MAROLT, District Court Judge, District Court of Ljubljana, Ljubljana (22/12/2015)

#### **SOUTH AFRICA**

The Honourable Justice Baratang Constance MOCUMIE, Free State High Court, Bloemfontein (05/08/2014)

#### **SRI LANKA**

The Honorable Justice Kankani Tantri CHITRASIRI, Judge of the Supreme Court of Sri Lanka, Colombo (15/07/2015)

#### **SURINAME**

Madam Justice Marie METTENDAF, Member of the Court of Justice, Court of Justice of Suriname, Paramaribo (18/07/2016)

Madam Justice Sieglie WIJNHARD, Member of the Court of Justice, Court of Justice of Suriname, Paramaribo (18/07/2016)

#### **SWEDEN**

The Honourable Judge Lena CARLBERG JOHANSSON, Stockholm District Court (*Stockholms Tingsrätt*), Stockholm (07/12/2017)

#### **THAILAND**

The Honourable Chief Judge Supat YOOTHANOM, Central Juvenile and Family Court, Bangkok (14/10/2014)

#### **TURKEY**

Dr. Süleyman MORTAŞ, Judge at the Supreme Court of Turkey, Ankara (26/09/2014)

Mr Yetkin ERGÜN, Judge, representative of the Central Authority for Turkey designated under the Hague 1980 Child Abduction Convention, General Directorate International Law & Foreign Relations, Ministry of Justice, Ankara (22/08/2016)

#### **UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

##### *For England and Wales*

The Honourable Mr Justice Alistair MACDONALD, Judge of the Family Division, Royal Courts of Justice, London (13/11/2017)

##### *For Northern Ireland*

The Honourable Mr Justice John O'HARA, The Royal Courts of Justice, Belfast (30/09/2014)

##### *For Scotland*

The Honourable Lady Morag WISE, Senator of the College of Justice, Outer House, Court of Session and the High Court of Justiciary, The Supreme Courts, Edinburgh (24/03/2016)

##### *For British Overseas Territories*

##### *Bermuda*

The Honourable Mrs Justice Nicole STONEHAM, Puisne Judge, Supreme Court of Bermuda, Hamilton (04/07/2016)

**UNITED STATES OF AMERICA**

The Honourable Hiram PUIG-LUGO, Presiding Judge of the Family Court, Superior Court of the District of Columbia, Washington, D.C. (31/07/2015)

**VENEZUELA**

Chief Judge Maryorie CALDERÓN GUERRERO, Presiding Judge of the Appellate Division for Social Matters and Co-ordinating Judge for the Judicial Circuit of Child Protection, Children and Adolescents (*Presidenta de la Sala de Casación Social y Coordinadora de la Jurisdicción de Protección de Niños, Niñas y Adolescentes, Tribunal Supremo de Justicia*), Caracas (14/07/2015)

Judge Rosa Isabel REYES REBOLLEDO, Superior Court Judge and Co-ordinating Judge for the Judicial Circuit of Child Protection, Children and Adolescents of the Judicial District of the Caracas Metropolitan Area and National Co-ordinating Judge of International Adoption (*Jueza Superiora y Coordinadora del Circuito Judicial de Protección de Niños, Niñas y Adolescentes del Área Metropolitana de Caracas y Nacional de Adopción Internacional*), Caracas (14/07/2015)

Judge Xiomara Josefina ESCALONA, Co-ordinating Judge for the Judicial Circuit of Child Protection, Children and Adolescents of the Judicial District of the state of Carabobo (*Jueza Coordinadora del Circuito Judicial de Protección de Niños, Niñas y Adolescentes del Estado Carabobo*) (14/07/2015)

Judge Carlos Guillermo ESPINOZA RONDÓN, Co-ordinating Judge for the Judicial Circuit of Child Protection, Children and Adolescents of the Judicial District of the state of Anzoátegui (*Juez Coordinador del Circuito Judicial de Protección de Niños, Niñas y Adolescentes del Estado Anzoátegui*) (14/07/2015)

Judge Douglas Arnoldo MONTOYA GUERRERO, Superior Court Judge and Co-ordinating Judge for the Judicial Circuit of Child Protection, Children and Adolescents of the Judicial District of the state of Mérida (*Juez Superior y Coordinador del Circuito Judicial de Protección de Niños, Niñas y Adolescentes del Estado Mérida*) (14/07/2015)

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45 The full list of members of the International Hague Network of Judges is available on the website of the HCCH ([www.hcch.net](http://www.hcch.net)) under "Child Abduction Section" then "Members of the International Hague Network of Judges".



## 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Entry into force: 1-XII-1983

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### Members of the Organisation

#### Albania

Albania - Central Authority

Ministry of Justice  
Department of Jurisdictional Foreign Relations  
Blvd "ZOG i I-rë"  
TIRANA  
Albania  
Tel.: +355 4 2259-390/91 Ext: 71114  
Tel.: +355 4 2228359  
Fax: +355 4 2234560  
E-mail: [foreigndepart@drejtesia.gov.al](mailto:foreigndepart@drejtesia.gov.al)  
Internet: [www.drejtesia.gov.al](http://www.drejtesia.gov.al)

Contact Person:  
Odeta Fengjilli  
Head of Department  
E-mail: [odeta.thengjilli@drejtesia.gov.al](mailto:odeta.thengjilli@drejtesia.gov.al)  
Tel.: +355 42221554

(This page was last updated on 22 March 2017)

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#### Andorra

Andorra - Central Authority

Ministry of Social Affairs, Justice and Interior  
International Relations & Legal Cooperation  
Department of Justice and Interior  
Carretera de l'Obac s/n  
AD700 Escaldes-Engordany  
Principality of Andorra

Contact person:

- Ms, Patricia Quillacq  
Head of Section  
E-mail: [patricia\\_quillacq@govern.ad](mailto:patricia_quillacq@govern.ad)

(This page was last updated on 7 April 2017)

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#### Argentina

Argentina - Central Authority

Ministry of Foreign Affairs and Worship  
International Legal Assistance Department  
Office of the Legal Adviser  
Esmeralda 1212 - 4th floor - Of. 402  
1007 BUENOS AIRES  
Argentina

Telephone number: +54 (11) 4819 7385  
Fax: +54 (11) 4819 7353  
URL: <http://www.menores.gov.ar/>  
e-mail address: [menores@mrecic.gov.ar](mailto:menores@mrecic.gov.ar)

Personnes à contacter / Contact persons:

- Amb. Horacio A. BASABE  
Director of the International Legal Assistance Department  
(langues de communication / languages of communication: espagnol, anglais / Spanish, English)
- Ana GRANILLO  
(langues de communication / languages of communication: anglais, espagnol / English, Spanish)
- Florencia CASTRO  
(langues de communication / languages of communication: anglais, espagnol / English, Spanish)
- Yago Marcelo AUCEJO  
(langues de communication / languages of communication: portugais, espagnol / Portuguese, Spanish)
- María Isabel RUA  
(langues de communication / languages of communication: espagnol / Spanish)

(This page was last updated on 1 April 2016)

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## Armenia

Armenia - Central Authority

Ministry of Justice of the Republic of Armenia  
Agency of Civil Status Acts Registration  
Vazgen Sargsyan 3/8  
YEREVAN 0010  
Republic of Armenia

Contact persons:

- Ms Ani Mkhitarian  
Head of the Agency of Civil Status Acts Registration  
Tel.: +374 10 594 185, +374 93 426 066  
E-mail: [ani.mkhitarian@moj.am](mailto:ani.mkhitarian@moj.am); [animkhitarian.agency@gmail.com](mailto:animkhitarian.agency@gmail.com)

(This page was last updated on 16 May 2017)

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## Australia

Australia - Central Authority

POUR LE COMMONWEALTH CENTRAL AUTHORITY/FOR THE COMMONWEALTH CENTRAL AUTHORITY\*

The Director  
International Family Law Section  
Access to Justice Division  
Commonwealth Attorney-General's Department  
3-5 National Circuit  
BARTON, ACT 2600  
Australia  
numéro de téléphone/telephone number: +61 (2) 6141 3100 or 1800 100 480  
numéro de télécopie/telefax number: +61 (2) 6141 3246  
Email: [australiancentralauthority@ag.gov.au](mailto:australiancentralauthority@ag.gov.au)  
Internet: [www.ag.gov.au/childabduction](http://www.ag.gov.au/childabduction)

personne à contacter / person to contact:

- Tracy Ballantyne  
Director  
Tel: +61 (2) 6141 3110  
Fax: +61 (2) 6141 3246
- Ms Tamsyn Harvey  
Assistant Secretary  
Family Law Branch  
Tel: +61 (2) 6141 3110  
Fax: +61 (2) 6141 3246

\* Note: The Convention extends to the legal system applicable only in the Australian States and mainland Territories. Some Australian State and Territory agencies have been appointed to carry out some functions under the Convention but are not authorised to receive or transmit applications. Communications should be sent in the first instance to the Attorney-General's Department.

POUR L'ÉTAT DE QUEENSLAND/FOR THE STATE OF QUEENSLAND

Department of Communities, Child Safety and Disability Services  
Legal Services  
GPO Box 806  
BRISBANE Qld 4001  
Attention: Ms Helen Tooth  
adresse e-mail/e-mail address: [QLDCentralAuthority@communities.qld.gov.au](mailto:QLDCentralAuthority@communities.qld.gov.au)

POUR L'ÉTAT DU NORTHERN TERRITORY/FOR THE NORTHERN TERRITORY

Department of the Attorney General and Justice  
Child Protection and Community Services Team  
GPO Box 1722  
DARWIN NT 0801  
Attention: Ms Gabby Brown

POUR L'ÉTAT DE VICTORIA/FOR THE STATE OF VICTORIA

Department of Human Services  
Legal Services  
GPO Box 4057  
MELBOURNE VIC 3000  
Attention: Director, Legal Services

POUR L'ÉTAT DE NEW SOUTH WALES/FOR THE STATE OF NEW SOUTH WALES

Department of Family and Community Services  
Child Law and General Litigation  
Locked Bag 4028  
ASHFIELD NSW 2131  
Attention: General Counsel  
E-mail: [FACS.LegalInbox@facs.nsw.gov.au](mailto:FACS.LegalInbox@facs.nsw.gov.au)

POUR L'ÉTAT DE TASMANIE/FOR THE STATE OF TASMANIA

Department of Health and Human Services  
GPO Box 125  
HOBART TAS 7001  
Attention: Mr Bruce Kemp

POUR L'ÉTAT DE WESTERN AUSTRALIA/FOR THE STATE OF WESTERN AUSTRALIA

Western Australian Commissioner of Police  
Missing Persons Bureau  
Major Crime Squad  
Hatch Building

144 Stirling Street  
PERTH WA 6000

POUR L'ÉTAT DE SOUTH AUSTRALIA/FOR THE STATE OF SOUTH AUSTRALIA

The Commissioner of Police  
South Australian Police Department  
GPO Box 1539  
ADELAIDE SA 5001  
Attention: Officer in Charge, Major Crime Investigation Branch

POUR LE AUSTRALIAN CAPITAL TERRITORY/FOR THE AUSTRALIAN CAPITAL TERRITORY

Community Services Directorate  
Legal Services, Care and Protection Services  
GPO Box 817  
CANBERRA ACT 2601  
Attention: Ms Philiuppa Spence

(This page was last updated on 3 February 2017)

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## Austria

Austria - Central Authority

Federal Ministry of Justice  
Museumstraße 7  
1070 Vienna  
Austria  
Telephone number: +43 1 521 52-0  
Telefax number: +43 1 521 52-2829  
E-mail Address: [team.z@bmj.gv.at](mailto:team.z@bmj.gv.at) (preferred method of communication)  
Website: [www.bmj.gv.at](http://www.bmj.gv.at)  
Languages of communication: German, English, French

Contact persons:

- Mr Robert Fucik
- Ms Vanessa Eriksson
- Ms Caroline Mokrejs
- Mr Angelo Rosenberg

(This page was last updated on 4 January 2016)

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## Belarus

Belarus - Central Authority

Ministry of Justice of the Republic of Belarus  
International Cooperation Department  
ul. Kollektornaya 10  
220004 MINSK  
Belarus

tel./fax: +375 17 211 01 85, +375 17 211 02 01  
e-mail: [kanc@minjust.by](mailto:kanc@minjust.by)  
website: [www.minjust.gov.by](http://www.minjust.gov.by)

Contact person:

Ms Anastasiya Kudyrko  
(languages of communication: Belarusian, Russian, English, German)

e-mail: [omd@minjust.by](mailto:omd@minjust.by); [icd@minjust.by](mailto:icd@minjust.by)

N.B. Belarus having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Belarus and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 20 February 2018)

## Belgium

Belgium - Central Authority

Service Public Fédéral Justice (Federale Overheidsdienst Justitie)

Direction générale Législation, des Libertés et Droits fondamentaux(Directoraat-generaal Wetgeving, Fundamentele Rechten en Vrijheden)

Service de Coopération internationale civile (Dienst Internationale Samenwerking in burgerlijke zaken)

Autorité centrale Coopération internationale civile (Centrale autoriteit internationale samenwerking in burgerlijke zaken)

Boulevard de Waterloo 115 (Waterloolaan 115)

B- 1000 BRUXELLES (BRUSSEL)

Numéro de téléphone/ telephone number : + 32 (2) 542 67 00

Numéro de télécopie/telefax number : + 32 (2) 542 70 06

e-mail : [rapt-parental@just.fgov.be](mailto:rapt-parental@just.fgov.be) / [kinderontvoering@just.fgov.be](mailto:kinderontvoering@just.fgov.be) /\* \*/

Website: [French](#) | [Dutch](#)

Important remark: Before submitting any translations, please contact the Central Authority for more information about the language requirements in individual cases.

persons to contact:

- Mme Karlijne VAN BREE  
Attaché (juriste)  
(néerlandais, anglais, français/Dutch, English, French)  
Tel. : + 32 (2) 542 65 95
- Mme Mailys MACHIELS  
Attaché (juriste)  
(français, anglais/French, English)  
Tel. : + 32 (2) 542 6719
- Mme Olfa BENIOUCEF  
Attaché (juriste)  
(français, anglais/French, English)  
Tel. : + 32 (2) 542 68 94
- Mme Vesselina ARAPTCHEVA  
Attaché (juriste)  
(néerlandais, anglais, français, bulgare /Dutch, English, French, Bulgarian)  
Tel. : + 32 (2) 542 65 88

(This page was last updated on 6 July 2017)

## Bosnia and Herzegovina

Bosnia and Herzegovina - Central Authority

Ministry of Justice of Bosnia and Herzegovina

Trg Bosne i Hercegovine 1

Tel.: +387 33 281 555

Fax: +387 33 201 653

Internet: [www.mpr.gov.ba](http://www.mpr.gov.ba)

Language of communication: English

Contact persons:

- Ms Olga Lucic-Radic, Head of Section for International Legal Aid in Civil Matters e-mail: [olga.lucic.radic@mpr.gov.ba](mailto:olga.lucic.radic@mpr.gov.ba)  
tel.: +387 33 281 582
- Mrs Teuta Žubi-Bakovic, Expert Advisor e-mail: [teuta.zubi-bakovic@mpr.gov.ba](mailto:teuta.zubi-bakovic@mpr.gov.ba)  
tel.: +387 33 281 571

(This page was last updated on 24 April 2014)

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## Brazil

Brazil - Central Authority

Brazilian Central Authority  
Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional  
Secretaria Nacional de Justiça  
Ministério da Justiça e Segurança Pública  
SCN Quadra 06, Bloco A, 2° andar - Shopping ID  
Brasília/DF, Brazil CEP: 70297-400  
Tel.: +55 (61) 2025-7672  
Internet: <http://www.justica.gov.br/sua-protacao/cooperacao-internacional/acaf>  
E-mail: [acaf@mj.gov.br](mailto:acaf@mj.gov.br)

Personnes à contacter / persons to contact:

- Mrs Natalia Camba MARTINS  
Head of Central Authority  
(languages of communication: Portuguese, English, Spanish and French)
- Ms Lalisa Froeder DITTRICH  
Deputy Head of Central Authority – Coordinator of the International Child Abduction Division  
(languages of communication: Portuguese, English)
- Mr Gabriel VERA  
Case Officer  
(languages of communication: Portuguese, English, Spanish)
- Mr Rodrigo RODRIGUES  
Case Officer  
(languages of communication: Portuguese, English)
- Ms Marcela NOMAN  
Case Officer  
(languages of communication: Portuguese, English)
- Ms Lucicleia ROLLEMBERG  
Case Officer  
(languages of communication: Portuguese, Spanish)

Please note that since 1 August 2015 the Central Authority of Brazil receives applications and communications preferably by e-mail (no hard copies needed) to [acaf@mj.gov.br](mailto:acaf@mj.gov.br). In case the file is too large, regular mail can be used.

(This page was last updated on 25 October 2017)

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## Bulgaria

Bulgaria - Central Authority

The Ministry of Justice  
Legal Child Support Department  
Central Authority of the Republic of Bulgaria  
1, Slavyanska Street  
1040 SOFIA  
numéro de téléphone/telephone number: +359 (2) 923 7302  
numéro de télécopie/telefax number: +359 (2) 987 1557  
Internet: [www.mjeli.government.bg](http://www.mjeli.government.bg)

Personnes à contacter / persons to contact:



- Mme Elina Georgieva  
Chef du Département de la protection juridique internationale des enfants/  
Head of International Legal Child Support Department  
(langues de communication / languages of communication: français, russe / French, Russian)  
Email: [elina.georgieva@justice.government.bg](mailto:elina.georgieva@justice.government.bg)
- Mrs Lestalina Chernogorova  
Senior expert  
(langue de communication / language of communication: anglais / English)  
Email: [L\\_Chernogorova@justice.government.bg](mailto:L_Chernogorova@justice.government.bg)
- Mrs Maria Gencheva  
State expert  
(langue de communication / language of communication: anglais / English)  
E-mail: [M\\_Gencheva@justice.government.bg](mailto:M_Gencheva@justice.government.bg)

(This page was last updated on 30 January 2015)

## Burkina Faso

Burkina Faso - Central Authority

Ministère de la Femme de la Solidarité Nationale et de la Famille

01 BP 515

OUAGADOUGOU 01

Burkina Faso

Numéro de téléphone (tous service)/Telephone number : +226 25 33 53 90

Numéro de téléphone (secrétariat particulier)/Telephone number : +226 2530 6875

Numéro de télécopie/Telefax number : + 226 5031 6157

Courriel/E-mail : [laure.hien@gmail.com](mailto:laure.hien@gmail.com)

Personne à contacter/contact person :

- Madame Laure ZONGO/HIEN  
Ministre de la Femme, de la Solidarité Nationale et de la Famille  
(langue de communication / language of communication : français / French)

N.B. Burkina Faso having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Burkina Faso and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 21 November 2016)

## Canada

Canada - Central Authority

POUR LE GOUVERNEMENT FÉDÉRAL / FOR THE FEDERAL GOVERNMENT

Minister of Justice and Attorney General of Canada as represented by:

Justice Legal Services (JUS)

Global Affairs Canada

125 Sussex Drive, Tower C, 6th Floor

OTTAWA, Ontario

Canada

K1A 0G2

numéro de téléphone/telephone number: +1 (343) 203 2526

numéro de télécopie/telefax number: +1 (613) 944 0722

Personne à contacter / person to contact:

- Ms Sandra Zed Finless  
Senior Counsel and Federal Representative for the Hague Convention on the Civil Aspects of International

Child Abduction

tel.: +1 (343) 203 2526

e-mail: [sandra.zedfinless@international.gc.ca](mailto:sandra.zedfinless@international.gc.ca)

## POUR LA PROVINCE DE L'ALBERTA / FOR THE PROVINCE OF ALBERTA

Edmonton Office:

Alberta Justice

Central Authority for the Hague Convention

International Child Abduction

13th Floor Oxford Tower

10025-102A Avenue

Edmonton, Alberta Canada

T5J 2Z2

numéro de téléphone/telephone number: +1 (780) 415 1876

numéro de télécopie/telefax number: +1 (780) 427 5914

personne à contacter / person to contact:

- Ms Denise HARWARDT  
Barrister and Solicitor  
email: [denise.harwardt@gov.ab.ca](mailto:denise.harwardt@gov.ab.ca)

Calgary Office: \*

Department of Justice

Calgary Family Law

#1660, Standard Life Building

639 - 5th Avenue, S.W.

CALGARY, Alberta

Canada

T2P 0M9

numéro de téléphone/telephone number: +1 (403) 297 3360

numéro de télécopie/telefax number: +1 (403) 297 6381

personne à contacter / person to contact:

- Mr Jonathan M. NICHOLSON  
Section Head  
e-mail: [Jonathan.Nicholson@gov.ab.ca](mailto:Jonathan.Nicholson@gov.ab.ca)

\* The Calgary office will deal with matters which arise in the City of Calgary or south of that city, while the Edmonton office will deal with matters north of Calgary. To assist in establishing contact, the Section Head for Edmonton Family Law may be contacted, unless the person or authority requesting assistance knows that the child is in Calgary or south of Calgary. The two offices will be responsible for transferring a request, if necessary.

\* Le bureau de Calgary traitera les affaires qui émanent de la ville de Calgary ou du sud de cette ville, alors que le bureau d'Edmonton traitera les affaires émanant du nord de Calgary. Il est possible de s'adresser à la "Section Head for Edmonton Family Law" qui aidera à établir les contacts, à moins que la personne ou autorité demandant assistance sache que l'enfant se trouve à Calgary ou au sud de Calgary. Les deux bureaux auront la responsabilité du transfert de la requête, si nécessaire.

## POUR LA COLOMBIE-BRITANNIQUE / FOR BRITISH COLUMBIA

Ministry of Justice

Legal Services Branch

PO Box 9280, Stn. Prov. Gov't

1001 Douglas Street

VICTORIA, British Columbia

Canada

V8W 9J7

courriel / e-mail: [BCCentralAuthority@gov.bc.ca](mailto:BCCentralAuthority@gov.bc.ca)

numéro de télécopie / telefax number: +1 (250) 356 8992

personnes à contacter / persons to contact:

- Ms Jane Connell  
numéro de téléphone / phone number : +1 (250) 356-8433

- Ms Jillian Stewart  
numéro de téléphone / phone number : +1 (250) 356-8449

POUR LA PROVINCE DU MANITOBA / FOR THE PROVINCE OF MANITOBA

Department of Justice  
Family Law Branch  
1230 - 405 Broadway  
WINNIPEG, Manitoba  
Canada  
R3C 3L6  
numéro de téléphone/telephone number: +1 (204) 945 0268  
numéro de télécopie/telex number: +1 (204) 948 2004  
Email: [flb@gov.mb.ca](mailto:flb@gov.mb.ca)  
Internet: <http://www.gov.mb.ca/justice/family/law/index.html>

personne à contacter / person to contact:

- Ms Janet Sigurdson  
Crown Counsel  
Tel.: +1 (204) 945 2850  
e-mail: [Janet.Sigurdson@gov.mb.ca](mailto:Janet.Sigurdson@gov.mb.ca)

POUR LA PROVINCE DU NOUVEAU-BRUNSWICK / FOR THE PROVINCE OF NEW BRUNSWICK

Ms. Sonia DOIRON  
Family Crown  
Office of the Attorney General  
Family Crown Services  
14th Floor, Assumption Place  
770 Main Street, P.O. 5001  
MONCTON, New Brunswick  
Canada  
E1C 8R3  
Numéro de téléphone/telephone number: +1 (506) 856-2949  
Numéro de télécopie/telex number: +1 (506) 869-6148  
Adresse e-mail/e-mail address: [sonia.doiron@gnb.ca](mailto:sonia.doiron@gnb.ca)  
Moyen de communication privilégié/Preferred method of communication: by mail to receive the request for return and supporting information; by e-mail for all other communication  
Langues de communication/Languages of communication: français, anglais/French, English

POUR LA PROVINCE DE TERRE-NEUVE ET DU LABRADOR/FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR

Attorney General of Newfoundland and Labrador  
Department of Justice  
Confederation Building  
Prince Philip Drive  
4th Floor, East Block  
P.O. Box 8700  
ST JOHN'S, Newfoundland  
Canada  
A1B 4J6  
numéro de téléphone/telephone number: +1 (709) 729 1347  
numéro de télécopie/telex number: +1 (709) 729 5100

personne à contacter / person to contact:

- Ms Jacqueline Pelletier  
Manager – Family Litigation Unit  
e-mail: [jpelletier@gov.nl.ca](mailto:jpelletier@gov.nl.ca)

POUR LA PROVINCE DE LA NOUVELLE-ECOSSE/FOR THE PROVINCE OF NOVA SCOTIA

Nova Scotia Department of Justice  
Legal Services Division  
1690 Hollis Street, 9th Floor

P.O. Box 7  
HALIFAX, Nova Scotia  
Canada  
B3J 2L6  
numéro de téléphone/telephone number: +1 (902) 424 2343  
numéro de télécopie/telex number: +1 (902) 424 7158

personnes à contacter / persons to contact:

- Ms Megan Farquhar  
Senior Solicitor  
adresse e-mail/e-mail address: [megan.farquhar@novascotia.ca](mailto:megan.farquhar@novascotia.ca)

## POUR NUNAVUT / FOR NUNAVUT

Alexandre J. Blondin  
Department of Justice  
P.O. Box 1000, Stn. 540  
Iqaluit, Nunavut  
X0A 0H0  
numéro de téléphone/telephone number: +1 (867) 975 6354  
numéro de télécopie/telex number: +1 (867) 975 6349  
courriel/e-mail: [ablondin@gov.nu.ca](mailto:ablondin@gov.nu.ca)

## POUR LA PROVINCE DE L'ONTARIO / FOR THE PROVINCE OF ONTARIO

Ministry of the Attorney General  
Central Authority for Ontario  
P.O. Box 600  
Steeles West Post Office  
Toronto ON M3J 0K8  
Canada  
numéro de téléphone / telephone number: +1 416-240-2411  
numéro de télécopie / fax number: +1 416-240-2411  
Site web / Website: [http://www.attorneygeneral.jus.gov.on.ca/english/family/child\\_abduction/default.asp](http://www.attorneygeneral.jus.gov.on.ca/english/family/child_abduction/default.asp)

personnes à contacter / persons to contact:

- Jackie Manzon  
Case Manager  
e-mail: [jackie.manzon@ontario.ca](mailto:jackie.manzon@ontario.ca)
- Shane Foulds  
Counsel  
e-mail: [shane.foulds@ontario.ca](mailto:shane.foulds@ontario.ca)
- Caroline Brett  
Counsel  
e-mail: [caroline.brett@ontario.ca](mailto:caroline.brett@ontario.ca)
- Elizabeth Kay  
Counsel  
e-mail: [elizabeth.kay@ontario.ca](mailto:elizabeth.kay@ontario.ca)

## POUR LA PROVINCE DE L'ILE DU PRINCE-EDOUARD / FOR THE PROVINCE OF PRINCE EDWARD ISLAND

Central Authority for Prince Edward Island  
Department of Environment, Labour and Justice  
Family Law Centre  
1 Harbourside Access Road  
CHARLOTTETOWN, P.E.I.  
Canada  
C1A 7J8  
numéro de téléphone/telephone number: +1 (902) 368 4886  
numéro de télécopie/telex number: +1 (902) 368 6474

personne à contacter / person to contact:

- Ms Loretta Coady MacAulay  
Manager, Family Law Section  
e-mail: [llmacaulay@gov.pe.ca](mailto:llmacaulay@gov.pe.ca)

POUR LA PROVINCE DU QUÉBEC / FOR THE PROVINCE OF QUEBEC

Direction des services professionnels - Entraide internationale  
 Ministère de la Justice du Québec  
 1200, route de l'Église, 2e étage  
 QUÉBEC, Québec  
 Canada  
 G1V 4M1  
 numéro de téléphone/telephone number: +1 (418) 644 7153  
 numéro de télécopie/telex number: +1 (418) 528 9716  
 Internet: <http://www.justice.gouv.qc.ca/english/programmes/eie/eie-a.htm>

personnes à contacter / persons to contact:

- Mme France RÉMILLARD  
 (langues de communication / languages of communication: français, anglais / French, English)  
 numéro de téléphone/telephone number: +1 (418) 644 7153  
 numéro de télécopie/telex number: +1 (418) 528 9716  
 e-mail: [enlevement.enfant@justice.gouv.qc.ca](mailto:enlevement.enfant@justice.gouv.qc.ca)
- Mme Caroline BEAULAC (as backup)  
 (langues de communication / languages of communication: français, anglais / French, English)  
 Téléphone : +1 (418) 643 1427, poste 21601  
 Télécopieur : +1 (418) 528 9716  
 Courriel : [enlevement.enfant@justice.gouv.qc.ca](mailto:enlevement.enfant@justice.gouv.qc.ca)

POUR LA PROVINCE DE LA SASKATCHEWAN / FOR THE PROVINCE OF SASKATCHEWAN

Ministry of Justice  
 Strategic Initiatives and Program Support  
 310 – 1874 Scarth Street  
 REGINA, Saskatchewan  
 Canada  
 S4P 4B3  
 Numero de telephone/telephone number 1(306) 787-3481  
 Numero de telecopie/telex number: 1(306) 787-9008  
 Internet: <http://www.justice.gov.sk.ca/International-Child-Abduction-Act-1996>  
 Email: [Kim.Newsham@gov.sk.ca](mailto:Kim.Newsham@gov.sk.ca), [shelley.burwood2@gov.sk.ca](mailto:shelley.burwood2@gov.sk.ca)

personnes à contacter / persons to contact:

- Ms Kim NEWSHAM  
 Crown Solicitor  
 tel.: +1 (306) 787 5709
- Ms Shelley BURWOOD  
 Crown Solicitor  
 tel.: + 1 (306) 787-5518

POUR LES TERRITOIRES DU NORD-OUEST / FOR THE NORTHWEST TERRITORIES

Policy and Planning Division  
 Department of Justice  
 Government of the Northwest Territories  
 4903 - 49th Street  
 PO Box 1320  
 YELLOWKNIFE, Northwest Territories  
 Canada  
 X1A 2L9  
 numéro de téléphone/telephone number: +1 (867) 920-3006  
 numéro de télécopie/telex number: +1 (867) 873-0234

personne à contacter / person to contact:

- Mr Mike C. Reddy, Legal Counsel

POUR LE TERRITOIRE DU YUKON / FOR THE YUKON TERRITORY

Deputy Minister of Justice  
PO Box 2703  
WHITEHORSE, Yukon  
Canada  
Y1A 2C6  
numéro de téléphone/telephone number: +1 (867) 667 5856  
numéro de télex/telex number: 036-8260  
numéro de télécopie/telex number: +1 (867) 393 6379  
adresse e-mail/e-mail address: [marlaine.anderson-lindsay@gov.yk.ca](mailto:marlaine.anderson-lindsay@gov.yk.ca)

personne à contacter / person to contact:

- Marlaine Anderson-Lindsay

(This page was last updated on 29 March 2018)

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## Chile

Chile - Central Authority

Corporación de Asistencia Judicial de la Región Metropolitana  
Calle Agustinas 1419  
SANTIAGO DE CHILE  
Chile  
Tel./Fax: +56 (2) 937 1435  
courriel/e-mail: [internacional@cajmetro.cl](mailto:internacional@cajmetro.cl)  
Internet: [www.cajmetro.cl](http://www.cajmetro.cl)

personnes à contacter / persons to contact:

- Mr Alejandro Jiménez Mardones  
General Director  
email: [internacional@cajmetro.cl](mailto:internacional@cajmetro.cl)  
(langue de communication / language of communication: espagnol / Spanish)
- Miss Javiera VERDUGO TORO  
Abogado Jefe (s), Oficina Internacional  
(langues de communication / languages of communication: espagnol et anglais / Spanish and English)  
e-mail: [jverdugo@cajmetro.cl](mailto:jverdugo@cajmetro.cl)
- Ms. María Paz MARTIN COFRÉ  
Abogado Auxiliar, Oficina Internacional  
(langues de communication / languages of communication: espagnol, anglais / Spanish, English)  
email: [mpmartin@cajmetro.cl](mailto:mpmartin@cajmetro.cl)
- Ms. Fernanda SEPÚLVEDA GRASINS  
Abogado Auxiliar, Oficina Internacional  
(langues de communication / languages of communication: espagnol, anglais / Spanish, English)  
email: [fsepulveda@cajmetro.cl](mailto:fsepulveda@cajmetro.cl)

N.B. Chile having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Chile and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession." For further information, see status of the Convention.

(This page was last updated on 27 March 2018)

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## China, People's Republic of

China (Hong Kong) - Central Authority

Secretary for Justice of the Hong Kong Special Administrative Region  
c/o International Law Division  
(Mutual Legal Assistance Unit)  
Department of Justice  
7/F, Main Wing  
Justice Place,  
18 Lower Albert Road,



Central,  
 Hong Kong, China  
 Telephone number: -  
 Telefax number: +852 3918 4792 / +852 3918 4793  
 E-mail address: [childabduct@doj.gov.hk](mailto:childabduct@doj.gov.hk)  
 website: <http://www.doj.gov.hk/childabduct/>

Persons to contact:

Mr Wayne WALSH, SC  
 Deputy Law Officer  
 (language of communication: English)  
 Tel.: +852 3918 4766

Ms Susana SIT  
 Deputy Principal Government Counsel  
 (language of communication: Chinese, English)  
 Tel.: +852 3918 4774

Ms Yasmin MAHOMED  
 Senior Government Counsel  
 (language of communication: English)  
 Tel.: +852 3918 4760

Ms Cathy SZETO  
 Senior Government Counsel  
 (language of communication: Chinese, English)  
 Tel.: +852 3918 4757

(This page was last updated on 31 March 2017)

China (Macao) - Central Authority

Instituto de Acção Social (Social Welfare Bureau)  
 Estrada do Cemitério, No 6  
 Macau  
 People's Republic of China  
 telephone: +853 2826 7878  
 fax: +853 2855 9529  
 e-mail: [psec@ias.gov.mo](mailto:psec@ias.gov.mo)  
 Internet: [www.ias.gov.mo](http://www.ias.gov.mo)

Person to contact:

- Ms Celeste, Vong Yim Mui  
 Director of the Social Welfare Bureau  
 (languages of communication: Chinese and Portuguese preferred, English)

(This page was last updated on 18 July 2016)

## Costa Rica

Costa Rica - Central Authority

Patronato Nacional de la Infancia (PANI)  
 400 metros sur de esquina suroeste de la Corte Suprema de Justicia  
 Calle 21, Avenida 12 B  
 SAN JOSÉ  
 Costa Rica  
 Apartado Postal  
 5000-1000  
 Telephone numbers: +506 2523-0736 / +506 2523-0714  
 Telefax number: +506 2558-1494  
 Email: [asesoria@pani.go.cr](mailto:asesoria@pani.go.cr)  
 Contact person:

- Sr. Cristian Carvajal Coto, Coordinador Asesoría Jurídica (email: [ccarvajal@pani.go.cr](mailto:ccarvajal@pani.go.cr))

N.B. Costa Rica having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Costa Rica and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 17 September 2014)

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## Croatia

Croatia - Central Authority

Ministry for Demography, Family, Youth and Social Policy

Trg Nevenke Topalusic 1

10 000 Zagreb

Republic of Croatia

numéro de téléphone/telephone number: +385 (1) 555 7111

numéro de télécopie/telex number: +385 (1) 555 7222

adresse e-mail/e-mail address: [ministarstvo@mdomsp.hr](mailto:ministarstvo@mdomsp.hr)

Personnes à contacter / contact persons:

- Ms Jasna Palic Babic, Head of the Service for International Cooperation in the field of Protection of Children and Coordination of Social Security  
Telephone: + 385 1 555 7125  
E-mail: [Jasna.Palic.Babic@mdomsp.hr](mailto:Jasna.Palic.Babic@mdomsp.hr)  
Languages of communication: Croatian, English
- Ms Suncica Loncar, Senior advisor - specialist  
Telephone: + 385 1 555 7351  
E-mail: [Suncica.Loncar@mdomsp.hr](mailto:Suncica.Loncar@mdomsp.hr)  
Languages of communication: Croatian, English

The authority designated to serve the Central Authority under the Convention:

Ministry of Justice

Ulica grada Vukovara 49

10 000 Zagreb

Republic of Croatia

tel.: +385 (1) 371 4000

telefax: +385 (1) 371 4507

(This page was last updated on 27 March 2017)

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## Cyprus

Cyprus - Central Authority

Ministry of Justice and Public Order

International Legal Cooperation Unit

125 Athalassas Avenue

1461 NICOSIA

Cyprus

numéros de téléphone/telephone numbers: +357 (22) 805 928 / 932

numéro de télécopie/telex number: +357 (22) 518 328 / 356

adresse e-mail/e-mail address: [registry@mjpo.gov.cy](mailto:registry@mjpo.gov.cy)

website of the Central Authority: [www.mjpo.gov.cy](http://www.mjpo.gov.cy)

(langues de communication / languages of communication: grec, anglais / Greek, English)

Personnes à contacter / Contact persons:

- Mr Andreas K. Kyriakides  
Administrative Officer  
Email: [akyriakides@papd.mof.gov.cy](mailto:akyriakides@papd.mof.gov.cy)

- Ms Troodia Dionysiou  
Administrative Officer  
Email: [tdionysiou@mjpo.gov.cy](mailto:tdionysiou@mjpo.gov.cy)

N.B. Cyprus having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Cyprus and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 25 November 2013)

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## Czech Republic

Czech Republic - Central Authority

Úrad pro mezinárodne právni ochranu detí  
(Office for International Legal Protection of Children)  
Silingrovo namestí 3/4  
60200 BRNO  
Czech Republic  
tel.: +420 (5) 4221 5522  
fax: +420 (5) 4221 2836  
Internet: [www.umpod.cz](http://www.umpod.cz)

persons to contact:

- Mr Zdenek KAPITÁN  
Director  
(langues de communication / languages of communication: allemand, anglais / German, English)  
e-mail: [podatelna@umpod.cz](mailto:podatelna@umpod.cz)
- Mrs Markéta NOVÁKOVÁ  
Deputy Director  
(langues de communication / languages of communication: allemand, anglais / German, English)  
E-mail: [podatelna@umpod.cz](mailto:podatelna@umpod.cz)

(This page was last updated on 17 January 2011)

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## Denmark

Denmark - Central Authority

The Ministry for Children and Social Affairs  
Holmens Kanal 22  
DK - 1060 COPENHAGEN K  
Telephone: +45 33 92 93 00  
Email: [sm@sm.dk](mailto:sm@sm.dk) or [familieret@sm.dk](mailto:familieret@sm.dk)  
Internet: <http://www.boernebortfoerelse.dk/>  
Preferred method of communication: E-mail

The Ministry of Social Affairs and the Interior has also been designated as the Central Authority for Greenland.

Contact persons:

- Ms Kristine Kirkegaard, Head of Section  
Tel. + 45 41 85 11 97  
Email: [krkk@sm.dk](mailto:krkk@sm.dk)  
Languages of communication: Danish and English
- Ms Sofie Bøge, Head of Section  
Tel. + 45 41 85 13 37  
Email: [sofb@sm.dk](mailto:sofb@sm.dk)  
Languages of communication: Danish and English

- Ms Christine Hulthin Efland, Head of Section  
Tel. + 45 41 85 10 58  
Email: [chue@sm.dk](mailto:chue@sm.dk)  
Languages of communication: Danish and English
- Ms Katrine Caroline Andersson, Head of Section  
Tel. + 45 41 85 14 21  
Email: [kaca@sm.dk](mailto:kaca@sm.dk)  
Languages of communication: Danish and English
- Mr Christian Christensen, Head of Section  
Tel. + 45 41 85 10 98  
Email: [ccen@sm.dk](mailto:ccen@sm.dk)  
Languages of communication: Danish and English

Note: The Convention does not apply to the territories of the Faroe Islands.

(This page was last updated on 11 April 2018)

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## Ecuador

Ecuador - Central Authority

Dirección de Autoridad Central  
Subsecretaria de Derechos Humanos y Cultos  
Ministerio de Justicia, Derechos Humanos y Cultos  
Dirección: Av. 12 de octubre N24-41 entre Calle Wilson y Calle Foch, 2do piso  
Quito  
Ecuador

Personne à contacter/contact person:

- María José Chávez Naranjo, Directora de Autoridad Central  
E-mail: [chavezm@minjusticia.gob.ec](mailto:chavezm@minjusticia.gob.ec)  
Tel.: +593 2 395-5840 ext. 888
- Juan Carlos Hinojosa, Dirección de Autoridad Central  
E-mail: [hinojosaj@minjusticia.gob.ec](mailto:hinojosaj@minjusticia.gob.ec)  
Tel.: +593 2 395-5840 ext. 890

(This page was last updated on 23 November 2017)

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## Estonia

Estonia - Central Authority

Ministry of Justice  
Suur-Ameerika 1,  
15006 Tallinn  
Estonia  
tel.: +372 620 8100  
fax: +372 620 8109  
email: [central.authority@just.ee](mailto:central.authority@just.ee)  
general website: [www.just.ee](http://www.just.ee)

Contact person / Personne à contacter :

- Ms Anastasia ANTONOVA, Adviser  
International Judicial Co-operation Unit  
Ministry of Justice  
tel.: +372 620 8183  
e-mail: [central.authority@just.ee](mailto:central.authority@just.ee)  
contact languages: Estonian, English, Russian.

N.B. Estonia having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Estonia and such Contracting States as have declared their acceptance of the

accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 22 August 2017)

## Finland

Finland - Central Authority

Ministry of Justice  
 Unit for International Judicial Administration  
 Eteläesplanadi 10  
 00130 HELSINKI  
 Postal address: PO Box 25  
 00023 GOVERNMENT  
 Finland  
 numéro de téléphone/telephone number: +358 (9) 1606 7628  
 numéro de télécopie/telex number: +358 (9) 1606 7524  
 adresse e-mail/e-mail address: [central.authority@om.fi](mailto:central.authority@om.fi)  
 Internet: [www.om.fi/en/Etusivu/Perussaannoksia/Kvoikeusapu/Siviiliasiat/Lapsikaappaus](http://www.om.fi/en/Etusivu/Perussaannoksia/Kvoikeusapu/Siviiliasiat/Lapsikaappaus)

Translation of the Finnish Act on Child Custody and Rights of  
 Access: <http://www.finlex.fi/fi/laki/kaannokset/1983/en19830361>

A booklet providing basic information to parents and intended as a guide to Finnish authorities in cases of international child abduction, has been prepared in co-operation between the Ministry for Foreign Affairs, the Ministry of Justice, the Ministry of Social Affairs and Health, and the Association for Abducted Children in December 2000: [Booklet on International Child Abduction](#) (in Finnish, Swedish, English, French and Russian. The French and Russian versions are short versions).

personnes à contacter / persons to contact:

- Ms Tuuli Kainulainen  
 Legal Adviser  
 (langues de communication / languages of communication: anglais, finnois, estonien / English, Finnish, Estonian)  
 tel.: +358 29 5150 474
- Ms Maija Leppä  
 Legal Adviser  
 (langues de communication / languages of communication: anglais, finnois, suédois, allemand / English, Finnish, Swedish, German)  
 tel.: +358 29 5150 386
- Ms Merja Norros  
 Ministerial Counsellor  
 (langues de communication / languages of communication: anglais, finnois, russe / English, Finnish, Russian)  
 Tel. +358 29 5150 590

Preferred method of communication: by email.

(This page was last updated on 19 March 2014)

## Former Yugoslav Republic of Macedonia

the former Yugoslav Republic of Macedonia - Central Authority

Ministère du Travail et de la Politique Sociale / Ministry of Labour and Social Policy  
 Rue Dame Gruev No 14  
 1000 SKOPJE  
 République de Macédoine

personnes à contacter/contact persons:

1. Elka Todorova  
 Advisor

[etodorova@mtsp.gov.mk](mailto:etodorova@mtsp.gov.mk)

Telephone No. +3802 3106 376

2. Shpresa Saidi

Advisor

[ssaidi@mtsp.gov.mk](mailto:ssaidi@mtsp.gov.mk)

Telephone No. +3802 3106 376

3. Marija Shikova

Junior associate

[mshikova@mtsp.gov.mk](mailto:mshikova@mtsp.gov.mk)

Telephone No. +3802 3106 376

(This page was last updated on 15 August 2017)

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## France

France - Central Authority

Ministère de la Justice

Direction des Affaires Civiles et du Sceau

Bureau du droit de l'Union, du droit international privé et de l'entraide civile (BDIP)

13, Place Vendôme

75042 PARIS Cedex 01

France

numéro de téléphone/telephone number: +33 (1) 44 77 61 05

numéro de télécopie/telefax number: +33 (1) 4477 6122

messagerie/E-mail : [entraide-civile-internationale@justice.gouv.fr](mailto:entraide-civile-internationale@justice.gouv.fr)

Site web : <http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/>

Moyen de communication à privilégier/Preferred method of communication: courriel/email

personne à contacter / person to contact:

- Mme Christelle Hilpert  
(langues de communication / languages of communication: français, anglais / French, English)  
Email: [christelle.hilpert@justice.gouv.fr](mailto:christelle.hilpert@justice.gouv.fr)

Note: La Convention s'applique à l'ensemble du territoire de la République Française.

The Convention extends to the whole of the territory of the French Republic.

(This page was last updated on 8 December 2015)

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## Georgia

Georgia - Central Authority

Ministry of Justice of Georgia

Department of Public International Law

24a Gorgasali St.

0114 TBILISI

Georgia

working hours of the Ministry of Justice: 09:00 am till 6:00 pm (lunch: 1:00 to 2:00 pm)

Internet: <http://www.justice.gov.ge/Ministry/Index/302>

personnes à contacter / persons to contact:

- Ms. Ketevan Sarajishvili  
Head of Public International Law Department  
Email: [ksarajishvili@justice.gov.ge](mailto:ksarajishvili@justice.gov.ge)
- Ms. Teona Phiranishvili  
Senior Specialist of Public International Law Department  
Email: [tphiranishvili@justice.gov.ge](mailto:tphiranishvili@justice.gov.ge)  
Tel.: +995 322 40 57 82

N.B. Georgia having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Georgia and such Contracting States as have declared their acceptance of the



accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 26 March 2018)

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## Germany

Germany - Central Authority

Bundesamt für Justiz  
Zentrale Behörde  
53094 BONN  
Germany

tel.: +49 (228) 99 410 5212

fax: +49 (228) 99 410 5401

e-mail: [int.sorgerecht@bfj.bund.de](mailto:int.sorgerecht@bfj.bund.de)

website: [www.bundesjustizamt.de/sorgerecht](http://www.bundesjustizamt.de/sorgerecht) and [www.bundesjustizamt.de/custody-conflicts](http://www.bundesjustizamt.de/custody-conflicts)

(This page was last updated on 16 December 2009)

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## Greece

Greece - Central Authority

Hellenic Ministry of Justice, Transparency & Human Rights  
Directorate of Legislative Work, International Legal Relations and International Judicial Cooperation  
Department of International Judicial Cooperation in Civil and Criminal Cases  
96 Mesogeion Av.

Athens 11527

Greece

numéro de téléphone/telephone number: +30 (210) 776 7312, +30 (210) 776 7480

numéro de télécopie/telefax number: +30 (210) 776 7499

adresse e-mail/e-mail address: [kpapanikolaou@justice.gov.gr](mailto:kpapanikolaou@justice.gov.gr), [kzaharaki@justice.gov.gr](mailto:kzaharaki@justice.gov.gr), [civilunit@justice.gov.gr](mailto:civilunit@justice.gov.gr)

Internet: <http://www.ministryofjustice.gr/>

Person to contact:

- Ms Aikaterini Papanikolaou  
Head of Department of International Judicial Cooperation in Civil and Criminal Cases  
(languages of communication: Greek, English)
- Ms Katerina Zacharaki  
Department of International Judicial Cooperation in Civil and Criminal Cases  
(languages of communication: Greek, English, French)

(This page was last updated on 26 June 2015)

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## Hungary

Hungary - Central Authority

Ministry of Public Administration and Justice  
Department of Justice Cooperation and Private International Law  
P.O. Box 2

1357 Budapest

Kossuth tér 2-4.

1055 BUDAPEST

Hungary

tel.: +36 (1) 795-4846

fax: +36 (1) 795-0463

e-mail: [nmfo@kim.gov.hu](mailto:nmfo@kim.gov.hu)

General website: [www.kormany.hu](http://www.kormany.hu)

Languages of communication: Hungarian, English, German, French

personnes à contacter / persons to contact:

- dr. Zoltán NÉMETH  
Head of Department  
(langues de communication / languages of communication: anglais / English)
- dr. Ágnes NÍNAUSZ  
Head of Division  
(langue de communication / language of communication: français / French)
- dr. Szabolcs BORECZKI  
Head of Division  
(langues de communication / languages of communication: français, anglais / French, English)
- dr. Eszter MAROSI  
legal adviser  
(langues de communication / languages of communication: allemand, anglais / German, English)
- dr. Ildikó NÉMETH  
legal adviser  
(langues de communication / languages of communication: français, allemand, anglais / French, German, English)

N.B. Hungary having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Hungary and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 13 April 2017)

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## Iceland

Iceland - Central Authority

Ministry of Justice

Sölvhólgötu 7

150 REYKJAVÍK

Iceland

numéro de téléphone/telephone number: +354 545 9000

numéro de télécopie/telefax number: +354 552 7340

e-mail: [postur@dmr.is](mailto:postur@dmr.is)

Contact person:

- Ms Svanhildur Þorbjörnsdóttir  
Legal Expert  
tel.: +354 545 9000  
e-mail: [svanhildur.thorbjornsdottir@dmr.is](mailto:svanhildur.thorbjornsdottir@dmr.is)

N.B. Iceland having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Iceland and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 4 May 2017)

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## Ireland

Ireland - Central Authority

Department of Justice and Equality

Bishop's Square

Redmond's Hill

DUBLIN 2

Ireland

numéro de téléphone/telephone number: +353 (1) 4790 200 (switchboard)

numéro de télécopie/telefax number: +353 (1) 4790 201  
 adresse e-mail/e-mail address: [internationalchildabduction@justice.ie](mailto:internationalchildabduction@justice.ie)  
 Internet: <http://www.justice.ie/>

Personnes à contacter / persons to contact:

- Ms Catherine SHERIDAN, Head of Unit  
tel.: +353 (1) 4790 275  
(langue de communication/language of communication: anglais/English)
- Ms Mary MULVANERTY  
tel.: +353 (1) 4790 287  
(langue de communication/language of communication: anglais/English)
- M James WHELAN  
tel.: +353 (1) 4790 272  
(langue de communication/language of communication: anglais/English)
- Mr Peter TOAL  
Tel.: +353 (1) 4790 278  
(langue de communication/language of communication: anglais/English)

(This page was last updated on 2 August 2017)

## Israel

Israel - Central Authority

Ministry of Justice  
 Office of the State Attorney  
 Department of International Affairs  
 7 Mahal Street, Ma'alot Dafna  
 PO Box 49123  
 Jerusalem 97765  
 Israel

numéro de téléphone/téléphone number: +972-2-541-9614/9613

numéro de télécopie/telefax number: +972-2-541-9644/9645

after-hours emergency number: +972-50-6216419; +972-50-61 17045

adresse e-mail/e-mail address: [ICA@justice.gov.il](mailto:ICA@justice.gov.il)

Internet: [www.justice.gov.il/En/Units/StateAttorney/DepartmentInternational/ChildAbduction/Pages/default.aspx](http://www.justice.gov.il/En/Units/StateAttorney/DepartmentInternational/ChildAbduction/Pages/default.aspx)

personnes à contacter / persons to contact:

- Ms Leslie KAUFMAN  
(langues de communication / languages of communication: hébreu, anglais / Hebrew, English)  
tel.: +972-2-541-9615  
[lesliek@justice.gov.il](mailto:lesliek@justice.gov.il)
- Ms Galit GREENBERG  
(langues de communication / languages of communication: hébreu, anglais / Hebrew, English)  
tel.: +972-2-541-9643  
[galitgre@justice.gov.il](mailto:galitgre@justice.gov.il)
- Ms Ruti PAUZNER  
(langues de communication / languages of communication: hébreu, anglais / Hebrew, English)  
tel.: +972-2-5419620  
[rutip@justice.gov.il](mailto:rutip@justice.gov.il)

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## Italy

Italy - Central Authority

Ministero della Giustizia  
 Dipartimento per la Giustizia Minorile e di Comunità  
 Via Damiano CHIESA No 24  
 00136 ROME

Italia

téléphone/telephone : +39 0668188331 / + 39 0668188535

télécopie/fax: +39 0668808085 ou/or +39 0668807087

E-mail: [autoritacentrali.dgmc@giustizia.it](mailto:autoritacentrali.dgmc@giustizia.it)

Site web/Website: <http://www.giustizia.it/>

Personnes à contacter / persons to contact:

- Mme/Mrs Ludovica JOVENE  
Directrice faisant fonction / Acting Head of the Central Authority  
(langues de communication: italien, français / Italian, French)  
tel. +39 0668188328
- M./Mr Federico CICCARELLA  
(langues de communication: italien, anglais / Italian, English)  
tel. : +39 0668188363
- M./Mr Alessio NOCE  
(langues de communication: italien, anglais / Italian, English)  
tel.:+39 (06) 68188240
- Mme/Mrs Tiziana PAGLIAROLI  
(langues de communication : italien, anglais / Italian, English)  
tel.: +39 0668188555
- Mme/Mrs Barbara OLIVARI  
(langues de communication : italien, espagnol / Italian, Spanish)  
Tel. : +39 0668188363

(This page was last updated on 16 November 2016)

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## Japan

Japan - Central Authority

Hague Convention Division

Consular Affairs Bureau

Ministry of Foreign Affairs

100-8919 Kasumigaseki 2-2-1, Chiyoda-ku

TOKYO

Japan

Tel.: +81-(0)3-5501-8466

Fax: +81-(0)3-5501-8527

Email: [hagueconventionjapan@mofa.go.jp](mailto:hagueconventionjapan@mofa.go.jp)

Website: <http://www.mofa.go.jp/mofaj/gaiko/hague>

Contact person:

- Mr Shuji ZUSHI  
Director  
(languages of communication: Japanese, English)  
Tel.: +81 (0)3-5501-8466

(This page was last updated on 11 September 2017)

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## Kazakhstan

Kazakhstan - Central Authority

The Ministry of Education and Science of the Republic of Kazakhstan

Children Rights Committee

Address: 8, Mangilik Yel avenue

010000 Astana

Kazakhstan

Telephone: +7 (7172) 74-25-85, +7 (7172) 74-15-82 (reception)

Fax: + 7 (7172) 74-23-43  
E-mail: [kopd.mon@gmail.com](mailto:kopd.mon@gmail.com)  
Website: <http://edu.gov.kz>

Contact persons / personnes à contacter :

- Mr Yerzhan Yersainov

(This page was last updated on 12 December 2016)

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## Korea, Republic of

Republic of Korea - Central Authority

Ministry of Justice  
Government Complex  
Gwanmoonro 47  
Gwacheon City, Gyeonggi-Do  
427-720 Republic of Korea  
Telephone: +82-2-2110-3661/3662  
Fax: +82-2-2110-0327  
E-mail: [ildhd@moj.go.kr](mailto:ildhd@moj.go.kr)  
Website: [http://www.moj.go.kr/HP/MOJ03/menu.do?strOrgGbnCd=100000&strRtnURL=MOJ\\_10206010](http://www.moj.go.kr/HP/MOJ03/menu.do?strOrgGbnCd=100000&strRtnURL=MOJ_10206010)

Contact person(s):

- Mr Roh, Sunkyun  
Public Prosecutor, Vice Director  
International Legal Affairs Division (English)  
Tel. +82-2-2110-3661
- Ms Shin, Eunyoung  
Lawyer, Deputy Director  
International Legal Affairs Division (English)  
Tel. +82-2-2110-3661
- Ms Lim, Ayong  
Lawyer, Legal Specialist  
International Legal Affairs Division (English)  
Tel. +82-2-2110-3661

(This page was last updated on 18 May 2015)

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## Latvia

Latvia - Central Authority

Ministry of Justice  
International Cooperation Department  
Brivibas Blvd. 36  
Riga, LV-1536  
Latvia  
Telephone: +371 6703 6801  
Fax: +371 6721 0823  
E-mail: [tm.kanceleja@tm.gov.lv](mailto:tm.kanceleja@tm.gov.lv)  
Website: [www.tm.gov.lv](http://www.tm.gov.lv)

Persons to contact:

- Ms Anastasija Jumakova  
Lawyer at the International Cooperation Department  
Telephone: +371 6703 6790  
E-mail: [anastasija.jumakova@tm.gov.lv](mailto:anastasija.jumakova@tm.gov.lv)
- Ms Liva Upena  
Lawyer at the International Cooperation Department

Telephone: +371 6703 6846  
E-mail: [Liva.Upena@tm.gov.lv](mailto:Liva.Upena@tm.gov.lv)

Languages of communication: Latvian, English, Russian

(This page was last updated on 10 January 2017)

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## Lithuania

Lithuania - Central Authority

Ministry of Social Security and Labour  
State Child Rights Protection and Adoption Service  
A. Vivulskio Street 13  
03221 VILNIUS  
Lithuania  
tel.: +370 (5) 231 0928  
fax: +370 (5) 231 0927  
e-mail: [info@vaikoteises.lt](mailto:info@vaikoteises.lt)  
Internet: [www.vaikoteises.lt](http://www.vaikoteises.lt)

personnes à contacter / persons to contact:

- Ms Odeta TARVYDIENE, Director  
(languages of communication: English, Russian)  
tel.: +370 (5) 231 0936

(This page was last updated on 13 November 2013)

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## Luxembourg

Luxembourg - Central Authority

Le Procureur Général d'Etat  
Cité Judiciaire  
Plateau du St.-Esprit  
L-2080 LUXEMBOURG  
Luxembourg  
numéro de téléphone/telephone number: Secrétariat/Secretariat: +352 47 59 81-336  
numéro de télécopie/telefax number: +352 470550  
Courriel / Email: [parquet.general@justice.etat.lu](mailto:parquet.general@justice.etat.lu)  
Internet: [www.justice.public.lu](http://www.justice.public.lu)

personnes à contacter / persons to contact:

- M. Serge WAGNER  
Premier avocat général  
tel.: +352 47 59 81-393/336  
(langues de communication / languages of communication: français, allemand, anglais / French, German, English)
- en son absence / in his absence:
- Mme Simone FLAMMANG  
Avocat général  
(langues de communication / languages of communication: français, allemand, anglais / French, German, English)  
tel.: +352 47 59 81-393/336

(This page was last updated on 22 June 2017)

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## Malta

Malta - Central Authority



Director for Social Welfare Standards  
 Ministry for the Family, Children's Rights and Social Solidarity  
 469 Bugeia Institute  
 St. Joseph High Road  
 St. Venera SVR 1012  
 Malta  
 Tel. No. +356 2278 8000  
 Fax No. +356 2278 8355  
 e-mail address: [welfare.standards@gov.mt](mailto:welfare.standards@gov.mt)  
 Internet: [www.dsww.gov.mt](http://www.dsww.gov.mt)

Contact persons:

- Ms Carmen Buttigieg  
 Director  
 tel.: +356 2278 8300
- Ms Francesca Muscat Camilleri  
 Assistant Director - Central Authority Functions  
 tel.: +356 2278 8361

N.B. Malta having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Malta and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 31 August 2017)

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## Mauritius

Mauritius - Central Authority

The Permanent Secretary  
 Ministry of Gender Equality, Child Development and Family Welfare  
 7th floor, Newton Tower, Cr. Sir William Newton Street and Remy Ollier Street  
 PORT LOUIS  
 Mauritius  
 numéro de téléphone/telephone number: +230 405 3300  
 numéro de télécopie/telefax number: +230 213 6328  
 adresse e-mail/e-mail address: [mwfwcd@mail.gov.mu](mailto:mwfwcd@mail.gov.mu)

personnes à contacter / persons to contact:

- Mrs Karoonawtee Chooramun, Head, Child Development Unit  
 Tel.: +230 206 3742

N.B. La République de Maurice ayant adhéré à la Convention conformément à son article 38, cette adhésion n'aura d'effet que dans les rapports entre la République de Maurice et les Etats contractants qui auront déclaré accepter cette adhésion. "Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion".

(This page was last updated on 8 December 2015)

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## Mexico

Mexico - Central Authority

Dirección General de Protección a Mexicanos en el Exterior  
 Dirección de Derecho de Familia  
 Plaza Juárez #20, Piso 17  
 Col. Centro  
 Del. Cuauhtémoc  
 México, D.F. 06010  
 Tel.: +52 (55) 3686-5856  
 Fax: +52 (55) 3686-5865  
 Email: [dgpmexterior@sre.gob.mx](mailto:dgpmexterior@sre.gob.mx)

## Contact persons:

- Reyna Torres Mendivil  
Directora General
- María Cristina Oropeza Zorrilla  
Directora de Derecho de Familia  
[morepezaz@sre.gob.mx](mailto:morepezaz@sre.gob.mx)
- Claudia Sierra Martínez  
Subdirectora de Restitución a Menores  
[csierra@sre.gob.mx](mailto:csierra@sre.gob.mx)

Note: In addition to the Central Authority designated by Mexico in accordance with Article 6 of the Convention, Mexico has appointed State Central Authorities, the list of which is available below. The Central Authority to which applications should be addressed for transmission to the appropriate State Central Authority is the Dirección General de Protección a Mexicanos en el Exterior of the Ministry of Foreign Affairs of Mexico.

## AUTORIDADES CENTRALES ESTATALES EN LOS ESTADOS UNIDOS MEXICANOS

## distrito federal

direccion de asistencia juridica - sistema nacional para el desarrollo integral de la familia - prolongacion xochilcalco 947 - col. santa cruz atoyac - delegacion benito juarez - 03310 mexico, d.f. - tel.: 601 2222 (ext. 1600, 1601, 6012), 629 2367, 629 2368 - fax: 688 6710

## aguascalientes

direccion general del dif aguascalientes - av. de la convencion sur exq. av. de los maestros - col. españa - 20210 aguascalientes, ags. - tel.: 133376

procuraduria de la defensa del menor y la familia - dif aguascalientes - av. de la convencion sur y av. de los maestros - col. españa - 20210 aguascalientes, ags. - tel.:133363

## baja california

direccion general dif baja california - av. obregon calle "e" 1290 - col. nueva - 21100 mexicali, b.c. - tel.: 525680

direccion general de asuntos juridicos y procuraduria de la defensa del menor y la familia dif baja california - locales 12 y 13 centro comercial plaza fiesta - calz. independencia y niños heroes - 21280 mexicali, b.c. - tel.: 524802

## baja california sur

direccion general dif baja california sur - aquiles serdan y rosales - 23000 la paz, b.c.s. - tel.: 26790

procuraduria de la defensa del menor y la familia - dif baja california sur - aquiles serdan y rosales - 23000 la paz, b.c.s. - tel.: 23887

## campeche

direccion general dif campeche - calle diez n° 584 mansion carbajal - col. san roman centro - 24000 campeche, camp. - tel.: 167520

procuraduria de la defensa del menor y la familia - dif campeche - calle diez n° 584 mansion carbajal - col. san roman centro - 24000 campeche, camp. - tel.: 167644

## coahuila

direccion general dif coahuila - paseo de las arboledas y torres bodet - col. chapultepec - 25050 saltillo, coah. - tel.: 173700

## colima

direccion general dif colima - calz. galvan norte y emilio carranza - 28030 colima, col. - tel.: 125937

procuraduria de la defensa del menor y la familia - dif colima - calz. galvan norte y emilio carranza - 28030 colima, col. - tel.: 121705

## chiapas

direccion general dif chiapas - libramiento nte. ote. salomon gonzalez blanco - esq. paso limon - col. patria nueva - 29000 tuxtla gutierrez, chis. - tel.: 141584

procuraduria de la defensa del menor y la familia - dif chiapas - libramiento nte. ote. salomon gonzalez blanco - esq. paso limon - col. patria nueva - 29000 tuxtla gutierrez, chis. - tel.: 141557

#### chihuahua

direccion general dif chihuahua - av. tecnologico 2903 - 31310 chihuahua, chih. - tel.: 137689

procuraduria de la defensa del menor y la familia - dif chihuahua - av. tecnologico 2903 - 31310 chihuahua, chih. - tel.: 135644

#### durango

direccion general dif durango - h. colegio militar y cap francisco ibarra s/n - 34000 durango, dgo. - tel.: 83904

procuraduria de la defensa del menor y la familia - dif durango - h. colegio militar y cap francisco ibarra s/n - 34000 durango, dgo. - tel.: 178417

#### estado de mexico

direccion general dif estado de mexico - paseo colon y tollecan - col. isidro favela - 50170 toluca, mex. - tel.: 173786

procuraduria de la defensa del menor y la familia - del dif estado de mexico - jose v. villada 451, esq. francisco murguia - col. el ranchito - 50130 toluca, mex. - tel.: 124868

#### guanajuato

direccion general dif guanajuato - paseo de la presa 89-a - 36000 guanajuato, gto. - tel.: 320499

procuraduria de la defensa del menor y la familia - dif guanajuato - paseo de la presa 89-a - 36000 guanajuato, gto. - tel.: 321083

#### guerrero

direccion general dif guerrero - orquidea s/n av. lazaro cardenas esq. ruffo figueroa - apartado 131 - col. burocratas - 39090 chilpancingo, gro. - tel.: 722772

procuraduria de la defensa del menor y la familia - dif guerrero - av. lazaro cardenas esq. ruffo figueroa s/n - apartado 131 - col. burocratas - 39090 chilpancingo, gro. - tel.: 727992

#### hidalgo

direccion general dif hidalgo - salazar 100 - col. centro - 42000 pachuca, hgo. - tel.: 55395

procuraduria de la defensa del menor y la familia - dif hidalgo - salazar 100 - col. centro - 42000 pachuca, hgo. - tel.: 55283

#### jalisco

direccion general dif jalisco - av. alcalde 1220 piso 1 - 44280 guadalajara, jal. - tel.: 824 0097

procuraduria de la defensa del menor y la familia - av. alcalde 1220 - 44280 guadalajara, jal. - tel.: 624 4154

#### michoacan

direccion general dif michoacan - av. acueducto 447, esq. ventura - puente bosque cuauhtemoc - 58000 morelia, mich. - tel.: 120 7815

procuraduria de la defensa del menor y la familia - dif michoacan - av. acueducto y ventura puente - 58000 morelia, mich. - tel.: 133541

#### morelos

direccion general dif morelos - av. chapultepec s/n - col. chapultepec - 62450 cuernavaca, mor. - tel.: 156920

procuraduria de la defensa del menor y la familia - dif morelos - bajada de chapultepec 24 - col. chapultepec - 62450 cuernavaca, mor. - tel.: 155168

#### nayarit

direccion general dif nayarit - calle sauce y cedro - col. san juan - 63130 tepic, nay. - tel.: 140252

procuraduria de la defensa del menor y la familia - dif nayarit - amado nervo y puebla - 63130 tepic, nay. - tel.: 125271

#### nuevo leon

direccion general dif nuevo leon - av. morones prieto 600 ote. - col. independencia - 64720 monterrey, n.l. - tel.: 403297

procuraduria de la defensa del menor y la familia - dif nuevo leon - luis g. urgina s/n - col. fabriles - 64550 monterrey, n.l. - tel.: 481862

## oaxaca

direccion general dif Oaxaca - 1a. gral. vicente guerrero 114 - col. miguel aleman - 68120 Oaxaca, Oax. - tel.: 66928

procuraduria de la defensa del menor, la mujer y la familia dif Oaxaca - matamoros 305 - col. centro - 68000 Oaxaca, Oax. - tel.: 62385

## puebla

direccion general dif Puebla - priv. 5-b sur n° 4302 - col. gabriel pastor - 72420 Puebla. Pue. - tel.: 409912

procuraduria de la defensa del menor y la familia - dif Puebla - 25 poniente n°2302 - col. los angeles - 72440 Puebla, Pue. - tel.: 430240

## queretaro

direccion general dif Queretaro - pasteur sur n° 5 altos - 76000 Queretaro, Qro. - tel.: 141254

procuraduria de la defensa del menor y la familia - dif Queretaro - pasteur sur n° 6 altos casa de escala - 76000 Queretaro, Qro. - tel.: 141115

## quintana roo

direccion general dif Quintana Roo - av. adolfo lopez mateos 441 - col. campestre - 77030 Chetumal, Q.R. - tel.: 324177

procuraduria de la defensa del menor y la familia - dif Quintana Roo - av. adolfo lopez mateos 441 - col. campestre - 77030 Chetumal, Q.R. - tel.: 322224 (ext. 66 y 64)

## san luis potosi

direccion general dif San Luis Potosi - nicolas fernandez torres 500 - col. jardin - 78270 San Luis Potosi, S.l.p. - tel.: 176211

procuraduria de la defensa del menor y la familia - dif San Luis Potosi - mariano otero 804 - col. barrio de tequisquiapan - 78230 San Luis Potosi, S.l.p. - tel.: 135281

## sinaloa

direccion general dif Sinaloa - ignacio ramirez y rivapalacio centro - 80200 Culiacan, Sin. - tel.: 131109

procuraduria de la defensa del menor y la familia - dif Sinaloa - av. constitucion y juan m. banderas centro - 80200 Culiacan, Sin. - tel.: 164486

## sonora

direccion general dif Sonora - blvd. luis encinas esq. francisco monterverde - col. san benito a.p. 500 - 83260 Hermosillo, Son. - tel.: 150351

procuraduria de la defensa del menor y la familia - dif Sonora - blvd. luis encinas esq. francisco monterverde - col. san benito a.p. 500 - 83260 Hermosillo, Son. - tel.: 146283

## tabasco

direccion general dif Tabasco - lic. manuel antonio romero 203 - col. pensiones - 86170 Villahermosa, Tab. - tel.: 510942

direccion de la procuraduria de la defensa del menor y la familia y asuntos juridicos dif Tabasco - lic. manuel antonio romero 203 - col. pensiones - 86170 Villahermosa, Tab. - tel.: 510986

## tamaulipas

direccion general dif Tamaulipas - calz. gral. luis caballero 297 ote. - 86000 Cd. Victoria, Tams. - tel.: 124146

procuraduria de la defensa del menor y la familia - dif Tamaulipas - calz. gral. luis caballero 297 ote. - 86000 Cd. Victoria, Tams. - tel.: 128080 (ext. 114)

## tlaxcala

direccion general dif Tlaxcala - av. morelos 4 centro - 90000 Tlaxcala, Tlax. - tel.: 627825

procuraduria de la defensa del menor y la familia - dif tlaxcala - av. morelos 4 centro - 90000 tlaxcala, tlax. - tel.: 620210 (ext. 105)

veracruz

direccion general dif veracruz - av. miguel aleman 109 - col. federal - 91140 jalapa, ver. - tel.: 400044

procuraduria de la defensa del menor, la familia y el indigena dif veracruz - av. miguel aleman 109 - col. federal - 91140 jalapa, ver. - tel.: 400044 (ext. 40)

yucatan

direccion general dif yucatan - av. miguel aleman 355 - col. itzimna - 97100 merida, yuc. - tel.: 265085

procuraduria de la defensa del menor y la familia - dif yucatan - av. miguel aleman 355 - col. itzimna - 97100 merida, yuc. - tel.: 271798

zacatecas

direccion general dif zacatecas - instalaciones la encantada s/n - 98000 zacatecas, zac. - tel.: 222073

procuraduria de la defensa del menor y la familia - dif zacatecas - instalaciones lago la encantada s/n - 98000 zacatecas, zac. - tel.: 221377

(This page was last updated on 6 November 2014)

## Monaco

Monaco - Central Authority

Direction des Services Judiciaires

Palais de Justice

5 rue Colonel Bellando de Castro

MC 98000 MONACO

numéro de téléphone/telephone number: +377 9898 8811

numéro de télécopie/telefax number: +377 9898 8589

adresse e-mail/e-mail address: [dsj@justice.mc](mailto:dsj@justice.mc) / [bnardi@justice.mc](mailto:bnardi@justice.mc) / [asampo@justice.mc](mailto:asampo@justice.mc)

personnes à contacter / persons to contact:

- M. Bruno Nardi  
Assistant judiciaire à la Direction des services judiciaires
- Mme Antonella Sampo-Couma  
Administrateur Principal à la Direction des services judiciaires

N.B. Monaco having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Monaco and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 16 April 2018)

## Montenegro

Montenegro - Central Authority

Ministry of Justice of Montenegro

Vuka Karadžica br. 3

81 000 Podgorica

Tel.: +382 (20) 407 520

Fax: +382 (20) 407 515

Website: [www.mpa.gov.me](http://www.mpa.gov.me)

Contact Person:

- Ms Dara Tomcic  
Adviser in the Ministry of Justice of Montenegro  
tel./fax: +382 20 407 510  
e-mail: [dara.tomcic@mpa.gov.me](mailto:dara.tomcic@mpa.gov.me)

(This page was last updated on 12 March 2014)

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## Morocco

Morocco - Central Authority

Ministère de la justice et des libertés  
Direction des Affaires Civiles  
Service de l'entraide judiciaire en matière civile  
Place de la Mamounia  
10 000 Rabat  
Maroc  
Tel: +212 (0)5 37 21 36 75  
Fax : +212 (0)5 37 70 59 14  
Website: [www.justice.gov.ma](http://www.justice.gov.ma)  
E-mail: [entraidejudic.civile@gmail.com](mailto:entraidejudic.civile@gmail.com)

Contact Persons:

- Monsieur El Hassan EL GUASSEM  
Directeur des Affaires Civiles  
Email: [dac@justice.gov.ma](mailto:dac@justice.gov.ma)

(This page was last updated on 26 January 2018)

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## Netherlands

Netherlands - Central Authority

For the European part of the Netherlands:

Dutch Central Authority  
International Children's Issues  
Ministry of Security and Justice  
Directorate-General for Sanctions and Protection  
P.O. Box 20301  
2500 EH THE HAGUE  
The Netherlands  
Tel.: +31 (70) 370 6252  
Fax: +31 (70) 370 7507  
Email: [kinderontvoering@minvenj.nl](mailto:kinderontvoering@minvenj.nl)

Office hours: Monday to Friday 10:00 a.m. - 12.30 p.m.

Please note that all correspondence with the Dutch Central Authority must be in Dutch or in one of the official languages of the Hague Conventions.

For the Caribbean part of the Netherlands:

Guardianship Council (Voogdijraad)  
Rijksdienst Caribisch Nederland  
Kaya Internashonal z/n  
Postbus 357  
Kralendijk  
Bonaire

(This page was last updated on 4 January 2016)

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## New Zealand

New Zealand - Central Authority



Ministry of Justice  
Tahu o te Ture  
Level 3 Vogel Centre  
19 Aitken Street  
P. O. Box 180  
WELLINGTON 6140  
New Zealand  
telephone number: +64 (4) 918 8800  
telefax number: +64 (4) 918 8820  
Internet: [www.justice.govt.nz](http://www.justice.govt.nz)

person to contact:

Ms Patricia BAILEY  
e-mail: [Patricia.Bailey@justice.govt.nz](mailto:Patricia.Bailey@justice.govt.nz)

N.B.

New Zealand having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between New Zealand and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession." For further information, see the status of the Convention.

(This page was last updated on 8 September 2010)

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## Norway

Norway - Central Authority

Postal address:  
Royal Ministry of Justice and Public Security  
Department of Civil Affairs  
PO Box 8005 Dep  
0030 OSLO  
Norway

Office address:  
Royal Ministry of Justice and Public Security  
Gullhaug Torg 4 a  
0484 OSLO

numéro de téléphone/telephone number: +47 2224 5451

numéro de télécopie/telefax number: +47 2224 2722

Email: [childabduction@jd.dep.no](mailto:childabduction@jd.dep.no)

Internet: [www.government.no/child-abduction](http://www.government.no/child-abduction)

Personnes à contacter / persons to contact :

- Ms Linn KROGSVEEN  
Senior Adviser  
E-mail: <mailto:linn.krogsveen@jd.dep.no>  
(Norwegian and English)
- Ms Hanne KRISTENSEN LØSETH  
Senior Adviser  
E-mail: [hanne.loseth@jd.dep.no](mailto:hanne.loseth@jd.dep.no)  
(Norwegian and English)
- Ms Hanna RUMMELHOFF  
Higher Executive Officer  
E-mail: [hanna.rummelhoff@jd.dep.no](mailto:hanna.rummelhoff@jd.dep.no)  
(Norwegian and English)
- Ms Vilde HALLGREN BODAL  
Higher Executive Officer  
E-mail: [vilde.sandvik@jd.dep.no](mailto:vilde.sandvik@jd.dep.no)  
(Norwegian and English)

(This page was last updated on 16 April 2018)

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## Panama

Panama - Central Authority

Dirección General de Asuntos Jurídicos y Tratados  
(Directorate General of Legal Affairs and Treaties)  
Ministerio de Relaciones Exteriores  
(Ministry of Foreign Relations)  
San Felipe. 3rd Street. Palacio Bolívar. Panama city.

P.O. Box: Zona Postal San Felipe, Calle 3. Palacio Bolívar. Edificio 26. Panamá 4, Panamá.

Telephone number: + 507 511 4228

Fax number: + 507 511 4008

<http://www.mire.gob.pa/>

Personnes à contacter / Contact persons:

- Farah Diva Urrutia M.  
Directora General/General Director  
Languages of communication: Spanish and English  
Telephone number: + 507 511 4230  
E-mail: [furrutia@mire.gob.pa](mailto:furrutia@mire.gob.pa)
- Nadia Montenegro de Detresno  
Subdirectora General/Deputy General Director  
Languages of communication: Spanish and English  
Telephone number: + 507 511 4225  
E-mail: [namontenegro@mire.gob.pa](mailto:namontenegro@mire.gob.pa)
- José Roberto Castro  
Abogado/Legal Counsel  
Languages of communication: Spanish and English  
Telephone number: + 507 504 8892  
E-mail: [jcastro@mire.gob.pa](mailto:jcastro@mire.gob.pa)
- Grace Victoria Aparicio  
Abogada /Legal Counsel  
Languages of communication: Spanish and English  
Telephone number: + 507 511 4228  
E-mail: [gaparicio@mire.gob.pa](mailto:gaparicio@mire.gob.pa)

N.B. Panama having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Panama and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 20 December 2017)

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## Paraguay

Paraguay - Central Authority

Dirección de Restitución Internacional  
Secretaría Nacional de la Niñez y la Adolescencia  
Autoridad Central de Restitución Internacional  
Mesa de entrada de la Secretaría Nacional de la Niñez y la Adolescencia: Avenida Mariscal López N° 2029 esquina Aca Caraya  
Dirección de Restitución Internacional: Avenidad Mariscal Lopéz 2021 entre la calle América y Zanotti Cavazzoni  
ASUNCIÓN  
Paraguay

numéro de téléphone/telephone number: +595 (21) 207166 / +595 9 8125 5291 / +595 2122 8777 / +595 2120 7162

numéro de télécopie/telex number: +595 (21) 207 164 / 201 661

e-mail: [restitucion.internacional.py@gmail.com](mailto:restitucion.internacional.py@gmail.com)

Internet: [www.sna.gov.py](http://www.sna.gov.py)

personnes à contacter/persons to contact:

- Abogada Lili Beatriz Méndez Delgadillo  
E-mail: [lili4708@gmail.com](mailto:lili4708@gmail.com)  
(langue de communication / language of communication: espagnol / Spanish)

N.B.

Paraguay having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Paraguay and such Contracting States as have declared their [acceptance of the accession](#). "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 19 February 2015)

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## Peru

Peru - Central Authority

Ministerio de la Mujer y Poblaciones vulnerables  
Dirección General de Niñas, Niños y Adolescentes  
Jirón Camaná N° 616, Piso 7, Cercado de Lima  
LIMA  
Peru  
Tel.: +51 (1) 626 1600 – ext. 7003  
Internet: [www.mimp.gob.pe](http://www.mimp.gob.pe)

Contact persons:

- Claudia del Pozo Goicochea  
Directora General de Niñas, Niños y Adolescentes (DGNNA)  
Ministry of Women and Vulnerable Populations
- Cecilia Paredes Polar  
Psychologist of the DGNNA  
[cparedes@mimp.gob.pe](mailto:cparedes@mimp.gob.pe)
- Cecilia Alva Ruiz  
Lawyer of the DGNNA  
[calva@mimp.gob.pe](mailto:calva@mimp.gob.pe)
- Virginia Karina Guzmán Mori  
Lawyer of the DGNNA  
[kguzman@mimp.gob.pe](mailto:kguzman@mimp.gob.pe)

(This page was last updated on 7 November 2017)

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## Philippines

Philippines - Central Authority

Department of Justice  
Office of the Chief State Counsel (Legal Staff)

Point person:  
Ricardo V. Paras III  
Chief State Counsel  
Department of Justice  
Padre Faura St.  
Ermita  
Manila 1004  
Philippines

Direct Line No. : (+632) 525-0764/536-0446  
Telefax No. : (+632) 525-2218

Trunkline No.: (+632) 523-8481 loc. 316/341  
E-mail address: [rparas@doj.gov.ph](mailto:rparas@doj.gov.ph)

Last updated: 22 April 2016

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## Poland

Poland - Central Authority

Ministry of Justice  
Division of International Law  
Al. Ujazdowskie 11  
P.O. Box 35  
00-950 WARSAW  
Poland  
numéro de téléphone/telephone number: +48 (22) 239 0870  
numéro de télécopie/telefax number: +48 (22) 897 0539  
E-mail: [Polandchildabduction@ms.gov.pl](mailto:Polandchildabduction@ms.gov.pl)

Internet: [www.ms.gov.pl](http://www.ms.gov.pl) >Ministerstwo>Współpraca Miedzynarodowa>Konwencja haska dot. uprowadzenia dziecka (in Polish only).

N.B. Poland having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Poland and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 18 January 2017)

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## Portugal

Portugal - Central Authority

Direção-Geral de Reinserção e Serviços Prisionais  
Autoridade Central Portuguesa  
Travessa da Cruz do Toren, n.º 1  
1133-001 Lisboa  
Portugal  
Tel: (+351) 218812200  
Fax: (+351) 218853653  
E-mail: [gjc@dgrsp.mj.pt](mailto:gjc@dgrsp.mj.pt)  
Internet: <http://www.dgrs.mj.pt/>

Personnes à contacter / persons to contact:

- Mr Celso Manata  
Director General
- Mrs Maria da Ascensão Areias dos Santos Isabel  
Head of Unit  
(langues de communication / languages of communication: portugais, français / Portuguese, French)
- Mrs Carolina Garcia  
(langues de communication / languages of communication: portugais, anglais, français / Portuguese, English, French)
- Mr João Córias  
(langues de communication / languages of communication: portugais, anglais, / Portuguese, English)

(This page was last updated on 3 February 2016)

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## Republic of Moldova

Republic of Moldova - Central Authority

Ministry of Labor, Social Protection and Family  
1, Vasile Alecsandri str.  
MD-2009, Chisinau  
Republica Moldova

Tel.: +373 (0)22 269 301  
+373 (0)22 269 344  
+373 (0)22 269 343

Fax: +373 (0)22 269 310  
+373 (0)22 269 341

E-mail: [secretariat@mmpsf.gov.md](mailto:secretariat@mmpsf.gov.md)  
General Website: [www.mmpsf.gov.md](http://www.mmpsf.gov.md)

Contact persons:

Viorica DUMBRAVEANU  
Head of Family and Child Rights Protection Policies Department  
+373 (0)22 269 344  
e-mail: [viorica.dumbraveanu@mmpsf.gov.md](mailto:viorica.dumbraveanu@mmpsf.gov.md)

Corneliu TARUS  
Deputy Head of Family and Child Rights Protection Policies Department  
+373 (0)22 269 343  
+373 (0)22 605 255  
e-mail: [corneliu.tarus@mmpsf.gov.md](mailto:corneliu.tarus@mmpsf.gov.md)

N.B. The Republic of Moldova having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between the Republic of Moldova and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 15 August 2016)

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## Romania

Romania - Central Authority

Ministry of Justice  
Directorate of International Law and Judicial Co-operation  
Service of judicial co-operation in civil and commercial matters  
Strada Apolodor 17  
Sector 5 BUCURESTI  
Cod 050741  
Romania

Tel.: +4037 204 1077  
Fax: +44037 204 1084

Internet: <http://www.just.ro/>

E-mail: [ddit@just.ro](mailto:ddit@just.ro)

Contact person: Viviana ONACA Ph.d., Director  
Languages of communication: Romanian, English, French, German

N.B. Romania having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Romania and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 24 March 2016)

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## Russian Federation

Russian Federation - Central Authority (Art. 29)

The Ministry of Education and Science of the Russian Federation  
 Department for children's rights protection state policy  
 Lyusinovskaya street, 51,  
 Moscow,  
 Russia, 117997  
 Telephone numbers: +7 (499) 237 9411  
 Fax number: +7 (499) 237 5874  
 E-mail: [d07@mon.gov.ru](mailto:d07@mon.gov.ru)

Persons to contact:

- Irina I. Romanova  
 Deputy Director of the Department for children rights' protection state policy  
 E-mail: [romanovall@mon.gov.ru](mailto:romanovall@mon.gov.ru)  
 Tel.: +7 (499) 681 0387, ext. 4434;  
 Languages: Russian, English
- Anna N. Schepetkova  
 Chargé de mission of the Division for normative and legal regulation in the sphere of custody and guardianship of minors citizens of the Department for children rights' protection state policy  
 E-mail: [schepetkova-an@mon.gov.ru](mailto:schepetkova-an@mon.gov.ru)  
 Tel.: + 7 (499) 681 0387, ext. 4354  
 Languages: Russian, English
- Olga A. Vetrenko  
 Counselor of the Division for normative and legal regulation in the sphere of children's rights protection of the Department for children rights' protection state policy  
 E-mail: [vetrenko-oa@mon.gov.ru](mailto:vetrenko-oa@mon.gov.ru)  
 Tel.: + 7 (499) 681 0387, ext. 4153  
 Languages: Russian, English

For mediation aimed at resolving family conflicts under the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, please see [here](#).

(This page was last updated on 23 June 2016)

## Serbia

Serbia - Central Authority

Ministry of Justice of the Republic of Serbia  
 Sector for international legal assistance  
 Department for international legal assistance in civil matters  
 Nemanjina 22/26 Str.  
 11000 Belgrade  
 Republic of Serbia  
 Tel/Fax: +381 (11) 3622 352

Contact persons:

- Mr Nikola Naumovski  
 email: [nikola.naumovski@mpravde.gov.rs](mailto:nikola.naumovski@mpravde.gov.rs)
- Ms Maja Cvetanovic  
 email: [majacvetanovic@mpravde.gov.rs](mailto:majacvetanovic@mpravde.gov.rs)

(This page was last updated on 2 February 2017)

## Singapore

Singapore - Central Authority

Singapore Central Authority  
 Rehabilitation and Protection Group



Ministry of Social and Family Development  
 512 Thomson Road #08-00 MSF Building  
 Singapore 298136  
 Internet: <http://app.msf.gov.sg/SingaporeCentralAuthority.aspx>

Contact persons:

- Ms Jasmin Lopez  
 Head, Singapore Central Authority  
 Telephone: +(65) 6354 7646  
 Fax: +(65) 6354 1514  
 E-mail: [Jasmin\\_Lopez@msf.gov.sg](mailto:Jasmin_Lopez@msf.gov.sg)  
 Languages of communication: English
- Mr Kenneth Loh Kheng Hong  
 Assistant Head, Singapore Central Authority  
 Telephone: +(65) 6354 7645  
 Fax: +(65) 6354 1514  
 E-mail: [Loh\\_Kheng\\_Hong@msf.gov.sg](mailto:Loh_Kheng_Hong@msf.gov.sg)  
 Language of communication : English, Mandarin

(This page was last updated on 5 September 2016)

## Slovakia

Slovakia - Central Authority

Centrum pre medzinárodnoprávnu ochranu detí a mládeže  
 (Centre for International Legal Protection of Children and Youth)  
 Špitálska 8  
 P.O. Box 57  
 814 99 Bratislava  
 Tel.: +421 (2) 2046 3208  
 Fax: +421 (2) 5975 3258  
 E-mail: [cipc@cipc.gov.sk](mailto:cipc@cipc.gov.sk)  
 Internet: <http://www.cipc.sk/>

personnes à contacter / persons to contact:

- JUDr. Andrea Císarová, Director  
 (languages of communication : English (preferred), French)
- Mgr. Katarína Vinická  
 (language of communication : English)  
 e-mail : [katarina.vinicka@cipc.sk](mailto:katarina.vinicka@cipc.sk)

(This page was last updated on 14 November 2012)

## Slovenia

Slovenia - Central Authority

Ministry of Labour, Family, Social Affairs and Equal Opportunities of the Republic of Slovenia  
 Directorate of Family  
 Kotnikova 28  
 1000 Ljubljana  
 Tel.: +386-1-369-75-00 / +386-1-369-77-00  
 Fax : +386 1 369 78 32, +386 1 369 79 18  
 Email: [gp.mddsz@gov.si](mailto:gp.mddsz@gov.si)  
 Internet: [www.mddsz.gov.si/si/delovna\\_podrocja/druzina](http://www.mddsz.gov.si/si/delovna_podrocja/druzina)

Contact persons:

- Mr Tilen Zupan, e-mail: [tilen.zupan@gov.si](mailto:tilen.zupan@gov.si)

N.B. Slovenia having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Slovenia and such Contracting States as have declared this acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 30 October 2017)

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## South Africa

South Africa - Central Authority

Office of the Chief Family Advocate  
Central Authority for the Republic of South Africa  
Department of Justice and Constitutional Development  
329 Pretorius Street  
Private Bag X 81  
PRETORIA  
South Africa  
Tel. +27 12 357 8022  
Fax +27 12 357 8043  
Internet: [www.justice.gov.za](http://www.justice.gov.za)

persons to contact:

- Adv. P.I. Seabi-Mathope (Ms)  
Chief Family Advocate  
Email : [PeSeabiMathope@justice.gov.za](mailto:PeSeabiMathope@justice.gov.za)  
(language of communication: English)
- Ms Josephine Peta  
Senior Legal Administration Officer  
Email: [JPeta@justice.gov.za](mailto:JPeta@justice.gov.za)  
Tel.: +27 12 315 1680

N.B. South Africa having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between South Africa and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession." For further information, see status of the Convention.

(This page was last updated on 11 November 2015)

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## Spain

Spain - Central Authority

Ministerio de Justicia  
Servicio de Convenios  
c/ San Bernardo N° 62  
28071 MADRID  
Spain  
tel.: +34 (91) 390 4437 / +34 (91) 390 4273 / 4405  
fax: +34 (91) 390 2383  
Internet: <http://www.justicia.es/>  
Email: [sustraccionmenores@mjusticia.es](mailto:sustraccionmenores@mjusticia.es)

personnes à contacter / persons to contact:

- Mrs Carmen GARCIA REVUELTA  
Legal Adviser  
tel.: +34 (91) 390 4437  
fax: +34 (91) 390 2383  
(languages of communication: Spanish, English)

(This page was last updated on 10 June 2014)

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## Sri Lanka

Sri Lanka - Central Authority

The Secretary  
Ministry of Justice  
P.O. Box 555  
Superior Courts Complex  
COLOMBO 12  
Sri Lanka

numéro de téléphone/telephone number: +94 (11) 2323 979

numéro de télécopie/telex number: +94 (11) 2445 447

e-mail: [saslegal@justiceministry.gov.lk](mailto:saslegal@justiceministry.gov.lk)

personne à contacter / person to contact in case of wrongful removal or retention:

- Mrs Kamalini de Silva  
Secretary  
(langue de communication / language of communication: anglais / English)

(This page was last updated on 27 March 2012)

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## Sweden

Sweden - Central Authority (Art. 29)

Ministry for Foreign Affairs  
Department for Consular Affairs and Civil Law  
103 39 STOCKHOLM  
Sweden

numéro de téléphone/telephone number: +46 (8) 405 1000 (switchboard)

numéro de télécopie/telex number: +46 (8) 723 1176

email: [ud-kc@gov.se](mailto:ud-kc@gov.se)

site web / website: <http://www.government.se/information-material/2016/06/children-who-are-wrongfully-removed-or-retained-in-another-country/>

personnes à contacter / persons to contact:

- Mrs Erica Neiglick  
Deputy Director, Head of Section  
(langues de communication / languages of communication: suédois, anglais, allemand / Swedish, English, German)  
Tel.: +46 (8) 405 1455
- Mr Pär Eriksson  
Expert  
(langues de communication / languages of communication: suédois, anglais, français / Swedish, English, French)  
Tel.: +46 (8) 405 4774
- Ms Nadia Yousri  
Expert  
(langues de communication / languages of communication: suédois, anglais / Swedish, English)  
Tel.: +46 (8) 405 5019
- Ms Isabelle Carringer  
Expert  
(langues de communication / languages of communication: suédois, anglais, espagnol / Swedish, English, Spanish)  
Tel.: +46 (8) 405 1084
- Mr Marcel Salas Lindell  
Expert  
(langues de communication / languages of communication: suédois, anglais, espagnol / Swedish, English, Spanish)  
Tel.: + 46 (8) 405 4213

EMERGENCY NUMBERS

Ministry for Foreign Affairs - During office hours 8.00 a.m. - 5.00 p.m.: **+46 (8) 405 1000**

- Other times: **+46 (8) 405 5005**

(This page was last updated on 5 February 2018)

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## Switzerland

Switzerland - Central Authority

Office fédéral de la Justice

Unité Droit international privé

Bundesrain 20

CH-3003 BERNE

tel.: +41 (58) 463 88 64

fax: +41 (58) 462 78 64

adresse e-mail/e-mail address: [kindesschutz@bj.admin.ch](mailto:kindesschutz@bj.admin.ch)

URL: [www.ofj.admin.ch/](http://www.ofj.admin.ch/) (for child abduction, [click here](#))

(languages de communication/languages of communication: allemand, français, anglais, italien / German, French, English, Italian)

(This page was last updated on 26 March 2018)

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## Tunisia

Tunisia - Central Authority

Ministère de la Justice

Boulevard Bab Bnet

Tunis

Tunisia

Personne de contact / Contact Person:

- M. Abdessalem Dammak  
Procureur Général des affaires civiles

Téléphone / Telephone: +216 71 57 23 40

Télécopieur / Fax: +216 71 56 57 45

Courriel / e-mail: [abdessalem.dammak@laposte.tn](mailto:abdessalem.dammak@laposte.tn)

Langues de communication / Languages spoken by staff: Arabic and French

(This page was last updated on 11 April 2018)

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## Turkey

Turkey - Central Authority

Ministry of Justice

General Directorate of International Law and Foreign Relations

Adalet Bakanlığı Ek Binası Namık Kemal Mah. Milli Müdafaa Caddesi No:22

Kızılay - Çankaya

ANKARA

Numéros de téléphone/telephone numbers: +90 (312) 414 84 05 / +90 (312) 414 87 24

Numéro de télécopie/telefax number: +90 (312) 219 45 23

E-mail: [uhdigm@adalet.gov.tr](mailto:uhdigm@adalet.gov.tr)

Internet: [www.uhdigm.adalet.gov.tr](http://www.uhdigm.adalet.gov.tr)

personnes à contacter / persons to contact:

- Mr. Yavuz YILMAZ, PhD. (Language of communication: English)
- Ms. Hatice Seval ARSLAN (Language of communication: English)
- Mr. Yetkin ERGÜN (Language of communication: English)

- Mr. Tugrul UZUN (Language of communication: French)

(This page was last updated on 27 September 2016)

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## Ukraine

Ukraine - Central Authority

Ministry of Justice of Ukraine

Department of International Law, Recovery of Assets and Compensation of Losses Caused by the Temporary Occupation of Crimea

Division on Private International Law

13, Horodetskogo Street

KYIV 01001

Ukraine

website: [www.minjust.gov.ua](http://www.minjust.gov.ua)

Tel.: +380 44 279 5674

Fax: +380 44 279 5674

Contact persons:

- Mrs Kateryna Shevchenko, Head of Department  
(languages of communication: Ukrainian, English, French)  
email: [ilad@minjust.gov.ua](mailto:ilad@minjust.gov.ua)
- Mrs Olga Zozulia, Head of the Division on Private International Law  
(languages of communication: Ukrainian, English)  
email: [ilatu@minjust.gov.ua](mailto:ilatu@minjust.gov.ua)
- Mr Andriy Rupa, Chief Specialist of the Division on Private International Law  
(languages of communication: Ukrainian, English)  
email: [ilatu@minjust.gov.ua](mailto:ilatu@minjust.gov.ua), [a.rupa@minjust.gov.ua](mailto:a.rupa@minjust.gov.ua)
- Ms Nathaliya Dankevych, Leading Specialist of the Division on Private International Law  
(languages of communication: Ukrainian, English, Spanish)  
email: [ilatu@minjust.gov.ua](mailto:ilatu@minjust.gov.ua)

(This page was last updated on 22 December 2014)

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## United Kingdom of Great Britain and Northern Ireland

United Kingdom - Central Authority

FOR ENGLAND AND WALES:

(Central Authority for England and Wales and the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within the United Kingdom.)

The International Child Abduction and Contact Unit

Office of the Official Solicitor

Victory House, 30-34 Kingsway

LONDON WC2B 6EX

DX 141423 Bloomsbury 7

United Kingdom

numéros de téléphone/telephone numbers: tel.: +44 (203) 681 2608

numéro de télécopie/telex number: +44 (203) 681 2763

Email for new applications and general enquiries: [ICACU@offsol.gsi.gov.uk](mailto:ICACU@offsol.gsi.gov.uk)

Internet: [www.gov.uk](http://www.gov.uk)

Preferred method of communication: email

Persons to contact:

- Mrs Kath HAMILTON  
Joint Head of Unit and Senior Case Manager
- Mrs Imogen ADAMS-STIELL  
Joint Head of Unit and Senior Case Manager
- Mr John GODDEN  
Joint Head of Unit

## FOR NORTHERN IRELAND

Operational Policy Branch  
Northern Ireland Courts & Tribunals Service  
4th Floor Laganside House  
23-27 Oxford Street  
BELFAST BT1 3LA  
Northern Ireland  
United Kingdom

numéro de téléphone/telephone number: +44 (0)28 9072 8808

numéro de télécopie/telex number: +44 (0)28 9072 8945

Internet: <http://www.courtsni.gov.uk/>

Email: [internationalchildabduction@courtsni.gov.uk](mailto:internationalchildabduction@courtsni.gov.uk)

Person to contact:

- Ms Rosie Keenan

## FOR SCOTLAND

Scottish Government  
Central Authority & International Law Team  
GW15 St. Andrew's House  
EDINBURGH EH1 3DG  
Scotland, UK

numéro de téléphone/telephone number: +44 (0) 131 244 4827

numéro de télécopie/telex number: +44 (0) 131 244 4848

Persons to contact:

- Ms Dawn Livingstone  
Case Manager  
tel: +44 (0) 131 244 4827  
Email: [dawn.livingstone@gov.scot](mailto:dawn.livingstone@gov.scot)  
Email: [childabduction@gov.scot](mailto:childabduction@gov.scot)
- Ms Dawn Livingstone  
Case Manager  
tel: +44 (0) 131 244 4827  
e-mail: [dawn.livingstone@gov.scot](mailto:dawn.livingstone@gov.scot)

## FOR THE ISLE OF MAN

Attorney General's Chambers  
3rd Floor, St Mary's Court  
Hill Street  
Douglas  
Isle of Man IM1 1EU  
British Isles  
email: [ChildAbduction@attgen.gov.im](mailto:ChildAbduction@attgen.gov.im)  
Internet: <http://www.gov.im/government/offices/attorney.xml>

Persons to contact:

- Ms Michelle NORMAN  
(langue de communication/language of communication: anglais/English)  
tel.: +44 (1624) 685 452  
fax: +44 (1624) 629 162

## FOR THE FALKLAND ISLANDS

The Governor  
Government House  
STANLEY  
Falkland Islands  
numéro de téléphone/telephone number: -  
numéro de télécopie/telex number: -  
adresse e-mail/e-mail address: -



FOR THE CAYMAN ISLANDS  
Cayman Islands Central Authority  
Solicitor General's Office  
Portfolio of Legal Affairs  
4th Floor, Government Administration Building  
P.O. Box 136 Grand Cayman, KY1-9000  
Cayman Islands  
Tel: (345)946-0022  
Email: [ciabduction@gov.ky](mailto:ciabduction@gov.ky)  
Website: <https://www.judicial.ky/home/the-portfolio-of-legal-affairs/about-us-legal-affairs>

#### FOR MONTSERRAT

Attorney General's Chambers  
Government of Montserrat  
P.O. Box 129  
Valley View  
Montserrat  
T: (664) 491-4686/5180  
F: (664) 491-4687  
email: [legal@gov.ms](mailto:legal@gov.ms)  
<http://agc.gov.ms>

#### FOR BERMUDA

The Attorney General  
Attorney General's Chambers  
Global House  
43 Church Street  
HAMILTON HM12  
Bermuda  
numéro de téléphone/telephone number: +1 (441) 292-2463  
numéro de télécopie/telex number: +1 (441) 292-3608  
adresse e-mail/e-mail address: [agc@gov.bm](mailto:agc@gov.bm)

#### FOR ANGUILLA

Attorney-General's Chambers  
PO Box 60  
The Valley  
Anguilla  
British West Indies  
E-mail: [attorneygeneral@anguillanet.com](mailto:attorneygeneral@anguillanet.com)  
Phone: + 1 264 497 3044, + 1 264 497 3185  
Fax: + 1 264 497 3126

#### FOR JERSEY

HM Attorney General  
Law Offices Department  
Morier House  
St Helier  
Jersey  
JE1 1DD  
Tel: 0044 1534 441200  
Fax: 0044 1534 441299  
Email: [law.offices@gov.je](mailto:law.offices@gov.je)

(This page was last updated on 29 March 2018)

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## United States of America

United States of America - Central Authority

U.S. Department of State - Office of Children's Issues

The Office of Children's Issues is the Central Authority and is the primary contact for cases of children abducted both to and from the United States. Additionally, this office has overall policy co-ordination responsibility for implementation of the Abduction Convention in the United States.

Office of Children's Issues (CA/OCS/CI)

U.S. Department of State

SA-17, 9th Floor

WASHINGTON, DC 20522 - 1709

United States of America

numéro de téléphone/telephone number: +1 (202) 485 6205

numéro de télécopie/telex number: +1 (202) 485 6221

website: [www.travel.state.gov/childabduction](http://www.travel.state.gov/childabduction)

personnes à contacter / persons to contact:

- Mr Theodore R. COLEY, Director  
Office of Children's Issues  
United States Central Authority  
tel.: +1 (202) 485 6262
- Mr David BRIZZEE  
Division Chief, Western Hemisphere  
Office of Children's Issues  
Tel.: +1 (202) 485 6254
- Mr Eric M. ALEXANDER  
Division Chief Eastern Hemisphere  
Office of Children's Issues  
tel: +1 (202) 485 6314
- Ms Elena CORONA  
Division Chief, Europe Abductions and Prevention  
Office of Children's Issues  
tel.: +1 (202) 485 6266

\* Note: Security-related mail processing requirements continue to cause significant delays in the delivery of mail to U.S. Government facilities. It is recommended that time-sensitive correspondence be sent to the Office of Children's Issues by email, fax or courier service.

## EMERGENCY NUMBERS

### CENTRAL AUTHORITY OF THE UNITED STATES

U.S. Department of State - Office of Children's Issues

- Monday-Friday 8.15 am-5.00 pm: **+1 (202) 485 6205**

- Outside office hours: **(888) 407 4747** if calling from within the United States or Canada; **+1 (202) 501 4444** if calling from outside the United States

(This page was last updated on 16 October 2017)

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## Uruguay

Uruguay - Central Authority

Ministerio de Educación y Cultura

Autoridad Central de Cooperación Jurídica Internacional

Reconquista 535, Piso 5°

Montevideo

República Oriental del Uruguay

Número de teléfono / Numéro de téléphone / Telephone number: +598 2915 8836

Número de Fax / Numéro de télécopie / Telefax number: +598 2915 9780

Correo electrónico / courriel / e-mail: [urures@mec.gub.uy](mailto:urures@mec.gub.uy)

Web: [http://www.mec.gub.uy/innovaportal/v/1197/9/mecweb/materia\\_familia\\_y\\_minoridad](http://www.mec.gub.uy/innovaportal/v/1197/9/mecweb/materia_familia_y_minoridad)

Puntos de contacto / personnes à contacter / persons to contact:

- Dra. Adriana Fernández Pereiro  
Correo electrónico / courriel / e-mail: [fernandezad@mec.gub.uy](mailto:fernandezad@mec.gub.uy) (lenguajes de comunicación / langues de communication / languages of communication: español, inglés / espagnol, anglais / spanish, english)
- Dr. Daniel Trecca  
Correo electrónico / courriel / e-mail: [trecca@mec.gub.uy](mailto:trecca@mec.gub.uy) (lenguajes de comunicación / langues de communication / languages of communication: español, inglés / espagnol, anglais / spanish, english)
- Dra. Carolina Vergara  
Correo electrónico / courriel / e-mail: [avergara@mec.gub.uy](mailto:avergara@mec.gub.uy) (lenguajes de comunicación / langues de communication / languages of communication: español, inglés / espagnol, anglais / spanish, english)

N.B. Uruguay having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Uruguay and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 10 November 2011)

## Venezuela

Venezuela - Central Authority

Ministerio del Poder Popular para Relaciones Exteriores  
Oficina de Relaciones Consulares  
(Ministry of People's Power of Foreign Affairs  
Office of Consular Affairs)  
Avenida Urdaneta  
Esquina Carmelitas a Puente Llaguno  
Piso 1 del Edificio Anexo a la Torre MRE  
Caracas, 1010  
República Bolivariana de Venezuela  
Telephone: +58 (212) 806 4449/802-8000 Ext. 6701 — 6713  
Email: [acvenzolana@mppre.gob.ve](mailto:acvenzolana@mppre.gob.ve); [relaciones.consulares@mppre.gob.ve](mailto:relaciones.consulares@mppre.gob.ve)  
Internet: <http://www.mppre.gob.ve> (in Spanish)

Personnes à contacter / Contact persons:

- Esquía Rubin de Celis Núñez  
Directora General de la Oficina de Relaciones Consulares  
Director-General of the Office of Consular Affairs  
E-mail: [esquia.rubin240@mppre.gob.ve](mailto:esquia.rubin240@mppre.gob.ve)
- María Auxiliadora Ruz  
Directora del Servicio Consular Extranjero  
Director of Foreign Consular Service  
E-mail: [maria.ruz842@mppre.gob.ve](mailto:maria.ruz842@mppre.gob.ve)
- Daniel Peñuela  
Asistente de la Dirección del Servicio Consular Extranjero  
Assistant of Directorate of the Foreign Consular Service  
E-mail: [daniel.penuela@mppre.gob.ve](mailto:daniel.penuela@mppre.gob.ve)
- Adriana Gutiérrez  
Coordinadora de Asuntos Especiales  
Special Matters Coordinator  
E-mail: [adriana.qutierrez679@mppre.gob.ve](mailto:adriana.qutierrez679@mppre.gob.ve)
- Ayetsa Rebolledo  
E-mail: [ayetsa.rebolledo@mppre.gob.ve](mailto:ayetsa.rebolledo@mppre.gob.ve)
- Julio Castillo  
E-mail: [julio.castillo060@mppre.gob.ve](mailto:julio.castillo060@mppre.gob.ve)
- Doris Sayago  
E-mail: [doris.sayago958@mppre.gob.ve](mailto:doris.sayago958@mppre.gob.ve)

(This page was last updated on 21 June 2017)

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## Zambia

Zambia - Central Authority (Art. 6)

the Permanent Secretary  
Ministry of Community Development, Mother and Child Health  
LUSAKA  
Zambia

Tel: +260 211 225 327

Fax: +260 211 235 342

Email: [jhsikwela@gmail.com](mailto:jhsikwela@gmail.com); [malumbbeh@yahoo.com](mailto:malumbbeh@yahoo.com)

(This page was last updated on 20 March 2017)

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## Non-Member States of the Organisation

### Bahamas

Bahamas - Central Authority

Ministry of Foreign Affairs & Immigration

Attn: Permanent Secretary

2nd Floor

Goodman's Bay Corporate Centre

P.O. Box N-3746

Nassau, N.P.

The Bahamas

Tel.: 1-242-356-5956, 1-242-356-5957, 1-242-356-5958, 1-242-356-5959, 1-242-356-5960

Fax: 1-242-328-8212, 1-242-326-2123

Email: [mofabahamas@bahamas.gov.bs](mailto:mofabahamas@bahamas.gov.bs)

Contact person:

- Ms Allene Ambrose  
Legal Affairs Division  
Tel. 1-242-356-5956 ext. 9568  
Email: [alleneambrose@bahamas.gov.bs](mailto:alleneambrose@bahamas.gov.bs)

N.B. The Bahamas having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between the Bahamas and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 12 February 2016)

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### Belize

Belize - Central Authority

Ministry of Human Development and Social Transformation

West Block

Independence Hill

## BELMOPAN

Belize

numéro de téléphone/telephone number: +501 822 2161 ou/or +501 822 2684

numéro de télécopie/telex number: +501 822 3175

adresse e-mail/e-mail address: [secretary@humandev.gov.bz](mailto:secretary@humandev.gov.bz)

N.B. Belize having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Belize and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 18 February 2011)

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## Bolivia

Bolivia - Central Authority

Ministry of Foreign Affairs

Plaza Murillo c Ingavi esq. c. Junin

La Paz

Tel: (591-2) 2408900 - 2409114 - 2408595

Fax: (591-2) 2408640 - 2408905

E-mail: [mreuno@rree.gob.bo](mailto:mreuno@rree.gob.bo)Website: <http://www.cancilleria.gob.bo>

Contact Person:

Dr. Fernando Victor Zeballos Gutierrez

General Director, Legal Affairs

Tel: (591-2) 2409068

E-mail: [fzeballos@rree.gob.bo](mailto:fzeballos@rree.gob.bo); [f.zeballos.gutierrez@gmail.com](mailto:f.zeballos.gutierrez@gmail.com)

Language of Communication: Spanish-English

(This page was last updated on 6 October 2017)

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## Colombia

Colombia - Central Authority

Instituto Colombiano de Bienestar Familiar

Avenida Carrera 68 – 64C- 75 Bogotá

Colombia

Código Postal: 111061000

PBX: (57) (1) 4377630

- Doctor Eduardo Alexander Franco Solarte  
Subdirector de Adopciones  
Delegado de la Autoridad Central Para los Convenios Internacionales  
Correo electrónico: [Eduardo.franco@icbf.gov.co](mailto:Eduardo.franco@icbf.gov.co)
- Andrea Carolina Mogollón Caballero  
Abogada – Autoridad Central Colombiana  
Correo electrónico: [Andrea.mogollon@icbf.gov.co](mailto:Andrea.mogollon@icbf.gov.co)
- Carolina Méndez Bouzas  
Abogada – Autoridad Central Colombiana  
Correo electrónico: [Carolina.mendez@icbf.gov.co](mailto:Carolina.mendez@icbf.gov.co)
- Edid Viviana Abril Bolívar  
Abogada – Autoridad Central Colombiana  
Correo electrónico: [Edid.abril@icbf.gov.co](mailto:Edid.abril@icbf.gov.co)
- María Harker Rozo  
Abogada – Autoridad Central Colombiana  
Correo electrónico: [Maria.harker@icbf.gov.co](mailto:Maria.harker@icbf.gov.co)

(This page was last updated on 5 March 2018)

## Dominican Republic

Dominican Republic - Central Authority

Consejo Nacional Para la Niñez y la Adolescencia (National Council for Childhood and Adolescence) (CONANI)

Avenida Máximo Gómez No. 154, esq. Paraguay

Ensanche la Fé

Apartado Postal 2081

SANTO DOMINGO, D.N.

Dominican Republic

Tel.: +1 (809) 567 2233

Fax: +1 (809) 567 2494

E-mail: [conani@conani.gov.do](mailto:conani@conani.gov.do)

(langues de communication / languages of communication: espagnol, anglais / Spanish, English)

personnes à contacter / persons to contact:

- Lic. Aly Q. PEÑA  
Consultora Jurídica  
e-mail: [aly.pena@conani.gov.do](mailto:aly.pena@conani.gov.do)
- Lic. Giovanni HERNANDEZ-ESPINAL  
Sub-Consultor Jurídico  
e-mail: [subconsultorjuridico@conani.gov.do](mailto:subconsultorjuridico@conani.gov.do)

(This page was last updated on 22 July 2011)

## El Salvador

El Salvador - Central Authority

Procuraduría General de la República

9a Calle Pte. y 13 Avenida Norte

Torre PGR, Centro de Gobierno

SAN SALVADOR

El Salvador, C.A.

Tel: +503 2231-9346

Fax: +503 2231-9353

Internet: <http://www.pgr.gob.sv/>

Personne à contacter / Contact person:

- Licda. Emilia Guadalupe Portal Solís  
Email: [emelyportal@yahoo.es](mailto:emelyportal@yahoo.es)  
(langue de communication / language of communication: espagnol / Spanish)

Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia (ISNA)

Colonia Costa Rica Nos 2

Final Avenida Irazú, Calle Santa Marta

Municipio y Departamento de San Salvador

SAN SALVADOR, El Salvador, C.A.

tel.: (503) 7678-9479, (503) 2213-4701, (503) 2213-4703

fax: (503) 2270-1348

Contact person: Lic. Elda Gladis Tobar Ortiz, Directora Ejecutiva

email: [direccionejecutiva@isna.gob.sv](mailto:direccionejecutiva@isna.gob.sv)

Internet: [www.isna.gob.sv](http://www.isna.gob.sv)

Preferred method of communication: telephone and email

Language of communication: Spanish

N.B. El Salvador having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between El Salvador and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 10 December 2015)



## Fiji

Fiji - Central Authority

The Permanent Secretary for Justice  
 P.O. Box 2213  
 Government Buildings  
 Suva  
 Fiji  
 Tel.: +679 330 9866  
 Fax: +679 330 5421  
 Email: [mvuniwaqa@govnet.gov.fj](mailto:mvuniwaqa@govnet.gov.fj)  
 (Language of communication: English)

Contact person:

- Ms Mereseini Vuniwaqa  
 Acting Permanent Secretary for Justice

(This page was last updated on 25 January 2012)

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## Guatemala

Guatemala - Central Authority

Procuraduría General de la Nación  
 Procuraduría de la Niñez y la Adolescencia  
 15 Avenida 9-69 zona 13  
 Primer Nivel  
 Código Postal 01013  
 GUATEMALA  
 Tel: +502 2414-8787 ext. 2011-2010-6018  
 Internet: [www.pgn.gob.gt](http://www.pgn.gob.gt)  
 Languages of communication: Spanish, English

personnes à contacter / persons to contact:

- Lic. Harold A. Flores Valenzuela  
 Jefe de la Procuraduría de la Niñez y la Adolescencia  
 Procuraduría General de la Nación  
 Tel. +502 22483200/24148787 ext. 2011/2012/2011  
 Fax: +502 22483200 ext. 216  
 Email: [notificaciones@pgn.gob.gt](mailto:notificaciones@pgn.gob.gt)
- Sonia M. Pascual  
 Asistente del Jefe de la Procuraduría de la Niñez y la Adolescencia

(This page was last updated on 8 December 2015)

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## Guinea

Guinea - Central Authority

Ministère de l'Action Sociale, de la Promotion Féminine et de l'Enfance  
 Immeuble ENIPRA (5ème et 6ème étages du bâtiment du CNLS)  
 Commune de Kaloum  
 BP:527  
 Quartier Almamya  
 Ville de Conakry  
 Guinée  
 Tel: +224 655 35 31 71  
 Language of communication / Langue de communication : French / Français

Contact person / Personne de contact :

Aboubacar Sidiki Camara  
Conseiller Juridique du Ministre  
Tel.: +224 (622) 16 94 28  
Email: [bacarkiki@yahoo.fr](mailto:bacarkiki@yahoo.fr) ou [aboubacr72@gmail.com](mailto:aboubacr72@gmail.com)

(This page was last updated on 8 December 2015)

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## Honduras

Honduras - Central Authority

Dirección de Niñez, Adolescencia y Familia (DINAF)  
Programa de Migración y Sustracción Internacional de Niños, Niñas y Adolescentes  
Colonia Humuya  
Calle La Salud, No 1101 frente a puente desnivel de El Prado  
TEGUCIGALPA  
Honduras  
Número de téléphone/telephone number: +504 2239 3131  
Internet: [www.dinaf.gob.hn](http://www.dinaf.gob.hn)  
Email: [convenciondelahayadinaf@gmail.com](mailto:convenciondelahayadinaf@gmail.com)

Personne à contacter/Contact person:

- Abogado Francisco Urbina  
Jefe de Migración y Sustracción Internacional de Niños, Niñas y Adolescentes
- Ms Eva Solorzano  
Oficial de Seguimiento de la Convención de la Haya sobre los Aspectos Civiles de Sustracción Internacional de Menores

N.B. Honduras having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Honduras and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession." For further information, see the full status of the Convention.

(This page was last updated on 3 March 2016)

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## Jamaica

Jamaica - Central Authority

Child Development Agency  
Address: 48 Duke Street, Kingston  
Telephone: +1876-948-2841-2, +1876-922-8857  
Fax: +1876-924-9401  
E-mail: [jacentralauthority@cda.gov.jm](mailto:jacentralauthority@cda.gov.jm)  
Website: <http://www.cda.gov.jm/>

Contact person:

- Maxine Bagalue (Mrs)  
Adoption Coordinator  
[bagaluem@cda.gov.jm](mailto:bagaluem@cda.gov.jm)  
Tel: +1876-922-5615, Ext. 227, +1876-922-1751 (office)  
+1876-469-4639(mobile)

(This page was last updated on 30 May 2017)

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## Lesotho

Lesotho - Central Authority (Art. 29)

Ministry of Justice, Human Rights and the Correctional Services  
P.O. Box 402  
Maseru, 100  
Lesotho  
Tel.: +266 (22) 312 036 / 323 617  
Fax: +266 (22) 310 934

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## Nicaragua

Nicaragua - Central Authority

Ministerio de la Familia Adolescencia y Niñez (MIFAN)  
Del Antiguo ENEL Central, 100 mts. al Sur  
Apdo. 1292  
Managua  
Nicaragua  
Tel.Fax: +505 2278-1620 / 2270-2644  
Email: [asuntosinternacionales@mifamilia.gob.ni](mailto:asuntosinternacionales@mifamilia.gob.ni)  
website: [www.mifamilia.gob.ni](http://www.mifamilia.gob.ni)

Contact persons:

- Marcia Ramírez Mercado, Ministra de la Familia, Adolescencia y Niñez  
Email: [mramirez@mifamilia.gob.ni](mailto:mramirez@mifamilia.gob.ni)
- Dr. Johana Vanessa Flores Jiménez, Directora General de la Dirección General de Adopción  
Email: [jflores@mifamilia.gob.ni](mailto:jflores@mifamilia.gob.ni)  
Tel: +505 22702644

(This page was last updated on 17 June 2016)

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## Pakistan

Pakistan - Central Authority

Solicitor-General  
Ministry of Law and Justice  
Room No. 343, R Block  
Pak Secretariat  
Islamabad  
Pakistan  
Tel: +92-51-9202494  
E-mail: [solicitor@molaw.gov.pk](mailto:solicitor@molaw.gov.pk)  
Website: <http://www.molaw.gov.pk/frmDetails.aspx?opt=misclinks&id=54>

(This page was last updated on 1 December 2017)

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## Saint Kitts and Nevis

Saint Kitts and Nevis - Central Authority

Ministry of the Attorney General, Justice and Legal Affairs  
c/o Hon. Patrice D. Nisbett, Attorney General  
Government Headquarters  
PO Box 164  
BASSETERRE  
Saint Kitts, West Indies  
numéro de téléphone/telephone number: +1 (869) 465 2521 ext. 1013  
numéro de télécopie/telex number: +1 (869) 465 5040  
adresse e-mail/e-mail address: [attorneygeneral@gov.kn](mailto:attorneygeneral@gov.kn)

N.B. Saint Kitts and Nevis having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Saint Kitts and Nevis and such Contracting States as have declared this

acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 18 February 2011)

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## San Marino

San Marino - Central Authority

Tribunale Unico (Single Court)  
via 28 Luglio, 194  
47893 BORGIO MAGGIORE  
San Marino

numéro de téléphone/telephone number: +378 (0549) 888 888

numéro de télécopie/telex number: -

personnes à contacter / persons to contact:

- Mr Gilberto FELICI  
Law Commissioner  
e-mail: [gilberto.felici.tribunaleunico@pa.sm](mailto:gilberto.felici.tribunaleunico@pa.sm)
- Mrs Valeria PIERFELICI  
Law Commissioner  
e-mail: [valeria.pierfelici.tribunaleunico@pa.sm](mailto:valeria.pierfelici.tribunaleunico@pa.sm)

(This page was last updated on 22 March 2017)

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## Seychelles

Seychelles - Central Authority

Ms Beryl Laboudallon  
Director of Social Services  
Ministry of Health and Social Development  
P.O. Box 190  
Victoria, Mahé  
Seychelles  
Tel.: +248 4 28 16 32  
Fax: +248 4 22 56 56  
[blaboudallon@gov.sc](mailto:blaboudallon@gov.sc)

(This page was last updated on 27 March 2018)

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## Thailand

Thailand - Central Authority

Office of the Attorney General  
International Affairs Department  
Rajaburi Direkridhi Building  
Government Complex  
Chaeng Watthana Road, Laksi  
Bangkok 10210, Thailand  
Tel : +662-142-1637  
Fax : +662-143-9791 / +662-143-9792  
Email: [inter@ago.go.th](mailto:inter@ago.go.th)  
(language of communication: English)  
Contact person:

- Mr Wanchai Roujanavong  
Director General of the International Affairs Department

(This page has last been updated on 12 November 2014)

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## Trinidad and Tobago

Trinidad and Tobago - Central Authority

International Office of Child Rights & Civil Child Abduction Authority  
 Ministry of the Attorney General and Legal Affairs  
 Corner Richmond and London Streets  
 Government Campus Plaza, 17th Floor  
 PORT OF SPAIN  
 Trinidad and Tobago  
 Email: [ccaa@ag.gov.tt](mailto:ccaa@ag.gov.tt)  
 Contact person: Ravita Babwah, Senior Legal Counsel  
 Tel: 1-868-623-7010  
 Alt. email : [rbabwah@ag.gov.tt](mailto:rbabwah@ag.gov.tt)

N.B. Trinidad and Tobago having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Trinidad and Tobago and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 31 March 2017)

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## Turkmenistan

Turkmenistan - Central Authority

Turkmen National Institute of Democracy and Human Rights under the President of Turkmenistan  
 Karl Libkneht St., 47  
 ASHGABAT 744000  
 Turkmenistan  
 numéro de téléphone/telephone number: +993 (12) 393481 / 350946  
 numéro de télécopie/telex number: +993 (12) 350677 / 350946

(Les renseignements mentionnés ci-dessus sont valables au 7 décembre 1998).  
 (The effective date of the above information is 7 December 1998).

N.B. Le Turkménistan ayant adhéré à la Convention conformément à son article 38, cette adhésion n'aura d'effet que dans les rapports entre le Turkménistan et les Etats contractants qui auront déclaré accepter cette adhésion. "Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion".

Turkmenistan having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between Turkmenistan and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

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## Uzbekistan

Uzbekistan - Central Authority

Ministry of Justice of the Republic of Uzbekistan  
 International Legal Department  
 5, Sailgoh Street  
 TASHKENT 700047  
 Uzbekistan  
 numéro de téléphone/telephone number: +998 (71) 232 0742  
 numéro de télécopie/telex number: +998 (71) 232 4844  
 e-mail: [international@minjust.gov.uz](mailto:international@minjust.gov.uz)

personne à contacter / person to contact:

- Davronbek AKHMEDOV

N.B. The Republic of Uzbekistan having acceded to the Convention in accordance with Article 38, the accession has effect only as regards the relations between the Republic of Uzbekistan and such Contracting States as have declared their acceptance of the accession. "Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

(This page was last updated on 17 February 2011)

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## Zimbabwe

Zimbabwe - Central Authority

Permanent Secretary for Justice and Legal Affairs

New Government Composite Building

6th floor, Bloc C

Samora Machel Avenue / 4th Street

Private Bag: 7751

Causeway

HARARE

Zimbabwe

numéro de téléphone/telephone number: +263 (4) 774620-7 / +263 (4) 774589-94 / +263 (4) 774 4560

numéro de télécopie/telefax number: +263 (4) 772 999

adresse e-mail/e-mail address: -

(This page was last updated on 23 February 2011)



## **Convention on the Rights of the Child**

**Adopted and opened for signature, ratification and accession by General Assembly  
resolution 44/25 of 20 November 1989**

**entry into force 2 September 1990, in accordance with article 49**

### **Preamble**

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

## **PART I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

### **Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

### **Article 6**

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

#### **Article 7**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

#### **Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

#### **Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### **Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

#### **Article 13**

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

#### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

### **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

### **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### **Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

#### **Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

#### **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

#### **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.



**Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

**Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

**Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

**Article 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) Make educational and vocational information and guidance available and accessible to all children;
  - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy

throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

### **Article 29**

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### **Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### **Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

### **Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

### **Article 37**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

### **Article 40**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### **Article 41**

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

### **PART II**

#### **Article 42**

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

#### **Article 43**

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute

a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

#### **Article 44**

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

#### **Article 45**

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### **PART III**

#### **Article 46**

The present Convention shall be open for signature by all States.

#### **Article 47**

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 48**

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### **Article 49**

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### **Article 50**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any



amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

#### **Article 51**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

#### **Article 52**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

#### **Article 53**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

#### **Article 54**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.



## CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979, (CEDAW)

### Article 1

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms to the political, economic, social, cultural, civil or any other field

### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated herein and to ensure through laws and other appropriate means, the practical realization of this principle;
- (b) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated herein and to ensure through laws and other appropriate means, the practical realization of this principle;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women
- (g) To repeal all national penal provisions which constitute discrimination against women

**Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields all appropriate measures, including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

**Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

**Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

**Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women

**Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women on equal terms with men, the right;

- (a) To vote in all elections and public referenda, and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

**Article 8**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

**Article 9**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure to particular that neither marriage to an alien nor change of nationality by the husband during marriage nor change of nationality; by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

**Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.

- (a) The same conditions for career and vocational guidance for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be

ensure in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of text books and school programmes and adaptation of teaching methods.
- (d) The same opportunities to benefit from scholarships and other study grants.
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing at the earliest possible time, any gap in education existing between men and women
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely.
- (g) The same opportunities to participate actively in sports and physical education
- (h) Access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.

## Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of women and men, the same rights, in particular
  - (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment'
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right

to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training.

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures;

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of marriage or of maternity leave and discriminate in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowance;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them

3. Protective legislations relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repeated or extended as necessary.

## **Article 12**

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*



2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation

## Article 13

1. States Parties shall take all appropriate; measure to eliminate discrimination against women in other areas of economic and social life in order to ensure on a basis of equality of men and women, the same rights, in particular: -
  - a) The right to family benefits
  - b) The right to bank loans, mortgages and other forms of financial credit
  - c) The right to participate in recreational activities, sports and all aspects of cultural life

## Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right;
  - (a) To participate in the elaboration and implementation of development planning at all levels.
  - (b) To have access to adequate health care facilities, including information, counseling and services in family planning
  - (c) To benefit directly from social security programmes.
  - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter-alia, the benefit of all community and extension services, in order to increase their technical proficiency.

- (e) To organize self-help groups and cooperatives in order to obtain equal access to economic opportunities through employment or self-employment.
- (f) To participate in all community activities
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications

### **Article 15**

1. States Parties shall accord to women equality with men before the law
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity, In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

### **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women;
  - (a) The same right to enter into marriage
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent

- (c) The same rights and responsibilities during marriage and at its dissolution.
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating *to their children*, in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist *in national legislation*; in all cases the interests of the children shall be paramount
  - (f) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (g) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

[Source: <http://wcd.nic.in> ]

MINUTES OF THE MEETING OF THE COMMITTEE ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016 HELD ON 03.06.2017 AT 11.30 AM UNDER THE CHAIRMANSHIP OF HON'BLE MR. JUSTICE RAJESH BINDAL, JUDGE, PUNJAB & HARYANA HIGH COURT

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The Committee held its first meeting, after formally being notified, on 3.06.2017 at 11.30 A.M at Chandigarh Judicial Academy, Chandigarh. Some members of the Committee attended the same from Delhi and the two venues remained connected through video conferencing facility.

The following members attending the meeting: -

1. Hon'ble Ms. Justice Mukta Gupta, Judge, Delhi High Court
2. Hon'ble Ms Justice Anita Chaudhary, Judge, Punjab and Haryana, High Court
3. Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.), Chairman, Punjab State NRI Commission, Chandigarh
4. Mr. A. K. Upadhyaya, Member, Law Commission of India, New Delhi
5. Ms.Rekha Sharma, Member, National Commission for Women, New Delhi
6. Dr.Balram Gupta, Director (Academics), Chandigarh Judicial Academy
7. Ms. Uma Sekhar, IFS, Ministry of External Affairs, New Delhi
8. Ms Astha Saxena , ICAS , JS, WCD, New Delhi
9. Mr. Sudhir Kumar Gupta, Deputy Secretary, Ministry of Home Affairs, New Delhi
10. Mr. P.K. Behera, Deputy Legal Advisor, Ministry of Law and Justice, Delhi
11. Ms. Meenaxee Raj, HCS, Joint Secretary to Governor of Haryana (Member Secretary), Chandigarh
12. Sh.Anil Malhotra, Advocate, Punjab and Haryana High Court, Chandigarh

Mr. Justice Rajesh Bindal opened the session. After a brief introduction, the Chair suggested that before going ahead with deliberations, a reference must be made to the main points discussed in the meeting held at New Delhi on 03.02.2017, which was attended by various stakeholders and presided over by Hon'ble Ms. Maneka Sanjay Gandhi, Cabinet Minister, Ministry of Women and Child Development. It was also suggested by the Chair that the Committee must take a call on the way forward. The Chairperson apprised the house of the purpose of constitution of the committee. Since some of the members had not attended the preliminary meeting dated 3.2.17 held in New Delhi, the Chairperson read out the points discussed in the said meeting as well as the way forward. In light of the previous discussions, the Chairperson said that the committee needs to take a call on whether the existing draft bill was sufficient to tackle all the issues involved in the trans-national child removal and the issues that may arise out of it in future or certain amendments are required keeping in view peculiar situation in our country. He also suggested that the Committee also needs to examine whether amendments in existing statutes dealing with the issue will be sufficient. He further suggested that issues have to be shortlisted to be discussed with various parties likely to be affected. May be by holding meetings/seminars at different places, as required. Some of the persons, NGO's who had attended the meeting at Delhi on 3.2.2017.

Ms. Justice Mukta Gupta enlightened the House regarding the important aspects of Indian women being victims of domestic violence in inter country marriages, thereafter, being blamed to be an abductor of their own children. She suggested that the committee must examine the need for India to be a signatory to The Hague Convention. Ms Justice Mukta Gupta had attended the meeting dated 3.02.2017. She mentioned that many stakeholders in the previous meeting strongly felt that India should not go ahead with signing The Hague Convention in view of the fact that the women of Indian origin in overseas marriages may end up being blamed with abduction of their own children in case they return to India after some matrimonial dispute. In view of the same, it was suggested that a call has to be taken if India should go ahead with signing the convention. Justice Mukta Gupta also laid emphasis that the committee should also look into

the aspect whether the Bill is to be retained as it is or it needs amendments. She further suggested that a concept note be prepared highlighting the issues and then comments and suggestions be called from various stake holders.

Ms.Astha Saxena, Joint Secretary to Ministry of Women and Child Development said that on the basis of the data made available, the Ministry will come up with a concept note. The concept note will be uploaded on the websites of the Ministry of Women and Child Development, Punjab NRI Commission and National Commission for Women. The same shall be given wide publicity for information to various stakeholders. She also made a presentation on the subject spelling out the key issues and concerns; the same is being circulated along with the minutes.

Mr Anil Malhotra, Advocate, Punjab and Haryana High Court, suggested that since there are a lot of legislations in India to take care of violence against women, we must not allow this legislation envisaged in best interest of the child as a central idea, to be put forth as another women specific law. He also emphasised the need to avoid confusion with definitions of many clauses with those already existing in various Acts. He was of the view that India must go ahead with signing The Hague convention and that we must harmonise the provisions of existing laws to suit the needs of our people. He also said that being a signatory of the convention will benefit us with access to other counties. However, our laws should have additional safeguards keeping in mind the Indian perspective. He also explained that the Civil Procedure Code, 1908 contains specific provisions on applicability of foreign decrees in India. Further, to substantiate his points , he placed reliance on catena of judgments like *Ruchi Majoo v. Sanjeev Majoo*, 2011 (6) SCC 479, *Amrit Pal Singh v. Jasmit Kaur*, AIR 2006 Del 213 and elaborated on important principles like first strike rule amongst others.

Mr. Justice R.K. Garg (Retd.), Chairman Punjab NRI commission, stated that the committee should be cautious in not allowing the legislation to be misused by fighting couples as a battle ground to settle their conjugal scores, diverting the focus from best interest of the child which has to remain the

cynosure of the act. Additionally, he suggested the need for reliable data for consideration of the committee.

Ms.Meenaxee Raj, HCS, Joint Secretary to Governor of Haryana, suggested that there is a need to harmonise the provisions existing under other laws with reference to the law under deliberation and come up with a fresh draft legislation, besides analysing the actual need to sign the Convention in the light of the special socio-economic dynamics prevalent in our country.

Ms Rekha Sharma, Member, NCW, handed over documents (attachment enclosed ) to the members of the committee for perusal . She also expressed her willingness to share data regarding such cases as available with the Commission.

Ms. Uma, Joint Secretary, MEA suggested that the data and figures must be looked into and the Ministry of External Affairs would share data available mainly from the United States, with the committee shortly, preferably within a week

After due deliberations it was resolved that after the Ministry of External Affairs furnishes the data in one week, the same shall be circulated to all the Members of the Committee. Within one week thereafter, the Joint Secretary, Ministry of Women & Child Development will prepare a concept note which shall be circulated to all the Members of the Committee. The same shall be deliberated upon in the meeting of the Committee to be held tentatively towards end of June, 2017 –venue and time to be notified. The issues, which may require deliberation, may include:-

1. Whether India should sign Hague Convention?
2. Whether the Bill is acceptable in its present form or requires amendments? If yes, to what extent?
3. Whether there is requirement to pass the Bill or the objectives can be achieved with necessary amendments in the existing statutes?

It was resolved that after concept note and the issues to be flagged are finalized, for inviting objections and suggestions, the same shall be uploaded on



the website of the Ministry of Women and Child Development, NRI Commission, National Commission for Women and other websites, which may be decided. Wide publicity shall be given through media to enable the stakeholders to participate in the process by submitting their suggestions and objections. Modes shall be decided later on.

Meeting ended with thanks to the chair.

If agreed, the same may kindly be approved so that the undersigned can circulate the minutes amongst all the worthy members of the Committee. Documents placed at Annexure-A (PPT) and Annexure –B submitted by the Ministry of Women and Child Development and Ms. Rekha Sharma, Member, NCW respectively may also be circulated alongwith the minutes to all the worthy members.

Submitted for kind approval please.

(Meenaxee Raj,HCS)  
Joint Secretary, Haryana Raj Bhawan  
Member Secretary,  
Committee for Civil aspects of  
International Child Abduction Bill, 2016

Dated: 07.06.2017

Hon'ble Justice Sh. Rajesh Bindal  
President ,Board of Governors Judicial  
Academy of Chandigarh  
Judge, High Court of Punjab and Haryana  
Chairperson, Committee for Civil Aspects of International Child  
Abduction Bill, 2016



## PROCEEDINGS OF THE COMMITTEE

**Concept Note on Legislation to address issue related to Civil Aspects of International Child Removal****Background:**

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty on custodial issues of children, which came into existence on 1st December, 1983. The Convention seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to ensure their prompt return. It is intended to enhance the international recognition of rights of custody and access arising in place of habitual residence, and to ensure prompt return of the child who is wrongfully removed or retained from the place of habitual residence. It seeks the return of children abducted or retained overseas, to their country of habitual residence, for the courts of that country to decide on matters of residence and contact. The objects of the Convention are:

- To secure prompt return of children wrongfully removed to or retained in any Contracting State; and
- To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

A copy of Convention on the Civil Aspect of International Child Abduction 1980 is attached at **Annexure-I**.

1. In the year 2009, Law Commission of India, headed by former Supreme Court Judge, Justice (Dr.) A.R.

Lakshmanan, had submitted a report recommending the government to ratify the Hague Convention. (Law Commission of India, **Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)**, Report No. 218 (Mar. 2009). It recommended that “the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their home in India”. Accordingly, the issue was examined in the Ministry, and a draft bill (The International Child Removal and Retention Bill, 2016) was prepared. The draft bill was uploaded on the website of the Ministry of Women and Child Development in June 2016 for public comments.

2. In the meantime, the Hon’ble High Court of Punjab and Haryana in the matter of Seema Kapoor & Anr. Vs. Deepak Kapoor & Ors. Civil Revision No. 6449/2006 decided on 24th February, 2016, referred the matter to Law Commission of India to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on Child Abduction. The order of the High Court is attached as **Annexure –II**.
3. In pursuance of above orders, the Law Commission of India prepared Report No. 263. The Commission observed that “On perusal of the said Bill (draft bill, The

International Child Removal and Retention Bill, 2016 prepared by the ministry) , the Law Commission is of the opinion that it requires revision, keeping in view the legislative precedents and practices followed in the drafting of Bills and to suitably harmonize its provision with the Hague Convention 1980 ”. The Law Commission also recommended revision of certain clauses of the draft bill prepared by the ministry, and the same is a part of the 263<sup>rd</sup> report of the Law Commission. A copy of the Report is attached as **Annexure-III**.

4. Besides, in response of the Bill uploaded on the website of the Ministry, comments were received both against and in favour. While some individuals/ organizations supported the Bill, certain others had reservations about it on account of being in conflict with the interest of the Indian children and the women who often return to the country after marital break-up for different reasons.
5. In view of these developments, the Ministry of Women and Child Development held a National Consultation under the chairmanship of Hon’ble Minister of Women and Child Development on 3rd February 2017. After detailed deliberation it was decided to constitute a Multi member Committee to be chaired by the Head of Chandigarh Judicial Academy, Chandigarh and to draft a suitable legislation, and to give advice whether India should be a signatory to the Hague Convention or not .

Economic liberalisation in India has ushered in the era of globalization, where the world has come to be called a global village, and India has become a part of this global village. Cross border movement of people comes easy with the global job opportunities. The instances of an Indian citizen marrying an NRI or a person of Indian origin having citizenship of a foreign nation, popularly referred to as 'trans-national marriages' are frequent and in abundance.

However, many a times , it so happens that the spouses fall apart and the marriage breaks down irretrievably. In many such cases, the spouses return to the net of their families/ extended families in India, seeking mental comfort for themselves and their children. However, such instances often land such estranged spouse situation of being perceived as abductors of their children in light of The Hague convention provisions .

In another situation where both the spouses may be Indians, residing in India, one of the spouses may move out of India along with the child born out of such wedlock after breakdown of marriage. In such situation, the issue of getting the child back from the foreign land assumes importance, in the process of redressing the grievance of the left behind spouse. In such cases, the signatory countries of the Hague convention can avail access to the Central authorities of the other contracting states to resolve such issues. Another factor that deserves consideration, is that many a times, on account of the broken marriages, often the complaint of child abduction is alleged against each other by the estranged spouse, to settle their personal scores.

Since the matter is of immense importance and is likely to have large scale ramifications, it is desirable and in the fitness of things to put the same in public domain and invite suggestions from various quarters. The Committee may even hold meetings with different stakeholders.

Suggestions, if any, may be sent by e-mail to the Member Secretary, namely, Ms. Meenaxee Raj of the Committee at [meenaxeeraj@gmail.com](mailto:meenaxeeraj@gmail.com) upto 31.07.2017 If any information or clarification is required, the same can also be sought from the Member Secretary.

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We propose to upload this note after approval on the websites of following ministries/commissions/academies:

1. Ministry of External Affairs
2. Ministry of Women & Child Development
3. National Commission for Women
4. National Commission for Protection of Child Rights
5. National Judicial Academy
6. Chandigarh Judicial Academy
7. Punjab State NRI Commission

For other bodies that may be of state level and state specific, we would request the ministry of Women and Child Development to arrange for uploading .





**PROCEEDINGS OF THE HEARINGS OF THE COMMITTEE  
ON CIVIL ASPECTS OF INTERNATIONAL PARENTAL  
CHILD ABDUCTION BILL 2016, HELD AT NEW DELHI ON  
16-17<sup>TH</sup> SEPTEMBER 2017:**

The committee held its session through video-conferencing at the Video-conferencing room of the Delhi High Court. Various left behind as well as flight to safety parents joined in the session through video-conferencing, skype, whatsapp etc. Another session was held to afford personal hearing to various stakeholders. The session was attended by many affected parties. Few advocates representing them and representatives of organizations involved with inter-country parental child removal cases also interacted with the Committee.

They apprised the committee about the details of their individual cases and also explained the entire phenomena. Some of the participants laid emphasis on how domestic violence inflicted by one spouse was instrumental in removal of child by the other. Some other participants, however, submitted that the hue and cry raised by taking parent about violence was false, since there were ample laws dealing with domestic violence in the countries where they were residing. Few academicians and organizations associated with the cause of international parental child removal also interacted with the committee and aired their views.

Most participants had reservation regarding the other spouse knowing their presence in the session. Therefore, with a view to honor their rights to privacy, the names of the participants are not being recorded. The suggestions/comments/objections/statements given by

these participants have been noticed. However, since most of the participants desired to send elaborate written material to the committee through e-mail for detailed consideration, the committee decided that the same be summarized and be made a part of the report.

The U.S. Embassy upon knowledge of constitution of the committee and its meeting scheduled at New Delhi, desired to meet the committee during the two day session. On 16<sup>th</sup> September, Ms. Mary Kay Carlson, Charge d'Affaires accompanied by Joseph R. Pomper, Minister Counselor for Consular Affairs, George H. Hogeman, (Consul General) and Pamela R. Kazi, Consul and American Citizens Services Chief interacted with the committee. They highlighted the importance of signing the Hague Convention 1980 for India. The main point of emphasis was return of a child removed out of the U.S., so that the determination of custody rights could take place before the judicial forums of the place of habitual residence of the child. They also said that parental child abduction (as popularly referred to in the U.S) was a felony as per the U.S legal framework. They informed the committee of the robust Foster Care Services prevalent in the U.S. On the issue of domestic violence the panel apprised the committee that the U.S had an adequate and robust mechanism of law and helplines to address domestic violence. Therefore, the world need to see international parental child removal/abduction and domestic violence as two separate phenomena.

The following members of the committee attended the meetings:

1. Hon'ble Mr. Justice Rajesh Bindal  
Judge, Punjab and Haryana High Court  
(Chairperson)

2. Hon'ble Ms. Justice Mukta Gupta  
Judge, Delhi High Court
3. Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.)  
Chairman, Punjab State NRI Commission
4. Ms. Rekha Sharma  
Chairperson, National Commission for Women
5. Ms Astha Saxena, ICAS  
Joint Secretary, Ministry of Women and Child Development,  
Government of India
6. Ms. Uma Sekhar, ILS  
Joint Secretary (Law & Treaty), Ministry of External Affairs,  
North Block, New Delhi
7. Sh. A.K. Upadhya  
Additional Law Officer to Chairman of Law Commission,  
Law Commission of India
8. Sh. Sudhir Kumar Gupta  
Deputy Secretary, Ministry of Home Affairs  
Government of India
9. Ms. Meenaxee Raj, HCS (Member Secretary)  
Joint Director (Admn.), Urban Local Bodies,  
Government of Haryana
10. Dr. Balram K. Gupta  
Director (Academics), Chandigarh Judicial Academy  
Chandigarh
11. Shri Anil Malhotra,  
Advocate, Punjab & Haryana High Court,  
Chandigarh

PROCEEDINGS OF THE HEARINGS OF THE COMMITTEE ON CIVIL ASPECTS OF INTERNATIONAL PARENTAL CHILD ABDUCTION BILL 2016, HELD AT KARNATAKA JUDICIAL ACADEMY, BENGALURU (KARNATAKA) ON 31<sup>ST</sup> OCTOBER, 2017:

The committee held another round of interaction at Bengaluru, on 31.10.2017. The meeting was joined by various stakeholders in person as well as via IT modes such as skype, whatsapp etc.

They apprised the committee of the details of their individual cases and also explained the entire phenomena. Some of the participants laid emphasis on how domestic violence inflicted by one spouse was instrumental in bringing about removal of child by the other. Some other participants, however, submitted that the hue and cry raised by taking parent about violence was false, since there were ample laws dealing with domestic violence in the countries where they were residing. Few academicians and organizations associated with the cause of international parental child removal also interacted with the committee and aired their views.

Most participants had reservation regarding the other spouse knowing their presence in the session. Therefore, with a view to honor their rights to privacy, the names of the participants are not being recorded. The suggestions/comments/objections/statements given by these participants have been recorded. However, since most of the participants desired to send elaborate written material to the committee through e-mail for detailed consideration, the committee decided that the same be summarized and be made a part of the report.

The meeting was attended by the following members:

1. Hon'ble Mr. Justice Rajesh Bindal  
Judge, Punjab and Haryana High Court  
(Chairperson)
2. Hon'ble Ms. Justice Mukta Gupta  
Judge, Delhi High Court
3. Hon'ble Mrs. Justice Anita Chaudhry  
Judge, Punjab and Haryana High Court
4. Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.)  
Chairman, Punjab State NRI Commission
5. Ms. Kanchan  
On behalf of Chairperson,  
National Commission for Women
6. Ms Astha Saxena ICAS  
Joint Secretary,  
Ministry of Women and Child Development, Government of India
7. Ms. Uma Sekhar, ILS  
Joint Secretary (Law & Treaty), Ministry of External Affairs,  
North Block, New Delhi
8. Sh. A.K. Upadhya  
Addl. Law Officer to Chairman of Law Commission, Law  
Commission of India
9. Mr. P.K. Behera  
Deputy Legal Advisor, Department of Legal Affairs, Ministry of  
Law and Justice, Government of India
10. Sh. Sudhir Kumar Gupta  
Deputy Secretary, Ministry of Home Affairs

11. Ms. Meenaxee Raj, HCS (Member Secretary)  
Joint Director (Admn.), Urban Local Bodies, Haryana
12. Dr. Balram K. Gupta  
Director (Academics), Chandigarh Judicial Academy  
Chandigarh
13. Shri Anil Malhotra, Advocate  
Punjab & Haryana High Court, Chandigarh



**2017(3) Apex Court Judgments (SC) 225 : 2017(3) R.C.R.(Civil) 798 : 2017(4) Recent Apex Judgments (R.A.J.) 328 : 2017 AIR (SC) 3137 : 2017(7) Scale 183 : 2017(7) JT 97 : 2017 AIR (SCW) 3137 : 2017(3) JBCJ 208 : 2017(8) SCC 454 : 2017(7) MLJ 54 : 2017(177) AIC 134 : 2017(124) ALR 273 : 2017 All SCR (CrL) 1686 : 2017(3) BBCJ 47 : 2017(4) AIR Jhar R. 476 : 2017(6) CTC 637 : 2017(4) CivCC 135**

## **SUPREME COURT OF INDIA**

Before:- Dipak Misra, A.M. Khanwilkar and Mohan M. Shantanagoudar, JJ.

Criminal Appeal No. 972 of 2017 (Arising out of SLP (CrL.) No. 5751 of 2016). D/d. 3.7.2017.

Nithya Anand Raghavan - Appellant

**Versus**

State of NCT of Delhi & Anr. - Respondents

### **VERY IMPORTANT**

Husband and wife lived in U.K - Wife came to India alongwith minor child - On Petition by husband U.K court directed wife to return child to U.K - Order of Foreign Court not binding on courts in India - Custody given to mother.

### **IMPORTANT**

Wife came to India from U.K. and brought minor child with her - Suit by husband for custody of child in U.K. Court - Husband to bear travel and stay express of both wife and daughter.

**A. Guardians And Wards Act, 1890 Sections 7 and 14 Husband and wife lived in U.K - Wife came to India alongwith minor child - On Petition by husband U.K court directed wife to return child to U.K - Order of Foreign Court not binding on courts in India - Custody given to mother.**

**In the instant case husband and wife both of Indian origin - They married in India and shifted to U.K. - Wife came to India and gave birth to female child and returned to U.K - Child also acquired U.K.**

citizenship - Wife returned to India due to matrimonial disputes with husband and brought the child alongwith her - On a petition by husband U.K. Court passed an ex-parte order directing wife to produce the child in U.K. Court - Order of foreign court whether binding on courts in India (No) - It is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court - Court gave the custody of child to mother - Held :-

- (1) An Indian Court not to get fixated with decisions of foreign Court.
- (2) Interest of child should be paramount consideration in deciding child custody cases order of the foreign Court must yield to the welfare of the child.
- (3) Court has authority not to send a child to a foreign country from where he/she had been removed if it was satisfied that the child's return will bring to him/her grace or risk or harm - Pre-existing order of a foreign court can only be one of the factors in deciding child-custody cases.
- (4) India was still not a signatory to the Hague Convention and therefore Indian courts would not breach any international obligation if they applied their minds independently.
- (5) The principle of comity of courts cannot be given primacy in deciding custody battles.
- (6) Indian court was free to decline the relief of return of the child if it was satisfied that the child was settled in its new environment - (1998)1 SCC 112 Approved (2010)1 SCC 174 Relied - (2010)1 SCC 174 Distinguished.

[Paras 24, 25, 26, 32 33, 35, 42 and 44]

**B. Constitution of India, 1950 Article [226](#) Habeas Corpus Petition -** Habeas corpus was essentially a procedural writ dealing with machinery of justice - The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty-

- (1) The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court - On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper - 2001(2) R.C.R.(Criminal) 591 : 2001(2) R.C.R.(Civil) 613 Relied. [Para 28]

**C. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Matter with regard to custody of minor child between parties - The principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person - While doing so, the paramount consideration must be about the welfare of the child-**

**(1) In such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor.**

**(2) Decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration - 2001(2) R.C.R.(Criminal) 591 and (1987)1 SCC 42 Relied. [Para 29]**

**D. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Wife residing in a foreign country and came to India alongwith minor child - At the instance father Foreign court directed the wife produce the child in its court - Merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se-**

**(1) Custody of the minor with the mother being her biological mother, will have to be presumed to be lawful.**

**(2) In the instant case custody given to mother despite order of Foreign Court - It was in interest and welfare of child. [Paras 30 and 31]**

**E. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Constitution of India, 1950 Article [226](#) Order of Foreign court directing a woman to produce the child in court - Husband filing Habeas corpus petition for enforcement of directions-**

**(1) So far as non-convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration.**

**(2) The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which**

he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education - For these are all acts which could psychologically disturb the child. [Paras 28 and 43]

F. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Abduction of child from one country to another - Order of foreign court for return of child - Order whether be complied - Held:-

(1) So far as non-convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind the welfare of the child is of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration.

(2) The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education - For these are all acts which could psychologically disturb the child. [Paras 26 and 43]

G. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Wife came to India from U.K. and brought minor child with her - Suit by husband for custody of child in U.K. Court - Husband to bear travel and stay express of both wife and daughter. [Para 45]

H. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Custody of minor child - In such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor-

(1) The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court - 113(2004) Delhi Law Time 823 Relied. - (1987)1 SCC 42 Relied. [Para 28]

I. Guardians And Wards Act, 1890 Sections [14](#) and [7](#) Custody of minor child - Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are

circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother - 2000(2) R.C.R.(Civil) 367 Relied. [Para 33]

**J. Guardians And Wards Act, 1890 Sections 14 and 7** Mother came to India from U.K and brought her 7 years old child to India - Order of U.K. Court to return the child to U.K. - Ignoring the order Supreme Court gave the custody of child to mother taking into consideration welfare and interest of child - Unless the Court of competent jurisdiction trying the issue of custody of the child orders to the contrary - Father given visitation rights -

(1) However mother cannot disregard the proceedings instituted before the UK Court - She must participate in those proceedings by engaging solicitors of her choice.

(2) If mother is required to appear in the said proceeding in person than father will bear the air fares or purchase the tickets for the travel of appellant and daughter to the UK and including for their return journey to India.

(3) Father will make all arrangements for the comfortable stay of the mother and her companions at an independent place. [Paras 33, 42, 44 and 45]

#### Cases Referred :

[Arathi Bandi v. Bandi Jagadrakshaka Rao, 2013\(3\) R.C.R.\(Civil\) 968 : 2013\(4\) Recent Apex Judgments \(R.A.J.\) 558 : \(2013\) 15 SCC 790.](#)

[Dhanwanti Joshi v. Madhav Unde, 1998\(1\) R.C.R.\(Civil\) 190 : \(1998\) 1 SCC 112.](#)

[Dr. V. Ravi Chandran v. Union of India, 2009\(4\) R.C.R.\(Civil\) 961 : \(2010\) 1 SCC 174.](#)

[Elizabeth Dinshaw v. Arvind M. Dinshaw.](#)

In Re: H.(Infants), (1965) H. No.2428 : (1966) 1 AII ER 886.

J v. C.

Khamis v. Khamis.

Kuldeep Sidhu v. Chanan Singh, 1988(1) R.C.R.(Criminal) 534 : (1989) AIR (Punjab and Haryana) 103.

Lozano v. Montoya Alvarez, 572 US (2014) : 134 S.Ct. 1224 (2014).

Marggarate Maria Pulparampil Nee Feldman v. Chacko Pulparampil, (1970) AIR (Ker) 1.

McKee v. McKee.

[Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw, \(1987\) 1 SCC 42.](#)

Paul Mohinder Gahun v. State of NCT of Delhi, 2005(1) R.C.R.(Civil) 737 : 113 (2004) Delhi Law Time 823.

[Ruchi Majoo v. Sanjeev Majoo, 2011\(3\) R.C.R.\(Civil\) 122 : 2011\(3\) Recent Apex Judgments \(R.A.J.\) 223 : \(2011\) AIR SC 1952.](#)

[Kanu Sanyal v. District Magistrate, Darjeeling, 1974\(4\) S.C.C. 141.](#)

[Sarita Sharma v. Sushil Sharma, 2000\(2\) R.C.R.\(Civil\) 367 : 2000\(2\) R.C.R.\(Criminal\) 194 : \(2000\) 3 SCC 14.](#)

[Sayed Saleemuddin v. Dr. Rukhsana, 2001\(2\) R.C.R.\(Civil\) 613 : 2001\(2\) R.C.R.\(Criminal\) 591 : \(2001\) 5 SCC 247.](#)

[Shilpa Aggarwal v. Aviral Mittal, 2010\(1\) R.C.R.\(Civil\) 231 : \(2010\) 1 SCC 591.](#)

[Surinder Kaur Sandhu v. Harbax Singh Sandhu, \(1984\) 3 SCC 698.](#)

[Surya Vadanam v. State of Tamil Nadu, 2015\(2\) R.C.R.\(Civil\) 183 : 2015\(2\) Recent Apex Judgments \(R.A.J.\) 95 : \(2015\) 5 SCC 450.](#)

## JUDGMENT

**A.M. Khanwilkar, J.** - Leave granted.

2. This appeal arises from the final judgment and order (for short "the Impugned Judgment") passed by the High Court of Delhi dated 8th July, 2016 in a writ petition for issuance of a writ of habeas corpus for production of the minor daughter Nethra, allegedly illegally removed by the mother-appellant on 2nd July, 2015 from the custody of the father-respondent no.2 (writ petitioner) from the United Kingdom (UK), being Writ Petition (Criminal) No. 247 of 2016.

3. The High Court inter alia directed the mother to produce her daughter Nethra and to comply with the order dated 08.01.2016 passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom (UK), within 3 (three) weeks from the date of the impugned order or in the alternative to handover the custody of the daughter to the father within 3 (three) weeks from the date of the order.

4. The appellant has assailed the aforesaid order inter alia on the ground that in the present scenario, the paramount interests and welfare of the daughter, Nethra, who is presently over seven years of age, is to remain in custody of her mother, especially because she suffers from a cardiac disorder and that she would face immense physical and psychological harm

if repatriated to the custody of the father in England in light of the alleged physical, verbal and mental abuse meted out by him. The appellant has also contended that the UK Court does not have intimate contact with Nethra merely because she has acquired the citizenship of the UK in December, 2012. The daughter has her deep roots in India as she was born here in Delhi and has retained her Indian citizenship. She has been schooling here for the past 12 (twelve) months and has spent equal time in both the countries out of her first six years. Further, Nethra has her grandparents, family and relatives here in India, unlike in the UK where she lived in a nuclear family of the three (father, mother and herself) with no extended family and friends. Thus, it is the Indian Courts which have the intimate contact with the minor and including the jurisdiction to decide the matter in issue. Furthermore, the respondent no.2 did not initiate any action for initial six months even after knowing that the appellant was unwilling to return along with her daughter and until he was slapped with a notice regarding complaint filed by the appellant before the Women Cell at Delhi in December 2015, relating to violence inflicted by him. As a counter blast to that notice the respondent no.2 rushed to the UK Court and then filed writ petition in the Delhi High Court to pressurise the appellant to withdraw the allegations regarding violence inflicted by him.

5. To be able to fully appreciate and analyse the issues raised before this Court, it would be expedient to first set out the factual milieu from which the present case arises:

a. The appellant has a Masters' degree in communication and had worked in India prior to her marriage. Respondent no.2 had gone to the United Kingdom as a student in 2003 and was working there since 2005. Admittedly, both appellant and respondent no.2 were Indian citizens when they contracted marriage.

b. On 30.11.2006, the appellant and respondent no.2 were married in Chennai according to Hindu rites and customs and was registered before SDM Court Chennai the under the Hindu Marriage Act. Their traditional marriage ceremony was performed in Chennai on 22.01.2007. After marriage, the parties shifted to the UK in early 2007 and began living in respondent no.2's home in Watford (UK).



- c. After marriage, disputes and differences arose between the parties. The appellant contends that these disputes were often violent and that she was physically, mentally and psychologically abused, a claim strenuously denied by respondent no.2.
- d. The appellant eventually got a job with an advertising agency in London in 2008, earning close to 25,000 pounds (GBP) per annum.
- e. Having conceived in and around December 2008, the appellant left the UK for Delhi in June 2009 to be with her parents. On 7th August, 2009, the appellant gave birth to a girl child Nethra, in Delhi. Respondent no.2 soon joined them in India.
- f. After the birth of their daughter, they went back to the UK in March 2010. Subsequently in August 2010, the appellant and her daughter returned to India after several incidents with respondent no.2.
- g. After an exchange of legal correspondence between the parties, setting out the numerous differences which had arisen in the marriage, the appellant and her daughter eventually went back to London in December 2011, more than a year after they had come to India.
- h. In January 2012, the daughter was admitted to a nursery school in the UK and attended the same till she was old enough to attend a primary school.
- i. In September 2012, an application was filed on behalf of the daughter for grant of UK citizenship, purportedly with the consent of both the appellant and respondent no.2. The appellant, however, denies that she gave consent for this application.
- j. In December 2012 the daughter was granted citizenship of the UK. Soon thereafter in January 2013, respondent no.2 was also granted citizenship of the UK. Subsequently, respondent no.2 purchased another house in the UK, purportedly with the consent of the appellant, and the parties shifted there. The appellant had acquired a driving license in the UK around the same time.
- k. In September 2013, the daughter who was around 4 (four) years old at the time, was admitted to a primary school in the UK (and studied there till July 2015). Respondent no.2 was paying the annual fees for the school amounting to approximately 10,000 GBP per annum.

l. Subsequently, in July 2014, the appellant returned to India owing to certain purported health problems, and also brought her daughter along with her. Both the appellant and her daughter went back to the UK around a month later i.e. on 6th September, 2014, purportedly at the insistence of respondent no.2.

m. From late 2014 till early 2015, the daughter took ill and was eventually diagnosed with a cardiac disorder for which she had to undergo periodical medical reviews. According to the appellant, she was taking care of her daughter during this period while respondent no.2 did not even bother about the daughter's condition, a claim vehemently contested by respondent no.2.

n. On 2nd July, 2015, the appellant came back to India along with her daughter because of the alleged violent behaviour of respondent no.2. Respondent no.2 asserts that soon after the appellant left for India with their daughter, she sent an email to the school in which the daughter was enrolled, giving the reason for her departure as 'family medical reasons'. The appellant then allegedly sent further emails to the school, first informing it that her daughter would remain in India for an extended duration and finally, informing it that her daughter would not be coming back to the UK due to her own well-being and safety.

o. On 16th December, 2015, the appellant filed a complaint with the Crime Against Women Cell (CAWC), New Delhi which then issued notice to respondent no.2 and his parents, asking them to appear before it. On the date of hearing, neither respondent no.2 nor his parents appeared before the CAWC.

p. As a counter blast, respondent no.2 filed a custody/wardship petition on 8th January, 2016 before the High Court of Justice, Family Division, UK, seeking the return of his daughter to the jurisdiction of the UK Court. On this petition, the High Court of Justice passed an ex-parte order inter alia directing the appellant to return the daughter to the UK and to attend the hearing at the Royal Courts of Justice.

q. Then, on 23rd January, 2016, respondent no.2 filed a habeas corpus writ petition before the High Court of Delhi, seeking to have his daughter produced before the Court. The High Court passed the Impugned Judgment dated 8th July, 2016, inter alia directing the appellant to produce her daughter and comply with the orders passed by the UK Court or handover

her daughter to respondent no.2 within 3 (three) weeks from the date of the order.

6. The High Court, while ordering that the mother-appellant return to the UK with the child and produce her before the UK Court, set out and examined the factual aspects of the case. The High Court held that the child, having lived in the UK since the time of her birth in 2009, had developed roots there. Further, the child was a permanent citizen of the UK and held a British passport. The High Court also examined the wardship order passed ex-parte by the High Court of Justice, Family Division, London on 8th January, 2016. In the said order, the UK Court inter alia recorded that the child had been wrongfully removed from England in July 2015 and wrongly retained in India since then. The UK Court also recorded the father's willingness to bear the expenses for the transport and stay of the mother and the child to the UK. The UK Court held that it had the jurisdiction to hear the matter and directed that the child would become a ward of the court during her minority or until further orders and that the mother would have to return the child to England by 22nd January, 2016. The High Court opined that in light of the order by the UK Court, the mother would not face any financial hardship and further, the order of the UK Court had attained finality due to lapse of time. The High Court then examined the law as propounded in several judgments, including *Arathi Bandi v. Bandi Jagadrakshaka Rao & Ors.*, 2013(3) R.C.R.(Civil) 968 : 2013(4) Recent Apex Judgments (R.A.J.) 558 : (2013) 15 SCC 790, *Surya Vadanam v. State of Tamil Nadu & Ors.*, 2015(2) R.C.R.(Civil) 183 : 2015(2) Recent Apex Judgments (R.A.J.) 95 : (2015) 5 SCC 450, *Surinder Kaur Sandhu v. Harbax Singh Sandhu & Anr.*, (1984) 3 SCC 698, *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr.*, (1987) 1 SCC 42, *Marggarate Maria Pulparampil Nee Feldman v. Chacko Pulparampil & Anr.*, (1970) AIR (Ker) 1, *Kuldeep Sidhu v. Chanan Singh & Ors.*, 1988(1) R.C.R.(Criminal) 534 : (1989) AIR (Punjab and Haryana) 103, *In Re: H.(Infants)*, (1965) H. No.2428 = (1966) 1 AII ER 886 and *Ruchi Majoo v. Sanjeev Majoo*, 2011(3) R.C.R.(Civil) 122 : 2011(3) Recent Apex Judgments (R.A.J.) 223 : (2011) AIR SC 1952. The High Court held that since the mother had not sought custody of the child by approaching any competent Indian Court prior to the passing of the

order by the UK Court, therefore, the first, effective order/direction had been passed by the UK/foreign court and, applying the principle expounded in *Surya Vadan* (supra) of comity of courts, the balance of favour would lie with the UK Court. Since the child had spent most of her life in the UK and studied there, it would be in the best interests of the child that she be returned to the UK. After analysing the principles deduced from the aforesaid judgments, the High Court was of the opinion that:

- a. The foreign court having the most intimate contact with the child would be better placed to appreciate the social and cultural milieu in which the child had been brought up;
- b. The principle of comity of courts should not be discarded except for special and compelling reasons. Especially when interim or interlocutory orders have been passed by foreign courts;
- c. If a foreign court has jurisdiction to hear the matter, then an interim/interlocutory order passed by such court should be given due weight age and respect. If such jurisdiction is not in doubt, then the "first strike" principle i.e. a substantive order passed by a foreign court prior to a substantive order passed by another foreign or domestic court, becomes applicable. Due respect and weight ought to be given to the earlier substantive order as compared to the latter order;
- d. A foreign court passing an interim/interlocutory order can make prima facie adjudications, similar to a domestic court;
- e. Merely because a parent has violated an order of a foreign court does not mean that the parent should be penalised for the same. While the conduct of the parent may be taken into account while passing the final order, the said conduct should not have a penalising result;
- f. A court may either hold an elaborate inquiry to decide whether a child should be repatriated to a foreign country or a summary inquiry without going into the merits of the dispute, relating to the best interests and welfare of the child. If, however, there exists a pre-existing order of a foreign Court of competent jurisdiction, then a domestic court must have special reasons to hold an elaborate inquiry. It must consider various factors such as the nature of the interim order passed by the foreign court, the likelihood of harm caused to the child, if any, when repatriated, the alacrity with which the parent moves the foreign court etc.

7. The High Court essentially applied the exposition in the case of *Surya Vadan* (*supra*) and held that there was no special or compelling reason to ignore the interim order passed by the UK Court and that the child was accustomed to and well adapted to the culture in the UK. Further, the High Court opined that there was no force in the mother's allegation that she was a victim of domestic abuse since she had not made a single complaint to the authorities while she was staying with the respondent no.2 in the UK. In addition, there was no documentary evidence to support such a claim either. Finally, the High Court rejected the contention, that the child ought to be medically treated only in Delhi for her heart condition and not in the UK, as baseless.

8. Advocate Malavika Rajkotia, learned counsel for the Appellant, first submits that the High Court has given undue emphasis to the principle of comity of courts in complete disregard to the paramount interests and welfare of the child. She submits that the welfare of the child is of paramount consideration and that such consideration ought to over-ride the need to enforce the principle of comity of courts. There is an obvious need to protect the interests of the child and the mother, especially in light of the fact that that the respondent no.2 had been physically and verbally abusive to the appellant in the past and even put the child at risk with his behaviour. She submits that while India is a signatory to the United Nations Child Rights Convention (UNCRC), it is not a signatory to the Hague Convention. The UNCRC mandates that in all actions concerning children, the best interests of the child shall be of primary concern and the child shall be provided the opportunity to be heard. The Hague Convention is intended to prevent parents from abducting children across borders and is governed by the principle of comity of courts. Upholding the principle of comity of courts while disregarding the welfare of the child would thus go against the public policy in India and result in great harm being caused to the child and the appellant.

9. Ms. Rajkotia submits that *parens patriae* jurisdiction of the court within whose jurisdiction the child is located as also the welfare of the child in question must be given greater weight as opposed to a mechanical interpretation of the principle of comity of courts. By giving effect to the

comity of courts, the High Court has eroded its own *parens patriae* jurisdiction and also ignored the welfare of the child who is located within its jurisdiction. In fact, the evolving standard, at least as far as the USA and the UK Courts are concerned, is to give greater importance to the welfare of the child as opposed to giving primacy to the principle of comity of courts. She has relied upon a judgment of the United States Supreme Court in ***Lozano v. Montoya Alvarez, 572 US\_(2014) = 134 S.Ct. 1224 (2014)*** wherein the Court *inter alia* stated that while the Hague Convention was intended to discourage child abduction, it was not supposed to do so at the cost of the child's interest in choosing to remain in the jurisdiction of the country or in settling the matter.

10. Ms. Rajkotia then submits that the High Court has failed to follow the established judicial trail of opinion as set out in several judgments of this Court while deciding custody matters. She submits that this Court has expounded that the welfare of the child is of paramount consideration and that the Court must rest its decision based on the best interests of the child. Even in instances where a mother has submitted to the jurisdiction of a foreign court but has subsequently fled that country with her child after an order of the foreign court, this Court has protected the welfare of the child. In the present case, the appellant left the UK prior to any proceedings being initiated against her, let alone any judicial order being passed. Ms. Rajkotia has relied upon the following judgments to buttress her argument: *Smt. Surinder Kaur Sandhu (supra)*, *Mrs. Elizabeth Dinshaw (supra)*, ***Sarita Sharma v. Sushil Sharma, 2000(2) R.C.R.(Civil) 367 : 2000(2) R.C.R.(Criminal) 194 : (2000) 3 SCC 14*** and ***Dr. V. Ravi Chandran v. Union of India & Ors., 2009(4) R.C.R.(Civil) 961 : (2010) 1 SCC 174***

11. Ms. Rajkotia further submits that in two cases, viz ***Shilpa Aggarwal v. Aviral Mittal and Anr., 2010(1) R.C.R.(Civil) 231 : (2010) 1 SCC 591*** and most recently in *Surya Vadanani (supra)*, this Court has deviated from the established principle of putting the welfare of the child above all other considerations. In both these cases, the Court ordered that the child and mother return to the jurisdiction of the foreign court, despite the fact that the two had left the foreign jurisdiction before the court had passed any order. She has taken exception to the reasoning given in these two judgments on the ground that the decisions overlook the *parens patriae*

jurisdiction of the Court as also misinterpreted the concept of 'intimate contact' with the child. The 'intimate contact' principle only applies in an instance where the child has been taken to a country with an alien language, social customs etc. It cannot be applicable where the child returns to a country where he/she has been born and brought up in, like in the present case. Further, the judgment in Surya Vadanani (supra) has the chilling effect of giving dominance to the principle of comity of courts over the welfare of the child. The judgment, in effect, rejects the perspective of the child and may encourage multiplicity of proceedings. This, ultimately, leads to a mechanical application of the principle of comity of courts. This is in direct conflict with the binding decision in Dr. V Ravi Chandran (supra) where a three-judge bench categorically held that under no circumstances can the principle of welfare of the child be eroded and that a child can seek refuge under the *parens patriae* jurisdiction of the Court.

12. Ms. Rajkotia then submits that the child has been born and brought up in India. While the child now has British citizenship, she still retains her Indian citizenship. The child was forced to return with the mother under compelling situation emanating from domestic violence inflicted by the father. The appellant even informed respondent no.2 that she had no desire to return to the UK, to which there was no reply.

13. Ms. Rajkotia submits that the legal action taken by respondent no.2 was nothing but a counter-blast to the appellant's allegations of abuse and violence leveled against him. This can be discerned from the fact that respondent no.2 initiated action before the UK court 6 (six) months after the appellant had left the UK and only after he learned that she had filed a complaint with the CAWC in December 2015. The court also needs to consider that the order of the UK court was passed *ex-parte* without giving the appellant an opportunity to present her case. The intention of respondent no.2 can be ascertained by the fact that he filed a habeas corpus petition before the High Court, which is meant for urgent and immediate relief whereas the appellant and the child were staying in India for more than 6 months. Clearly, there was no immediate or urgent need necessitating the production of the child and the petition was filed as an



after-thought and litigation stratagem. The High Court should have been loath to countenance such stratagem adopted by respondent no.2, which is bordering on abuse of the process of Court.

14. Ms. Rajkotia finally submits that the High Court has failed to consider certain factual circumstances and has committed manifest error in that regard. In that, respondent no.2 was offering the appellant a paltry monthly maintenance of just 1000 GBP whereas he himself was earning 10,000 GBP per month. Even after making such offer, respondent no.2 has not paid for the welfare or education of the child in India. Further, the High Court has not considered the serious health issues being faced by the child while ordering her to go back to the UK. Ms. Rajkotia submits that in India, the child has access to private, specialist health care whereas in the UK, the child would be constrained by the National Health Service (NHS) which is the publicly funded national health care system for England. Further, the High Court has relied on incorrect facts while passing the Impugned Judgment.

15. In addition to the aforementioned cases, Ms. Rajkotia has also submitted a compendium of judgments titled 'List of judgments filed on behalf of appellant'. The judgments referred to therein have been considered by us.

16. Per contra, Advocate Prabhjit Jauhar appearing for respondent no.2 first submits that the child was a British citizen and had been brought up in the UK. The child had been residing in the UK and the appellant was also a permanent resident of the UK. The respondent no.2 has also acquired citizenship of the UK. Both the appellant and respondent no.2 had every intention to permanently settle in the UK along with their child. The appellant had even signed the application/citizenship form of the child for British citizenship. Thus, the appellant's submission before the High Court that she had not given permission to apply for their child's British citizenship is patently false. In the emails exchanged with the child's school, the appellant mentioned that they would be returning to the UK. It is only much later that respondent no.2 was made aware by the school that the appellant would not be returning to the UK. The High Court even recorded that the parties had every intention of making the UK their home

and that the child had developed roots in the UK. Hence, the UK courts had the closest concern and intimate contact with the child as regards welfare and custody and would have jurisdiction in the matter.

17. Further, Mr. Jauhar submits that the High Court has duly considered the factum of welfare and interests of the child while passing the impugned judgment. While citing the judgments in *Surinder Kaur Sandhu* (supra) and *Surya Vadanam* (supra), the High Court noted that the UK Court would have the most intimate contact with and closest concern for the child. The child had clearly adapted to the social and cultural milieu of the UK and it was in the best interests of the child that she return to the UK. There was neither any material to suggest that repatriation of the child would result in psychological, physical or cultural harm nor anything to indicate that the UK Court was incompetent to take a decision in the interests and welfare of the child. There was no compelling reason for the High Court to ignore the principle of comity of courts. Further, as regards the medical condition of the child, the High Court was right in accepting the argument that the UK would have better medical facilities to treat the child and that she was fully covered by the medical services there. Further, respondent no.2 even had the resources to approach private hospitals.

18. Mr. Jauhar then submits that the respondent no.2's bonafides can be gleaned from the fact that the High Court directed respondent no.2 to honour his commitment of paying for accommodation near the child's school as well as boarding and travelling expenses of the appellant and the child. Respondent no.2 made statements before the UK court that he would vacate his family home for use of the appellant's family, pay for the child's school expenses and pay 1000 GBP per month for incidental expenses. In fact, respondent no.2 even made a statement before the High Court that he would not pursue any criminal proceedings against the appellant for kidnapping the child and only wished the family to be reunited in the UK so that the child could continue with her education. In addition to the aforesaid payments, respondent no.2 was even ready to provide a monthly payment of 1000 GBP to the appellant and is now willing to fund the cost of litigation borne by the appellant for custody of the child in the UK.

19. Mr. Jauhar then submits that only the UK Court would have jurisdiction with regard to the alleged acts of domestic violence leveled against respondent no.2 as the acts complained against allegedly occurred while the parties were staying in the UK.

20. Mr. Jauhar submits that there has been no delay on the part of respondent no.2 in filing the writ petition before the High Court of Delhi. Respondent no.2 became aware that the appellant was not inclined to bring the child back to the UK only on 23rd November, 2015 and thereafter came to India in December 2015. He then moved the UK court on 8th January 2016 and filed the writ petition before the High Court of Delhi on 23rd January 2016. Thus, it can be seen that respondent no.2 did not delay filing of proceedings.

21. Mr. Jauhar finally submits that legal notices were exchanged between the parties from 24th December 2010 till 7th June 2011, after which the appellant and the daughter came back to the UK on 11th December 2011 and the parties stayed together till 2nd July 2015. Thus, on applying the principle of condonation all the allegations made in the aforesaid legal notices stood condoned and the fact that these notices were exchanged in 2010-2011 are of no relevance and do not take away the jurisdiction of the foreign court.

22. In support of his arguments, Mr. Jauhar has cited several cases which have been placed before this Court in the form of a "List of judgments on Habeas Corpus". The same have been taken on record and duly considered.

23. We have cogitated over the submissions made by the counsel for both the sides and also the judicial precedents pressed into service by them. The principal argument of the respondent-husband revolves around the necessity to comply with the direction issued by the foreign Court against the appellant-wife to produce their daughter before the UK Court where the issue regarding wardship is pending for consideration and which Court alone can adjudicate that issue. The argument proceeds that the principle of comity of courts must be respected, as rightly applied by the High Court in the present case.

24. We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. We may usefully refer to the decision in the case of ***Dhanwanti Joshi v. Madhav Unde, 1998(1) R.C.R.(Civil) 190 : (1998) 1 SCC 112***. In Paragraphs 28 to 30, 32 and 33 of the reported decision, the Court observed thus:-

"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in ***McKee v. McKee***. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. *The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration"*. This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in ***J v. C***. This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See ***Khamis v. Khamis***)

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), and in E. (an infant), to the effect that

the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in *L. (minors) (wardship : jurisdiction)*, and in *R. (minors) (wardship : jurisdiction)*, *It was held by the Court of Appeal in L., that the view in McKee v. McKee is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody.* In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. *The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, - for these are all acts which could psychologically disturb the child.* Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. *Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed.* In that event, the unauthorised removal of the child from the native country would

not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79; Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), it has been firmly held that the concept of forum convenience has no place in wardship jurisdiction.

30. *We may here state that this Court in **Elizabeth Dinshaw v. Arvind M. Dinshaw**, while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, - which were independently considered - it was in the interests of the child to be sent back to the native State.* There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), which case, as pointed out by us above has been explained in L. as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in **McKee v. McKee** and **J v. C** and the distinction between summary and elaborate inquiries as stated in L. (infants), are today well settled in UK, Canada, Australia and the USA. *The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 - even assuming that the earlier orders passed in India do not operate as constructive res judicata.*

31. xxxx xxxx xxxx

32. In this connection, it is necessary to refer to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". *As of today, about 45 countries are parties to this Convention. India is not yet a signatory.* Under the Convention, any child below 16 years who had been "wrong fully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. *Article 12*

*requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return.* In England, these aspects are covered by the Child Abduction and Custody Act, 1985.

33. *So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in **McKee v. McKee** unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare,* as explained in L. As recently as 1996-1997, it has been held in P (A minor) (Child Abduction: Non-Convention Country), by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence -- which was not a party to the Hague Convention, 1980, - *the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established.* See also A (A minor) (Abduction: Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA."

(emphasis supplied)

The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-convention countries, the law is that the Court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign Court as only a factor to be taken into



consideration, unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the Court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the Court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign Court by directing return of the child. Be it noted that in exceptional cases the Court can still refuse to issue direction to return the child to the native state and more particularly inspite of a pre-existing order of the foreign Court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the Courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign Court if any as only one of the factors and not get fixated therewith. In either situation - be it a summary inquiry or an elaborate inquiry the welfare of the child is of paramount consideration. Thus, while examining the issue the Courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition.

25. Notably, the aforementioned exposition has been quoted with approval by a three-judge bench of this Court in *Dr. V. Ravi Chandran (supra)* as can be discerned from paragraph 27 of the reported decision. In that, after extracting paragraphs 28 to 30 of the decision in *Dhanwanti Joshi's* case, the three-judge bench observed thus:

"27.....However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. *It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.*"

(emphasis supplied)

Again in paragraphs 29 and 30, the three-judge bench observed thus:-

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, *the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.*

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests

of the child. The indication given in *Mckee v. McKee* that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re and *the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw.*"

(emphasis supplied)

26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign Court. In an elaborate inquiry, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign Court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weight age for deciding the matter of custody or for return of the child to the native state.

27. The respondent husband has placed emphasis on four decisions of this Court in the case of V. Ravi Chandran, Shilpa Aggarwal, Arathi Bandi and Surya Vadanam. We shall deal with those decisions a little latter.

28. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in ***Kanu Sanyal v. District Magistrate, Darjeeling & Ors., 1974(4) S.C.C. 141***, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the Court. On production of the person before the Court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the Court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in ***Sayed Saleemuddin v. Dr. Rukhsana & Ors., 2001(2) R.C.R.(Civil) 613 : 2001(2) R.C.R.(Criminal) 591 : (2001) 5 SCC 247***, has held that the principal duty of the Court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In the case of Mrs. Elizabeth (supra), it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court (see ***Paul Mohinder Gahun v. State of NCT of Delhi & Ors., 2005(1) R.C.R.(Civil) 737 : 113 (2004) Delhi Law Time 823*** relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

29. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position

referred to above. Once again, we may hasten to add that the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign Court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign Court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

30. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

31. The next question to be considered by the High Court would be whether an order passed by the foreign court, directing the mother to produce the child before it, would render the custody of the minor unlawful? Indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se. As in the present case, the order passed by the High Court of Justice, Family Division London on 8th January, 2016 for obtaining a Wardship order reads thus:

"Order made by His Honour Judge Richards sitting as a Deputy High Court Judge sitting at the Royal Courts of Justice, Strand, London WC2A 2LL in chambers on 8 January, 2016 IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

The Child is Nethra Anand (a girl, born 7/8/09) AFTER HEARING Counsel Paul Hopher, on behalf of the applicant father

AFTER consideration of the documents lodged by the applicant.

**IMPORTANT WARNING TO NITHYA ANAND RAGHAVAN**

If you NITHYA ANAND RAGHAVAN disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

If any other person who knows of this order and does anything which helps or permits you NITHYA ANAND RAGHAVAN to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

You have the following legal rights:

- a) to seek legal advice. This right does not entitle you to disobey any part to this order until you have sought legal advice;
- b) to require the applicant's solicitors, namely Dawson Cornwell, 15 Red Lion Square, London WC1R 4QT, tel 020 7242 2556 to provide you with a copy of any application form(s), statement(s), note of the hearing;
- c) to apply, whether by counsel or solicitor or in person, to Judge of the Family Court assigned to hearing urgent applications at the Royal Courts of Justice, Strand, London, if practicable after giving notice to the applicant's solicitors and to the court, for an order discharging or varying any part of this order. This right does not entitle you to disobey any part of this order until your application has been heard;
- d) if you do not speak or understand English adequately, to have an interpreter present in court at public expense in order to assist you at the hearing of any application relating to this order

The parties-

1. The Applicant is ANAND RAGHAVAN represented by Dawson Cornwell Solicitors The Respondent is NITHYA ANAND RAGHAVAN
- Recitals

2. This order was made at a hearing without notice to the respondent. The reason why the order was made without notice to the respondent is because she left England and Wales on or about 2 July 2015 and notice may lead her to take steps to defeat the purpose of the application and fail to return the child.

3. The Judge read the following documents:

a. Position statement

b. C67 application and C1A form

c. Statement of Anand Raghavan with exhibits dated 8.01.2016.

4. The court was satisfied on a provisional basis of the evidence filed that

a. NETHRA ANAND (a girl born on 7/8/09) was on 2 July 2015 habitually resident in the jurisdiction of England and Wales.

b. NETHRA ANAND (a girl born on 7/8/09) was wrongfully removed from England on 2 July, 2015 and been wrongfully retained in India since.

c. The courts of England and Wales have jurisdiction in matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR.

5. The Father has agreed to pay for the cost of the flights for the Mother and child in returning from India to England. He will either purchase the tickets for the Mother and child himself, or put her in funds, or invite her to purchase the tickets on his credit card, as she may wish, in order for her to purchase the tickets herself.

Undertakings to the court by the solicitor for the applicant

6. The solicitors for the applicant undertake;

a. To issue these proceedings forthwith and in any event by no later than 4 pm 11 January 2016;

b. To pay the ex parte application fee forthwith and in any event by no later than 4 pm 11 January 2016;

AND NOW THEREFORE THIS HONOURABLE COURT RESPECTFULLY REQUESTS:

7. Any person not within the jurisdiction of this Court who is in a position to do so to co-operate in assisting and securing the immediate return to England and Wales of the Ward NETHRA ANAND (a girl born on 7/8/09)  
IT IS ORDERED THAT:

8. NETHRA ANAND (a girl born on 7/8/09) is and shall remain a Ward of this Court during the minority or until further order.



9. The respondent mother shall return or cause the return of NETHRA ANAND (a girl born on 7/8/09) forthwith to England and Wales, and in any event no later than 23.59 on 22 January 2016.

10. Every person within the jurisdiction of this Honourable Court who is in a position to do so shall co-operate in assisting and securing the immediate return to England and Wales of NETHRA ANAND (a girl born on 7/8/09) a ward of this Court.

11. The applicant's solicitor shall fax copies of this order to the Office of the Head of International, Family Justice at the Royal Courts of Justice, the Strand, London WC2A 2LL (DX4550 Strand RCJ: fax 02079476408); and (if appropriate) to the Head of the Consular Division, Foreign and Commonwealth Office Spring Gardens London SW1A 2PA, Tel: 02070080212, Fax 02070080152.

12. The matter shall be listed for directions at 10:30 am on 29 January 2016 at the Royal Courts of Justice, the Strand, London Wc2A 2LL, with a time estimate of 30 minutes, when the court shall consider what further orders shall be made. The Court may consider making declarations in the terms of paragraph 4 above.

13. The respondent mother shall attend at the hearing listed pursuant to the preceding paragraph, together with solicitors or counsel if so instructed. She shall file and serve by 4 pm 27 January, 2016 a short statement responding to the application.

14. This order may be served on the respondent, outside of the jurisdiction of England and Wales as may be required, by way of fax, email or personally in order for the court to deem that it constitutes good service.

15. Costs reserved.

Dated this 8 January 2016."

31. On a bare perusal of this order, it is noticed that it is an ex parte order passed against the mother after recording prima facie satisfaction that the minor Nethra Anand (a girl born on 07/08/2009) was as on 2nd July, 2015, habitually resident in the jurisdiction of England and Wales and was wrongfully removed from England on 2nd July, 2015 and has been wrongfully retained in India since then. Further, the Courts of England and Wales have jurisdiction in the matters of parental responsibility over the child pursuant to Articles 8 and 10 of BIIR. For which reason, it has been

ordered that the minor shall remain a Ward of that Court during her minority or until further order; and the mother (appellant herein) shall return or cause the return of the minor forthwith to England and Wales in any event not later than 22 January, 2016. Indeed, this order has not been challenged by the appellant so far nor has the appellant applied for modification thereof before the concerned court (foreign court). Even on a fair reading of this order, it is not possible to hold that the custody of the minor with her mother has been declared to be unlawful. At best, the appellant may have violated the direction to return the minor to England, who has been ordered to be a Ward of the court during her minority and further order. No finding has been rendered that till the minor returns to England, the custody of the minor with the mother has become or will be treated as unlawful including for the purposes of considering a petition for issuance of writ of habeas corpus. We may not be understood to have said that such a finding is permissible in law. We hold that the custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful.

32. The High Court in such a situation may then examine whether the return of the minor to his/her native state would be in the interests of the minor or would be harmful. While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign Court directing return of the child within the stipulated time, since the order of the foreign Court must yield to the welfare of the child. For answering this issue, there can be no strait jacket formulae or mathematical exactitude. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration.

33. For considering the factum of interests of the child, the court must take into account all the attending circumstances and totality of the situation. That will have to be decided on case to case basis. In the present case, we find that the father as well as mother of the child are of Indian origin. They were married in Chennai in India according to Hindu rites and customs. The father, an Indian citizen, had gone to the U.K. as a student in 2003 and was working there since 2005. After the marriage, the couple shifted to the U.K. in early 2007 and stayed in Watford. The mother did get an employment in London in 2008, but had to come to her parents' house in Delhi in June 2009, where she gave birth to Nethra. Thus, Nethra is an Indian citizen by birth. She has not given up her Indian citizenship. Indeed, the mother, along with Nethra, returned to the U.K. in March 2010. But from August 2010 till December 2011, because of matrimonial issues between the appellant and respondent no.2, the appellant and her daughter remained in India. It is only after the intervention of and mediation by the family members, the appellant and her daughter Nethra went back to England in December 2011, more than a year after they had come to India. After returning to the U.K., Nethra was admitted to a nursery school in January 2012. An application for grant of U.K. citizenship was made on behalf of Nethra in September 2012 which was subsequently granted in December 2012. The father (respondent no.2) then acquired the citizenship of the U.K. in January, 2013. After grant of citizenship of the U.K., Nethra was admitted to a primary school in the U.K. in September 2013 and studied there only till July, 2015. Since Nethra had acquired British citizenship, the U.K. Court could exercise jurisdiction in respect of her custody issues. Significantly, till Nethra returned to India along with her mother on 2nd July, 2015, no proceeding of any nature came to be filed in the U.K. Court, either in relation to the matrimonial dispute between the appellant and respondent no.2 or for the custody of Nethra. Further, Nethra is staying in India along with the appellant, her grandparents and other family members and relatives unlike in the UK she lived in a nuclear family of the three with no extended family. She has been schooling here for the past over one year and has spent equal time in both the countries out of the first six years. She would be more comfortable and feel secured to live with her mother here, who can provide her love, understanding, care and guidance for her complete development of character, personality and

talents. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother [see Sarita Sharma (supra) para 6]. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the U.K. Court directing her to return the child to the U.K. before the stipulated date. Admittedly, when Nethra was in the U.K., no restraint order was issued by any court or authority in the U.K. in that behalf. She had travelled along with her mother from the U.K. to India on official documents. It is a different matter that respondent no.2 alleges that he was not informed before Nethra was removed from the U.K. and brought to India by his wife (appellant herein). It is common ground that Nethra is suffering from cardiac disorder and needs periodical medical reviews and proper care and attention. That can be given only by her mother. The respondent no.2 (father) is employed and may not be in a position to give complete attention to his daughter. There is force in the stand taken by the appellant that if Nethra returns to the U.K., she may not be able to get meaningful access to provide proper care and attention. Further, she has no intention to visit the U.K.

Admittedly, the appellant has acquired the status of only a permanent resident of the U.K., as she was staying with respondent no.2 who is gainfully employed there. The appellant has alleged and has produced material in support of her case that during her stay with respondent no.2 in the U.K., she was subjected to physical violence and mental torture. She has also alleged that if she goes back to the U.K., she may suffer the same ignominy. Further, the proceeding in the UK Court instituted by the husband is a counter blast to the complaint filed by her in Delhi about the violence inflicted on her by the husband and his family members. Indeed, respondent no.2 has vehemently denied and rebutted these allegations. It is not necessary for us to adjudicate these disputed questions of facts.

Suffice it to observe that taking the totality of the facts and circumstances into account, it would be in the interests of Nethra to remain in custody of

her mother and it would cause harm to her if she returns to the U.K. That does not mean that the appellant must disregard the proceedings pending in the U.K. Court against her or for custody of Nethra, as the case may be. So long as that court has jurisdiction to adjudicate those matters, to do complete justice between the parties we may prefer to mould the reliefs to facilitate the appellant to participate in the proceedings before the U.K. Court which she can do through her solicitors to be appointed to espouse her cause before that court. In the concluding part of this judgment, we will indicate the modalities to enable the appellant to take recourse to such an option or any other remedy as may be permissible in law. We say so because the present appeal arises from a writ petition filed by respondent no.2 for issuance of a writ of habeas corpus and not to decide the issue of grant or non-grant of custody of the minor as such. In a substantive proceeding for custody of the minor before the Court of competent jurisdiction including in India if permissible, all aspects will have to be considered on their own merit without being influenced by any observations in this judgment.

34. As aforesaid, the respondent No. 2 has heavily relied on four decisions of this Court. The case of V. Ravi Chandran (*supra*) also arose from a writ of habeas corpus for production of minor son and not from the substantive proceedings for custody of the minor by the father. The minor was in custody of his mother. It was a case of custody of a "male" child born in the US and an American citizen by birth, who was around 8 years of age when he was removed by the mother from the United States of America (USA) in spite of a consent order governing the issue of custody and guardianship of the minor passed by the competent Court namely, the New York State Supreme Court. The minor was given in joint custody to the parents and a restraint order was operating against the mother when the child was removed from the USA surreptitiously and brought to India. Before being removed from the USA, the minor had spent his initial years there. These factors weighed against the mother, as can be discerned from the discussion in paragraphs 32 to 38 of the reported judgment. This Court, therefore, chose to exercise summary jurisdiction in the interests of the child. The Court directed the mother to return the child "Aditiya" on her own to the USA within stipulated time. In the present case, the minor is a "girl" child who was born in India and is a citizen of India by birth. She has

not given up her citizenship of India. It is a different matter that she later acquired citizenship of the U.K. We have already indicated the reasons in the preceding paragraph, which would distinguish the facts from the case relied upon by the respondent no. 2 and under consideration.

35. As regards the case of Shilpa Aggarwal (*supra*), the minor (girl child) was born in England having British citizenship, who was only three and a half years of age. The parents had also acquired the status of permanent residents of the UK. The UK Court had not passed any order to separate the child from the mother until the final decision was taken with regard to the custody of the child, as in this case. This Court recorded its satisfaction on the basis of the facts and circumstances of the case before it that in the interests of the minor child, it would be proper to return the child to the UK and then applied the doctrine of comity of courts. Further, the Court was of the opinion that the issue regarding custody of the child should be decided by the foreign Court from whose jurisdiction the child was removed and brought to India. This decision has been rendered after a summary inquiry on the facts of that case. It will be of no avail to the respondent no. 2. It does not whittle down the principle expounded in *Dhanwanti Joshi (supra)*, the duty of the Court to consider the overarching welfare of the child. Be it noted, the predominant criterion of the best interests and welfare of the minor outweighs or offsets the principle of comity of courts. In the present case, the minor is born in India and is an Indian citizen by birth. When she was removed from the UK, no doubt she had, by then, acquired UK citizenship, yet for the reasons indicated hitherto dissuade us to direct return of the child to the country from where she was removed.

36. In the case of *Arathi Bandi (supra)* also, the male child was born in the USA and had acquired citizenship by birth there. The child was removed from the USA by the mother in spite of a restraint order and a red corner notice operating against her issued by the Court of competent jurisdiction in the USA. The Court, therefore, held that the matter on hand was squarely covered by facts as in *V. Ravi Chandran (supra)*. More importantly, as noted in paragraph 42 of the reported decision the mother (the wife of the writ petitioner) had expressed her intention to return to the USA and live with the husband. However, the husband was not prepared to

cohabit with her. In the present case, the situation is distinguishable as alluded to earlier.

37. In the case of Surya Vadanam (*supra*), the minor girls were again British citizens by birth. The elder daughter was 10 years of age and the younger daughter was around 6 years of age. They lived in the UK throughout their lives. In a petition for issuance of a writ of habeas corpus, the Court directed return of the girls to the UK also because of the order passed by the Court of competent jurisdiction in the UK to produce the girls before that Court. The husband had succeeded in getting that order even before any formal order could be passed on the petition filed by the wife in Coimbatore Court seeking a divorce from the appellant-husband. That order was followed by another order of the UK Court giving peremptory direction to the wife to produce the two daughters before the UK Court. A penal notice was also issued to the wife. The husband then invoked the jurisdiction of the Madras High Court for issuance of a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters of the couple and that they may be ordered to be produced in the Court and to pass appropriate direction thereafter. The said relief was granted by this Court. After the discussion of law in paragraphs 46 to 56 of the reported decision, on the basis of precedents adverted to in the earlier part of the judgment, in paragraph 56 the Court opined as under:-

"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the



parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

38. As regards clauses (a) to (c), the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi's case (*supra*), which has been quoted with approval by a three-judge bench of this Court in *V. Ravi Chandran* (*supra*). In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign Court on the issue of custody of the minor. That has been explicitly negated in Dhawanti Joshi's case. For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign Court can be reckoned only as one of the factor to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment.

39. As regards the fourth factor noted in clause (d), we respectfully disagree with the same. The first part gives weight age to the "first strike" principle. As noted earlier, it is not relevant as to which party first approached the Court or so to say "first strike" referred to in paragraph 52 of the judgment. Even the analogy given in paragraph 54 regarding extrapolating that principle to the Courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction. Section 14 of the said Act plainly deals with that aspect. The same reads thus:-

"14. *Simultaneous proceedings in different Courts.*- (1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself. (2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine

in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

[(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to and be guided by such orders as they may receive from their respective State Governments.]"

Similarly, the principle underlying Section 10 of the Code of Civil Procedure, 1908 can be invoked to govern that situation. The explanation clarifies the position even better. The same reads thus:-

**"10. Stay of suit.** - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government] [\*\*\*] and having like jurisdiction, or before [the Supreme Court].

*Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in [India] from trying a suit founded on the same cause of action."*

(emphasis supplied)

40. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the Court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign Court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi's case (supra), in relation to non-convention countries is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. While considering that aspect, the Court may reckon the fact that the child was abducted from his or her country of

habitual residence but the Court's overriding consideration must be the child's welfare.

41. The facts in all the four cases primarily relied upon by the respondent no.2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the Courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign Court of competent jurisdiction. That, however, will have to be considered on case to case basis - be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

42. In the present case, we are of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the minor (Nethra) to remain in custody of her mother (appellant) else she would be exposed to harm if separated from the mother. We have, therefore, no hesitation in overturning the conclusion reached by the High Court. Further, we find that the High Court was unjustly impressed by the principle of comity of courts and the obligation of the Indian Courts to comply with a pre-existing order of the foreign Court for return of the child and including the "first strike" principle referred to in *Surya Vadan*'s case (*supra*).

43. We once again reiterate that the exposition in the case of *Dhanwanti Joshi* (*supra*) is a good law and has been quoted with approval by a three-judge bench of this Court in *V. Ravi Chandran* (*supra*). We approve the view taken in *Dhanwanti Joshi* (*supra*), inter alia in paragraph 33 that so far as non-convention countries are concerned, the law is that the Court in the country to which the child is removed while considering the question must bear in mind the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration. The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has

been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, - for these are all acts which could psychologically disturb the child. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child.

44. Needless to observe that after the minor child (Nethra) attains the age of majority, she would be free to exercise her choice to go to the UK and stay with her father. But until she attains majority, she should remain in the custody of her mother unless the Court of competent jurisdiction trying the issue of custody of the child orders to the contrary. However, the father must be given visitation rights, whenever he visits India. He can do so by giving notice of at least two weeks in advance intimating in writing to the appellant and if such request is received, the appellant must positively respond in writing to grant visitation rights to the respondent no. 2 - Mr. Anand Raghavan (father) for two hours per day twice a week at the mentioned venue in Delhi or as may be agreed by the appellant, where the appellant or her representatives are necessarily present at or near the venue. The respondent no. 2 shall not be entitled to, nor make any attempt to take the child (Nethra) out from the said venue. The appellant shall take all such steps to comply with the visitation rights of respondent no. 2, in its letter and spirit. Besides, the appellant will permit the respondent no. 2 - Mr. Anand Raghavan to interact with Nethra on telephone/mobile or video conferencing, on school holidays between 5 PM to 7:30 PM IST.

45. As mentioned earlier, the appellant cannot disregard the proceedings instituted before the UK Court. She must participate in those proceedings by engaging solicitors of her choice to espouse her cause before the High Court of Justice. For that, the respondent no.2 - Anand Raghavan will bear the costs of litigation and expenses to be incurred by the appellant. If the appellant is required to appear in the said proceeding in person and for which she is required to visit the UK, respondent no.2 - Anand Raghavan will bear the air fares or purchase the tickets for the travel of appellant and Nethra to the UK and including for their return journey to India as may be required. In addition, respondent no.2 - Anand Raghavan will make all arrangements for the comfortable stay of the appellant and her companions

at an independent place of her choice at reasonable costs. In the event, the appellant is required to appear in the proceedings before the High Court of Justice in the UK, the respondent no.2 shall not initiate any coercive process against her which may result in penal consequences for the appellant and if any such proceeding is already pending, he must take steps to first withdraw the same and/or undertake before the concerned Court not to pursue it any further. That will be condition precedent to pave way for the appellant to appear before the concerned Court in the UK.

46. Accordingly, this appeal is allowed in the above terms. The impugned judgment and order passed by the High Court of Delhi dated 8th July 2016 in Writ Petition (Criminal) No. 247 of 2016 is set aside. Resultantly, the writ petition for issuance of writ of habeas corpus filed by the respondent no. 2 stands dismissed subject however, to the arrangement indicated above in paragraphs 44 and 45 respectively.

47. No order as to costs.

2017(14) Scale 121 : 2017(6) Recent Apex Judgments (R.A.J.) 371 : 2018(1) R.C.R.(Civil) 210 : 2017(12) JT 246

## **SUPREME COURT OF INDIA**

Before:- Dipak Misra, CJI. and Amitava Roy, J.

Criminal Appeal No. 968 of 2017. D/d.

6.12.2017. Prateek Gupta - Appellant

### **Versus**

Shilpi Gupta & Ors. - Respondents

For the Appellants :- Braj Nath Patel, Ms. Sweta, Ms. Romila, Ms. Binu Tamta, Advocates.

For the Respondents :- N.S. Dalal, D.P. Singh, R.C. Kaushik, Advocates.

**A. Principle of Comity of Courts - Applicability - Principle of comity of courts - Not to be accorded yielding primacy or dominance over welfare and well-being of child which unmistakeably is of paramount and decisive bearing.**

[Para 21]

**B. Issuance of Writ Habeas Corpus - Custody of child - While issuing writ habeas corpus - Paramount consideration to be welfare of child.**

[Para 22]

**C. Guardian and Wards Act, 1890, Sections 7 and 8 - Custody of child - Claim - Child brought from USA - Child removed from native country - Unless continuance of child in country to which it has been removed unquestionably harmful when judged on touchstone of overall perspectives, perception and practicability - It ought not to be dislodged and extricated from environment and setting to which it had got adjusted for its well being.**

[Para 35]

**D. Doctrine of intimate contact and closest concern - Only when child uprooted from its native country and taken to place to encounter alien environment, language, custom etc., with portent of mutilative bearing on process of its overall growth and grooming - Doctrines are of persuasive relevance.**

[Para 33]

**E. Guardian and Wards Act, 1890, Sections 7 and 8 - Custody of child - Claim - Child barely 2-1/2 years when came over to India - Today little over 5 years old - Spent half of his life in India - Appellant being biological father of child, custody not to be construed as illegal or unlawful drawing invocation of jurisdiction to issue writ in nature of habeas corpus - Dislodgement of child harmful to it - Child till attain majority ought to continue in custody of father subject to order to contrary if passed by court of competent jurisdiction in appropriate proceeding - Appeal allowed.**

[Para 37 and 38]

### **Cases Referred :**

[Arathi Bandi v. Bandi Jagadrakshaka Rao, 2013\(3\) R.C.R.\(Civil\) 968 : \(2013\) 15 SCC 790.](#)

[Dhanwanti Joshi v. Madhav Unde, 1998\(1\) R.C.R.\(Civil\) 190 : \(1998\) 1 SCC 112.](#)

[Elizabeth Dinshaw v. Arvand M. Dinshaw, \(1987\) 1 SCC 42.](#)

H. (Infants), (1966) 1 WLR 381.

In re [L. (Minors) (Wardship : Jurisdiction), (1974) 1 WLR 250 (CA).

Mark T. Mckee v. Evelyn Mckee, (1951) AC 352 (PC).

[Nithya Anand Raghavan v. State \(NCT of Delhi\), 2017\(3\) R.C.R.\(Civil\) 798 : 2017\(4\) Recent Apex Judgments \(R.A.J.\) 328 : \(2017\) 8 SCC 454.](#)

Ruchi Majoo v. Sanjeev Majoo, 2011(3) R.C.R. (Civil) 122 : 2011(3) Recent Apex Judgments (R.A.J.) 223 : (2011) 6 SCC 479.

Sarita Sharma v. Sushil Sharma, 2000(2) R.C.R. (Civil) 367 : (2000) 3 SCC 14.

Shilpa Aggarwal v. Aviral Mittal, 2010(1) R.C.R. (Civil) 231 : (2010)1 SCC 591.

Surya Vadanam v. State of Tamil Nadu, 2015(2) R.C.R. (Civil) 183 : 2015(2) Recent Apex Judgments (R.A.J.) 95 : (2015) 5 SCC 450.

Syed Saleemuddin v. Dr. Rukhsana, 2001(2) R.C.R. (Criminal) 591 : (2001) 5 SCC 247.

V. Ravi Chandran (Dr.) v. Union of India, 2009(4) R.C.R.(Civil) 961 : 2009(6) Recent Apex Judgments (R.A.J.) 380 : (2010) 1 SCC 174.

#### JUDGMENT

**Amitava Roy, J.** - By the impugned judgment and order dated 29.04.2016 rendered by the High Court of Delhi, in a writ petition filed by the respondent No. 1 seeking a writ in the nature of habeas corpus, the appellant-father has been directed to hand over the custody of the child, Master Aadvik, aged about 5 years to respondent No. 1- mother. The appellant-father is in assailment of this determination and seeks the remedial intervention of this Court. By order dated 03.05.2016, the operation of the impugned verdict was stayed and as the said arrangement was continued thereafter from time to time, the custody of the child as on date has remained with the appellant. The orders passed by this Court though attest its earnest endeavour to secure a reconciliation through interactions with the parents and the child, the efforts having failed, the appeal is being disposed of on merits.

2. We have heard Ms. Binu Tamta, learned counsel for the appellant and Mr. N.S. Dalal, learned counsel for the respondent No. 1 (hereafter to be referred to as "respondent").

3. A skeletal outline of the factual backdrop is essential. The appellant and the respondent who married on 20.01.2010 in accordance with the Hindu rites at New Delhi had shifted to the United States of America (for short, hereafter referred to as 'U.S. '), as the appellant was already residing and gainfully employed there prior to the nuptial alliance. In due course, the couple was blessed with two sons, the elder being Aadvik born on 28.09.2012 and the younger, Samath born on 10.09.2014. As adverted to hereinabove, the present lis is with regard to the custody of Master Aadvik, stemming from an application under Article [226](#) of the Constitution of India filed by the respondent alleging illegal and unlawful keeping of him by the appellant and that too in violation of the orders passed by the Juvenile and Domestic Relations Court of Fairfax County, passed on 28.05.2015 and 20.10.2015 directing him to return the child to the Commonwealth of Virginia and to the custody and control of the respondent.

4. The pleaded facts reveal that the child resided with the parents from his birth till 07.11.2014 and thereafter from 07.11.2014 till 06.03.2015 with the respondent-mother in the United States. This is so, as in view of irreconcilable marital issues, as alleged by the respondent, particularly due to the volatile temperament and regular angry outbursts of the appellant often in front of the child, the parties separated on or about 15.11.2014. Prior thereto, the appellant had on 08.11.2014 left for India leaving behind the respondent and her children in U.S. He returned on 18.01.2015 to the U.S., but the parties continued to live separately, the respondent with her children. The appellant however, made short time visits in between and on one such occasion i.e. on 24.01.2015, he took along with him Aadvik, representing that he would take him for a short while to the Dulles Mall. According to the respondent, she did not suspect any foul play and permitted the child to accompany his father, but to her dismay though assured, the appellant did not return with the child in spite of fervent insistences and implorations of the mother. As alleged by the respondent, the appellant thus separated the child from her from 24.01.2015 to 07.03.2015 in a pretentious and cruel move, seemingly acting on a nefarious strategy which surfaced when on 07.03.2015, the appellant left U.S. with the child to India without any prior information or permission or consent of hers.

5. Situated thus, the respondent approached Juvenile and Domestic Relations Court Fairfax



County, for its intervention and for that, on 15.05.2015, she filed "Emergency Motion For Return of Minor Child and Established Temporary Custody".

6. On the next date fixed i.e. 19.05.2015, after the service of the process on the appellant, his counsel made a "special appearance" to contest the service. On the date thereafter i.e. 28.05.2015, he however informed the court that he was not contesting the service upon the appellant, whereupon hearing the counsel for the parties at length and also noticing the plea on behalf of the appellant that he intended to return with the child in U.S. and that the delay was because of his mother's illness, the U.S. Court passed the following order:

**"IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FOR FAIRFAX COUNTRY**

IN re: Aadvik Gupta

D.O.B. September 28, 2012

Case No. JJ 431468-01-00

Shilpi Gupta - Petitioner

Vs.

Prateek Gupta - Respondent

**ORDER**

This cause came before this Court on the 19th May, 2015, upon the petitioner Shilpi Gupta's verified motion for return of minor child and to establish temporary custody;

It appearing to the Court that this Court has proper jurisdiction over the parties to this action pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, more specifically 20-146.24 and 20-146.32 of the Code of Virginia, 1950, as amended.

*It further appearing to the Court that it is in the best interest of the child, Aadvik Gupta, (hereinafter "Aadvik") born on September 28, 2012, that he be immediately returned to the custody of the petitioner and to the Commonwealth of Virginia pending any further order of this Court and that good cause exists with which to require that the petitioner take immediate possession of the child by all means necessary. It is therefore adjourned and ordered as follows:*

*1. Custody: The petitioner Shilpi Gupta, is hereby granted sole legal and physical custody of the minor child, Aadvik Gupta, pending further order of this Court.*

*2. Return of the Child: That the respondent, Prateek Gupta, is hereby ordered to immediately return Aadvik to the Commonwealth of Virginia, and to the custody and control of the petitioner or her agents. Thereafter, the respondent shall not remove the child from the Commonwealth of Virginia under any circumstances without further order of the Court.*

*3. Enforcement: That the all law enforcement agencies and related agencies (including but not limited to Police Department(s), Sheriff's Department(s), U.S. State Department, Federal Bureau of Investigations) are hereby directed to assist and/or facilitate the transfer of Aadvik to the petitioner, if necessary, including taking the child into custody from anyone who has possession of him and placing him in the physical custody of the petitioner.*

*4. Passport: That once the child has been returned to Virginia, any and all of Aadvik's passports must be immediately surrendered to the petitioner where it will be held until further order of this Court.*

*5. Removal from the Commonwealth of Virginia: That all relevant and/or local law enforcement agencies shall do whatever possible to prevent the removal of Aadvik Gupta, from the Commonwealth of Virginia except at the direction of the petitioner, Shilpi Gupta.*

And this cause is continued.

Entered this 28 day of May, 2015.

Sd/-

Judge"

7. Thereby, the Court in U.S. being satisfied that it had the proper jurisdiction over the parties to the action before it and also being of the opinion that it was in the best interest of the child, that he be returned to the custody of the respondent and to the Commonwealth of Virginia pending further orders, and that being convinced that good cause existed to require that the respondent-mother take immediate possession of the child by all means necessary, granted sole legal and physical custody of the child to the respondent pending further orders of the Court. The appellant was directed to immediately return the child to the Commonwealth of Virginia and to the custody and control of the respondent or her agents with a further restraint on him not to remove the child from the Commonwealth of Virginia under any circumstance without the further order of the Court. Thereby, all law enforcement and related agencies as mentioned in the order were directed to assist and/or facilitate the transfer of the child to the respondent, if necessary by taking the child into custody from anyone who had his possession and by placing him in the physical custody of the respondent.

8. As the records laid before this Court would divulge, the appellant meanwhile on 26.05.2015 filed a petition for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1956 (as amended) and also a petition under Section 7(b) of the Guardian and Wards Act, 1890 in the court of the Principal Judge, Family Court, Rohini, Delhi seeking a decree for restitution of conjugal rights between the parties and for a declaration that he was the sole and permanent guardian of the child, respectively. Subsequent thereto on 26.08.2015 he also instituted a suit in the High Court of Delhi at New Delhi praying for a decree inter alia to adjudge the proceedings initiated by the respondent in the court in U.S. to be false, malicious, vexatious, oppressive and nullis juris, being without jurisdiction and also to declare the order dated 28.05.2015 with regard to the return of the child to the custody of the respondent-mother to be also null and void and not binding on him. A decree for permanent injunction against the respondent, her agents etc. from pursuing her proceedings before the court in U.S. was also sought for. The orders, if any, passed in these proceedings instituted by the appellant having a bearing on those pursued by the respondent before the court in U.S. are however not on record and we therefore refrain from making any comment thereon. Suffice is to state that the lodging of the proceedings by the appellant in courts in India demonstrates in unambiguous terms, his knowledge about the lis in the Court in U.S. and the order dated 28.08.2015, interim though, directing him to return the custody of the child immediately to the respondent-mother and to the Commonwealth of Virginia, pending further orders.

9. Be that as it may, the court in U.S. on 20.10.2015 noticing inter alia that the appellant had refused to return the child to the U.S. and to the custody of the respondent in direct violation of its earlier order dated 28.05.2015, ordered that the respondent be granted sole, legal and physical custody of the child and also declared that no visitation be granted to the appellant. It was further directed that if either party intended to relocate his or her residence, he/she would have to give 30 days' advance written notice of any such intended relocation and of any intended change in address to the other party and the court. The proceedings concluded with the observation "This cause is final". For immediate reference the proceedings of 20.10.2015 is also extracted hereinbelow:

"IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FOR FAIRFAX COUNTY

D.O.B. September 28, 2012

Case No. JJ431468-01-00/02-00

In re: Aadvik Gupta

Shilpi Gupta - Petitioner

Vs.

Prateek Gupta - Respondent

**CUSTODY AND VISITATION ORDER**

This cause came before this Court on the 20th day of October, 2015, upon the petitioner Shilpi Gupta's petitions for custody and visitation of Aadvik Gupta.

*It appearing to the Court that it has jurisdiction over the parties and the subject matter of the above-styled matter;*

*It further appearing to the Court that the respondent, Prateek Gupta, unilaterally removed Aadvik Gupta to India without notice to or consent of the petitioner, and has further refused to return said child to the United States and into the custody of the petitioner in direct violation of this Court's order entered on May 28, 2015.*

Having considered all of the factors of 20-124.3 of the Code of Virginia, 1950, as amended, it is hereby:

*Adjudged and ordered that petitioner is granted sole legal and physical custody of Aadvik Gupta; it is further.*

*Adjudged and ordered that no visitation is granted to the respondent at this time; and it is further;*

Adjudged and ordered that pursuant to 20-124.5 of the Code of Virginia, 1950 as amended, either party who intends to relocate his or her residence shall give thirty-days advance written notice of any such intended relocation and of any intended change of address, said notice being given to both the other party and to this Court.

This cause is final

Entered this **20th day of October, 2015.**"

10. Mentionably, before the order dated 20.10.2015 was passed, the respondent in the face of deliberate non-compliance of the order dated 28.05.2015 of the court in U.S. had filed a contempt petition before it and the copy thereof was served on the appellant asking him to show cause. It is also a matter of record that the order dated 28.05.2015 of the court in U.S. had been published in the daily "The Washington Times" on 03.09.2015, whereafter the order dated 20.10.2015 was passed in the presence of the counsel for the appellant after affording the respondent due hearing, whereupon the counsel of the appellant signed the order with the following endorsement "objected to for returning the child to mother sole legal and physical custody". The proceedings of the order dated 20.10.2015 would also testify that he failed to appear even after personal service. That the notice of the proceedings in U.S. Court at both the stages had been served on the appellant is a minuted fact. It was in this eventful backdrop, that the respondent invoked the writ jurisdiction of the High Court of Delhi seeking a writ of habeas corpus against the appellant for the custody of the child alleging its illegal and unlawful charge by him.

11. In reinforcement of her imputations, the respondent elaborated that the child was an American citizen by birth, Virginia being his home State and that in spite of the order(s) of a court of competent jurisdiction, the appellant had illegally detained him. Various correspondences made by her with different authorities seeking their intervention and assistance as the last resort before approaching the Writ Court were highlighted.

12. In refutation, it was pleaded on behalf of the appellant that the petition for a writ in the nature of habeas corpus was misconceived in absence of any imminent danger of the life or physical or moral well-being of the child. Referring to, amongst others the proceedings initiated by him under the Guardian and Wards Act, 1890 which was pending adjudication, it was asserted on his behalf that as the same assured effective and efficacious remedy in law, the prayer in the writ petition ought to be declined. It was insisted as well that as the issue of the custody of the child was involved, a summary adjudication thereof was unmerited and that a proper trial was the imperative. Apart from referring to the reasons for the acrimonious orientation of the parties, the initiatives and efforts made by him and his family members to fruitlessly effect a resolution of the differences, were underlined. It was maintained on his behalf that the parties however, as an interim arrangement made on 24.01.2015 had agreed to live separately with each parent keeping one child in his/her custody and that in terms thereof Aadvik, the minor whose custody is in

dispute, was given in charge of the appellant. Institution and pendency of the other proceedings before the Indian Courts were also cited to oppose the relief of the writ of habeas corpus. It was contended as well that the respondent being a single working woman, she would not, in any view of the matter, be capable of appropriately looking after both the children.

13. In rejoinder, it was asserted on behalf of the respondent that the proceedings instituted by the appellant were all subsequent to the one commenced by her in the court in U.S. on 15.05.2015 and in the face of the final order(s) passed, directing return of custody of the child to her and the Commonwealth of Virginia, the continuance of the child with the appellant was apparently illegal and unauthorized, warranting the grant of writ of habeas corpus.

14. The High Court, as the impugned judgment would evince, after traversing the recorded facts, amongst others took note of the disinclination of the respondent-wife to join the company of her husband in India because of his alleged past conduct and the trauma and torture suffered by her, a plea duly endorsed by her father present in court, granted the writ as prayed for. While rejecting the contention of the appellant that no orders ought to be passed in the writ petition in view of the pendency of the three proceedings initiated by him in India, the High Court seemed to place a decisive reliance on the decision of this Court in ***Surya Vadanam v. State of Tamil Nadu & Ors., 2015(2) R.C.R.(Civil) 183 : 2015(2) Recent Apex Judgments (R.A.J.) 95 : (2015) 5 SCC 450*** and after subscribing to the principle of "comity of courts" and the doctrines of "most intimate contact" and "closest concern" returned the finding, in the prevailing factual setting, that the domestic court had much less concern with the child as against the foreign court which had passed the order prior in time. It observed further that no special or compelling reason had been urged to ignore the principle of comity of courts which predicated due deference to the orders passed by the U.S. Court, more particularly when the appellant was represented before it through his counsel and had submitted to its jurisdiction. It was held that as the child remained in the U.S. since birth upto March, 2015, it could be safely construed that he was accustomed to and had adapted himself to the social and cultural milieu different from that of India. It was observed that no plea had been raised on behalf of the appellant that the foreign court was either incompetent or incapable of exercising its jurisdiction or had not rendered a reasonable or fair decision in the best interest of child and his best welfare. In the textual facts, the conclusion of the High Court was that the most intimate contact with the parties and their children was of the court in U.S. which did have the closest concern for their well-being.

15. Having determined thus, the High Court directed the appellant to produce the child in court on the date fixed for consequential handing over of his custody to the respondent.

16. In the process of impeachment of the impugned ruling of the High Court, the learned counsel for the appellant at the threshold has assiduously questioned the maintainability of the writ proceeding for habeas corpus. According to the learned counsel, in the attendant facts and circumstances, the custody of the child of the appellant who is the biological father can by no means be construed as illegal or unlawful and thus the writ proceeding is misconceived. Further the appellant being in-charge of the child on the basis of an agreement between the parties, which also stands corroborated by various SMS and e-mails exchanged between them during the period from January, 2015 to 07.03.2015, the departure of the appellant with the child from the U.S. to India and its custody with him is authorized and approved in law. The learned counsel argued as well that during the interregnum, after the appellant had returned to India with the child, the couple had been in touch with each other with interactions about the well-being of the child and thus in law and on facts, there is no cause of action whatsoever for the writ of habeas corpus as prayed for. That in passing the impugned order, the High Court had visibly omitted to analyze the perspectives pertinent for evaluating the interest or welfare of the child has been underlined to urge that on that ground alone, the assailed ruling is liable to be interfered with. The learned counsel dismissed any binding effect of the order of the U.S. Court on the ground that the same had been obtained by the respondent by resorting to fraud in withholding the relevant facts from it and deliberately projecting wrongly that the safety of the child was in danger in the custody of the appellant. The order of the court in U.S. having thus been obtained by resorting to fraud, it is non est in law, she urged. Even otherwise, India being not a signatory to the Hague Convention of "The Civil Aspects of International Child Abduction", the order of the U.S. Court was not per se enforceable qua the appellant and as in any view of the matter, the principle of comity of courts was subject to the paramount interest and welfare of the child, the High Court had fallen in error in relying on the rendition of this Court in *Surya Vardanan* which in any event, was of no avail to the respondent in the singular facts of the case. According to the learned counsel, the parties are Indian nationals and citizens having Indian passports and they are only residents of

U.S. on temporary work visa. It has been argued that the respondent is all alone in U.S. with the younger child on a temporary work visa which would expire in 2017 and her parents and other family members are all in India. It has been pleaded as well that when the child was brought to India by the appellant, he was aged 2= years, by which age he could not be considered to have been accustomed and adapted to the lifestyle in U.S. for the application of the doctrines of "intimate contact" and "closest concern" by a court of that country. According to the learned counsel, the child after his return to India, has been admitted to a reputed school and has accustomed himself to a desired congenial family environment, informed with love and affection, amongst others of his grand-parents for which it would be extremely harsh to extricate him herefrom and lodge him in an alien setting, thus adversely impacting upon the process of his overall grooming. That the removal of the child by the appellant to India had not been in defiance of any order of the court in U.S. and that the issue, more particularly with regard to his custody as per the Indian law is presently pending in a validly instituted proceeding here has also been highlighted in endorsement of the challenge to the impugned judgment and order. The decisions of this Court in ***Dhanwanti Joshi v. Madhav Unde, 1998(1) R.C.R.(Civil) 190 : (1998) 1 SCC 112, Sarita Sharma v. Sushil Sharma, 2000(2) R.C.R. (Civil) 367 : (2000) 3 SCC 14*** and Surya Vadanani have been adverted to in consolidation of the above arguments.

17. In his contrasting response, the learned counsel for the respondent, while edifying the sanctified status of a mother and her revered role qua her child in its all round development, urged with reference to the factual background in which the child had been removed from his native country, that his continuing custody with the appellant is patently illegal and unauthorized besides being ruthless and inconsiderate vis-a-vis the respondent-mother and his younger sibling. Heavily relying on the determination of this Court in Surya Vadanani, the learned counsel has insisted that the High Court had rightly invoked the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" and therefore, no interference is called for in the ultimate interest and well-being of the child. It was urged that the orders passed by the court in U.S. directing the return of the child to the custody of the respondent and the Commonwealth of Virginia is perfectly legal and valid, the same having been rendered after affording due opportunity to the appellant and also on an adequate appreciation of the aspects bearing on the welfare of the child. The orders thus being binding on the appellant, the defiance thereof is inexcusable in law and only displays a conduct unbecoming of a father to justify retention of the custody of the child in disobedience of the process of law. The High Court as well on a due consideration of the facts and the law involved had issued its writ for return of the custody of the child to the respondent after affording a full-fledged hearing to both the parties for which no interference is warranted, he urged. The learned counsel however denied that there was ever any agreement or understanding between the couple, under which they agreed that each parent would have the custody of one child as represented by the appellant. In the case in hand as a final order has been passed by the court in U.S. with regard to the custody of the child in favour of the respondent after discussing all relevant aspects, the impugned order of the High Court being in conformance with the letter and spirit thereof, no interference is merited, he urged. While placing heavy reliance on the decision of this Court in Surya Vadanani, it was also insisted that the return of the elder child to the custody of the mother was indispensably essential also for the proper growth and grooming of the younger child in his company and association, sharing the common bond of love, affection and concern.

18. The recorded facts and the contentious assertions have received our due attention. A brief recapitulation of the state of law on the issue at the outset is the desideratum.

19. A three Judge Bench of this Court in ***Nithya Anand Raghavan v. State (NCT of Delhi) and another, 2017(3) R.C.R.(Civil) 798 : 2017(4) Recent Apex Judgments (R.A.J.) 328 : (2017) 8 SCC 454*** did have the occasion to exhaustively revisit the legal postulations qua the repatriation of a minor child removed by one of the parents from the custody of the other parent from a foreign country to India and its retention in the face of an order of a competent foreign court directing its return to the place of abode from which it had been displaced. The appeal before this Court arose from a decision of the High Court in a Writ Petition filed by the father alleging that the minor daughter of the parties had been illegally removed from his custody in United Kingdom (for short, hereafter referred to as "UK"), thus seeking a writ of habeas corpus for her production. By the verdict impugned, the High Court directed the appellant-mother therein to produce the minor child and to comply with an earlier order passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom within three weeks or in the alternative to handover the custody of the daughter to the respondent-father therein within that time. The proceeding in which the Court in the UK had passed the order dated 08.01.2016 had been initiated by the

respondent/father after the appellant/mother had returned to India with the minor.

20. A brief outline of the factual details, would assist better the comprehension of the issues addressed therein. The parties to start with, were Indian citizens and were married as per the Hindu rites and customs on 30.11.2006 which was registered before the SDM Court, Chennai, whereafter on the completion of the traditional formalities, they shifted to U.K. in early 2007 and set up their matrimonial home in Watford (U.K.). Differences surfaced between them so much so that as alleged by the wife, she was subjected to physical and mental abuse. She having conceived in and around December, 2008, left U.K. for Delhi in June, 2009 to be with her parents and eventually was blessed with a girl child, Nethra in Delhi. The husband soon joined the mother and the child in Delhi whereafter, they together left for U.K. in March, 2010. Skipping over the intervening developments, suffice it to state that the mother with the child who had meanwhile been back on a visit to India, returned to London in December, 2011, whereafter the minor was admitted in a Nursery School in U.K. in January, 2012. In December, 2012, the daughter was granted citizenship of U.K. and subsequent thereto, the husband also acquired the same. Meanwhile from late 2014 till early 2015, the daughter was taken ill and was diagnosed to be suffering from cardiac disorder for which she was required to undergo periodical medical reviews. As imputed by the wife, the father however, displayed total indifference to the daughter's health condition. Finally on 02.07.2015, the appellant-mother returned to India along with the daughter because of alleged violent behavior of the respondent and also informed the school that the ward would not be returning to U.K. for her well-being and safety.

The appellant thereafter filed a complaint on 16.12.2015 against the respondent with the Crime Against Women Cell, New Delhi, which issued notice to the respondent and his parents to appear before it. According to the appellant, neither the respondent nor his parents did respond to the said notice and instead as a counter-blast, he filed a custody/wardship petition on 08.01.2016 before the High Court of Justice, Family Division, U.K. praying for the restoration of his daughter to the jurisdiction of that Court. The Court in U.K. on 08.01.2016 passed an ex-parte order inter alia directing the appellant to return the daughter to U.K. and to attend the hearing of the proceedings. Within a fortnight therefrom, the respondent also filed a writ petition before the High Court of Delhi against the appellant-wife seeking a writ of habeas corpus for production of the minor before the Court. By the impugned Judgment and Order, the High Court directed the appellant to produce the daughter and comply with the orders passed by the U.K. Court or hand over the minor to the respondent-father within three weeks therefrom.

Assailing this determination, it was urged on behalf of the appellant inter alia that the High Court had wrongly assigned emphasis on the principle of comity of courts in complete disregard of the paramount interest and welfare of the child, more particularly in view of the vicious environment at her matrimonial home in U.K. in which she (appellant) had been subjected to physical and verbal abuse and had even placed the child at risk with his behaviour. The fact that India not being a signatory to the Hague Convention intended to prevent parents from abducting children across the borders, the principle of comity of courts did not merit precedence over the welfare of the child, an aspect overlooked by the High Court, was underlined. It was asserted that the impugned order did also disregard the *parens patriae* jurisdiction of the Indian court within whose jurisdiction the child was located as well as the welfare of the child in question in mechanically applying the principle of comity of courts. That though the welfare of the child in situations of the like as well, is of paramount consideration, this Court in ***Shilpa Aggarwal v. Aviral Mittal and another, 2010(1) R.C.R.(Civil) 231 : (2010)1 SCC 591*** and in *Surya Vadan* had deviated from this governing precept and had directed the child and mother to return to the jurisdiction of the foreign court by mis-interpreting the concept of 'intimate contact' of the child with the place of repatriation, was highlighted for reconsideration of the views expressed therein. It was urged that the decision in *Surya Vadan* had a chilling effect of assigning dominance to the principle of comity of courts over the welfare of a child, which mentionably undermined the perspective of the child, thus encouraging multiplicity of proceedings.

It was insistingly canvassed that the view adopted in *Surya Vadan* was in direct conflict with an earlier binding decision in ***V. Ravi Chandran (Dr.) v. Union of India and others, 2009(4) R.C.R. (Civil) 961 : 2009(6) Recent Apex Judgments (R.A.J.) 380 : (2010) 1 SCC 174*** in which a three-Judge Bench had categorically held that under no circumstance can the principle of welfare of the child be eroded and that a child can seek refuge under the *parens patriae* jurisdiction of the Court. While dismissing the initiative of the respondent before the UK Court to be one in retaliation of the appellant's allegation of abuse and violence and noticeably after she had filed a complaint with the Crime Against Women Cell (CAWC), New Delhi, it was also urged that the U.K. Court had

passed ex parte order without affording any opportunity to her to present her case. It was canvassed further that the writ petition filed by the respondent seeking a writ of habeas corpus which is envisaged for urgent and immediate relief was also a designed stratagem of his bordering on the abuse of the process of the court and thus ought to have been discouraged by the High Court. It was underlined as well that the High Court in passing the impugned direction had also overlooked that the respondent had defaulted in the discharge of his parental duty towards the child, who was suffering from serious health problems, thus compromising in all respects the supervening consideration of overall well-being of the child.

In refutation, it was maintained on behalf of the respondent that the child was a British citizen and brought up in U.K. and as he had acquired its citizenship and the appellant was also a permanent resident of U.K., they had the abiding intention to permanently settle there along with the child and thus the U.K. Court had the closest concern and intimate contact with the child as regards her welfare and custody and thus indubitably had the jurisdiction in the matter. It was urged on behalf of the respondent by referring amongst others to the rendering in *Surya Vadan* that the child had clearly adapted to the social and cultural milieu of U.K. and thus it was in its best interest to be rehabilitated there. That there was no material to suggest that the return of the child to U.K. would result in psychological, physical or cultural harm to her or that the U.K. Court was incompetent to take a decision in the interest and welfare of the child, was underlined. It was insisted as well that there was no compelling reason for the High Court to ignore the principle of comity of courts and that as acknowledged by the High Court, better medical facilities were available in U.K. to treat the child. The steps taken by the respondent towards the child's boarding and travelling expenses together with the expenditure incurable for the school and other incidental aspects and his undertaking not to pursue any criminal proceeding against the appellant for kidnapping the child with the avowed desire of reinstating his home was highlighted to demonstrate his bona fides. That there was no delay on the part of the respondent in filing the writ petition, which he did immediately after coming to learn that the appellant was disinclined to return the child to U.K., was stressed upon as well.

In this disputatious orientation, this Court premised its adjudication on the necessity to comply with the direction issued by the foreign court against the appellant to produce the minor child before the U.K. Court where the issue regarding wardship was pending for consideration and also to ascertain as to which Court could adjudicate the same.

While recalling that the concept of forum convenience has no place in wardship jurisdiction, this Court at the outset dwelt upon the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters and for that purpose, exhaustively traversed the relevant decisions on the issue. It referred to the verdict in *Dhanwanti Joshi*, which recorded the enunciation of the Privy Council in ***Mark T. Mckee v. Evelyn Mckee, (1951) AC 352 (PC)***, which in essence underlined the paramountcy of the consideration of welfare and happiness of the infant to be of decisive bearing in the matter of deciding its custody with the observation that comity of courts demanded not its enforcement but its grave consideration. In that case, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada, whereafter in the habeas corpus proceedings by the mother, though initially the decisions of the lower courts went against her, the Supreme Court of Canada gave her custody and the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the U.S.A. earlier. The above observation was made by the Privy Council on appeal to it which held that in the proceedings relating to the custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to the custody can be given due weight in the circumstances of the case but such an order of a foreign court was only one of the factors which must be taken into consideration. The duty of the Canadian Court to form any independent judgment on the merits of the matter with regard to the welfare of the child was emphasized. It recorded as well that this view was sustained in ***L (minors) (Wardship: Jurisdiction), In. re, (1974) 1 WLR 250 (CA)***, which reiterated that the limited question which arose in the latter decisions was whether the court in the country in which the child was removed could conduct (a) summary enquiry or (b) an elaborate enquiry in the question of custody. It was explicated that in case of (a) a summary enquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child and in case of (b) an elaborate enquiry, the court could go into the merits to determine as to where the permanent welfare lay and ignore the order of the Foreign Court or treat the fact of removal of the child from another country as only one of the circumstances and the crucial question as to whether the court (in the country to



which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. It was indicated that the summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. It was mentioned as well that the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may be well persuaded that it will be better for the child that those facets be investigated in the court in his native country on the expectation that an early decision in the native country could be in the interest of the child before it would develop roots in the country to which he had been removed. It was expounded in the alternative, that the Court might as well think of conducting an elaborate enquiry on merits and have regard to the other facts of the case and the time that has elapsed after the removal of the child and consider, if it would be in the interest of the child not to have it returned from the country to which it had been removed, so much so that in such an eventuality, the unauthorized removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interest of the child.

This Court recalled its mandate in ***Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr., (1987) 1 SCC 42***, directing the father of the child therein, who had removed it from USA contrary to the custody orders of U.S. Court, to repatriate it to USA to the mother not only because of the principle of comity but also because on facts, which on independent consideration merited such restoration of the child to its native State, in its interest. The following observations in Dhanwanti Joshi qua the state of law vis-a-vis the countries who are not the signatories of the Hague Convention are of formidable significance and as noticed in Nithya Anand Raghavan, are extracted hereinbelow:

"33. *So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in Re [L. (Minors) (Wardship : Jurisdiction)]. As recently as 1996-1997, it has been held in P. (A minor) (Child Abduction: Non-Convention Country), Re: by Ward, L.J. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence-which was not a party to the Hague Convention, 1980-the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A. (A Minor) (Abduction: Non-Convention Country) [Re, The Times, 3-7-1997 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA."*

Here again the court in the country to which the child is removed was required to consider the question on merits bearing on its welfare as of paramount significance and take note of the order of the foreign court as only a factor to be taken into consideration as propounded in McKee, unless the court thought it fit to exercise the summary jurisdiction of the child and its prompt return to its native country for its welfare. In elaboration of the above exposition, this Court in Nithya Anand Raghavan propounded thus:

"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards *the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise*

*summary jurisdiction in the interests of the child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native state because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation-be it a summary inquiry or an elaborate inquiry-the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."*

The above excerpt would in no uncertain terms underscore the predication that the courts in India, within whose jurisdiction the minor has been brought "ordinarily" while examining the question on merits, would bear in mind the welfare of the child as of paramount and predominant importance while noting the preexisting order of the foreign court, if any, as only one of the factors and not get fixated therewith and that in either situation, be it a summary enquiry or elaborate enquiry, the welfare of the child is of preeminent and preponderant consideration, so much so that in undertaking this exercise, the courts in India are free to decline the relief of repatriation of the child brought within its jurisdiction, if it is satisfied that it had settled in its new environment or that it would be exposed thereby to physical harm or otherwise, if it is placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return.

Sustenance of this view was sought to be drawn from the verdict of another three-Judge Bench of this Court in *V. Ravichandran*, as expressed in paragraphs 27 to 30 in the following terms:

"27. ... However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, *the matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.*"

(emphasis supplied)

Again in paras 29 and 30, the three-Judge Bench observed thus: (SCC pp. 195-96)

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, *the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be*

*investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.*

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in ***McKee v. McKee*** that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L. (Minors)*, ***In re [L. (Minors) (Wardship : Jurisdiction)*, (1974) 1 WLR 250 (CA)**] and the said view has been approved by this Court in *Dhanwanti Joshi* [*Dhanwanti Joshi*. Similar view taken by the Court of Appeal in ***H. (Infants) (1966) 1 WLR 381*** has been approved by this Court in *Elizabeth Dinshaw*."

(emphasis supplied)

The quintessence of the legal exposition on the issue was succinctly synthesised in the following terms:

"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State."

21. Thus the state of law as approved in *Nithya Anand Raghavan* is that if a child is brought from a foreign country, being its native country to India, the court in India may conduct (a) summary enquiry, or (b) an elaborate enquiry on the question of custody, if called for. In the case of a summary enquiry, the court may deem it fit to order the return of the child to the country from where he/she has been removed unless such return is shown to be harmful to the child. Axiomatically thus, even in case of a summary enquiry, it is open to the court to decline the relief of return of the child to the country from where he/she has been removed irrespective of a pre-existing order of return of a child by a foreign court, in case it transpires that its repatriation would be harmful to it. On the other hand, in an elaborate enquiry, the court is obligated to examine the merits as to where the paramount interest and welfare of the child lay and take note of the pre-existing order of the foreign court for the return of the child as only one of the circumstances. As a corollary, in both the eventualities whether the enquiry is summary or

elaborate, the court would be guided by the pre-dominant consideration of welfare of the child assuredly on an overall consideration on all attendant facts and circumstances. In other words, the principle of comity of courts is not to be accorded a yielding primacy or dominance over the welfare and well-being of the child which unmistakably is of paramount and decisive bearing.

22. This Court in Nithya Anand Raghavan also had to examine as to whether a writ of habeas corpus was available to the father qua the child which was in the custody of the mother, more particularly in the face of ex-parte order of the court in U.K. against her and directing her for its return to its native country by declaring it to remain as a ward of that court during its minority or until further orders. This Court noted that this order had remained not only unchallenged by the appellant mother but also no application had been made by her before the foreign court for its modification. This Court however was firstly of the view that this order per se did not declare the custody of the minor with the appellant mother to be unlawful or that till it returned to England, its custody with the mother had become or would be treated as unlawful inter alia for the purposes of considering a petition for issuance of writ of Habeas Corpus. In this regard, the decision of this Court, amongst others in ***Syed Saleemuddin v. Dr. Rukhsana & Ors., 2001(2) R.C.R.(Criminal) 591 : (2001) 5 SCC 247***, was adverted to, wherein it had been proclaimed that the principal duty of the court moved for the issuance of writ of habeas corpus in relation to the custody of a minor child is to ascertain whether such custody is unlawful or illegal and whether the welfare of the child requires, that his present custody should be changed and the child ought to be handed over to the care and custody of any person. It was once again emphasized that while doing so, the paramount consideration must be, the welfare of the child.

The observation in Elizabeth Dinshaw that in such matters, the custody must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion as to what would best serve the interest and welfare of the minor and that to that extent, the High Court would exercise its parens patriae jurisdiction, as the minor is within its jurisdiction was reminisced. In the facts of the case also, noting the supervening fact that the appellant was the biological mother and natural guardian of the minor child, the remedy of writ of habeas corpus invoked for enforcement of the directions of the foreign court was declined, however leaving the respondent/father to take recourse to such other remedy as would be available in law for the enforcement of the order passed by the foreign court for securing the custody of the child. It was held that the appellant being the biological mother and natural guardian of the child, it could be presumed that its custody with her was lawful.

23. This Court in Nithya Anand Raghavan next turned to the contextual facts to record that the parents of the child were of Indian origin and that the minor was an Indian citizen by birth as she was born in Delhi and that she had not given up her Indian citizenship though she was granted UK citizenship subsequent thereto. That the child was admitted to a primary school in UK in September 2013 and that she had studied there in July 2015 was noted. It was mentioned as well that till she accompanied her mother on 02.07.2015 to India, no proceeding of any kind had been filed in the UK Court, either in relation to any matrimonial dispute between the parents or for her custody. In India, the child had been living with her grand-parents and other family members and relations unlike in U.K., where she lived in a nuclear family of three with no other relatives. That she had been studying in India for last over one year and had spent equal time in both the countries up to the first six years of her life was taken note of as well. This Court also expressed that the child would be more comfortable and secured to live with her mother here in India, who can provide her with motherly love, care, guidance and the required upbringing for her desired grooming of personality, character and faculties. That being a girl child, the custody, company and guardianship of the mother was of utmost significance was felt. It was also recorded that being a girl child of the age of about seven years, she ought to be ideally in the company of her mother in absence of circumstances that such association would be harmful to her. That there was no restraint order passed by any court or authority in U.K. before the child had travelled with her mother to India was accounted for as well. This Court noticed most importantly, that the child was suffering from cardiac disorder, which warranted periodical medical reviews and appropriate care and attention, which it felt could be provided only by the mother as the respondent/father being employed would not be in a position to extend complete and full attention to his daughter. That the appellant/mother had neither any intention to return to UK nor according to her if the child returns to UK, she would be able to secure the desired access to her to the child to provide care and attention was noted in express terms. On an evaluation of the overall facts and circumstances, this Court thus was of the unhesitant opinion that it would be in the interest of the child to remain in the custody of her mother and that her return to UK would prove harmful to her. While concluding thus, it was stated that this arrangement notwithstanding the

appellant/mother ought to participate in the proceedings before the UK Court so long as it had the jurisdiction to adjudicate the matter before it. It was observed as well that, as the scrutiny involved with regard to the custody had arisen from a writ petition filed by the respondent/father for issuance of writ of a habeas corpus and not to decide the issue of grant or otherwise of the custody of the minor, all relevant aspects would have to be considered on their own merit in case a substantive proceeding for custody is made before any court of competent jurisdiction, including in India, independent of any observation made in the judgment.

To complete the narrative, the analysis of the other relevant pronouncements rendered on the issue would be adverted to in seriatim. In *V. Ravi Chandran*, a writ of habeas corpus for production of minor son from the custody of his mother was sought for by his father. The child was born in US and was an American citizen and was about eight years of age when he was removed by the mother from U.S., in spite of her consent order on the issue of custody and guardianship of the minor passed by the competent U.S. Court. The minor was given in the joint custody to the parents and a restraint order was operating against the mother when it was removed from USA to India. Prior to his removal, the minor had spent few years in U.S.. All these factors weighed against the mother as is discernible from the decision, whereupon this Court elected to exercise the summary jurisdiction in the interest of the child, whereupon the mother was directed to return the child to USA within a stipulated time.

24. In *Shilpa Aggarwa*, the minor girl child involved was born in England having British citizenship and was only 3½ years of age at the relevant time. The parents had also acquired the status of permanent residents of U.K. In the facts and circumstances of the case, this Court expressed its satisfaction that in the interest of the minor child, it would be proper to return her to U.K. by applying the principle of comity of courts. The Court was also of the opinion that the issue regarding custody of the child should be decided by the foreign court from whose jurisdiction the child was removed and brought to India. A summary enquiry was resorted to in the facts of the case.

25. In ***Arathi Bandi v. Bandi Jagadrakshaka Rao and others, 2013(3) R.C.R.(Civil) 968 : (2013) 15 SCC 790*** the minor involved was a male child who was born in USA and had acquired the citizenship of that country by birth. The child was removed from USA by the mother in spite of a restraint order and a red corner notice operating against her had been issued by a court of competent jurisdiction in USA. This Court therefore held that the facts involved were identical to those in *V. Ravi Chandran* and further noticed that the mother of the child also had expressed her intention to return to USA and live with her husband though the latter was not prepared to cohabit with her.

26. In *Surya Vadan*, the two minor girls aged 10 years 6 years respectively were British citizens by birth. Following intense matrimonial discords, the mother had left UK and had come to India with her two daughters. She also instituted a proceeding in the Family Court at Coimbatore seeking dissolution of marriage. The husband, finding the wife to be unrelenting and disinclined to return to U.K. with her daughters, petitioned the High Court of Justice in U.K. for making the children as the wards of the Court, which passed an order granting the prayer and required the mother to return the children to its jurisdiction. This order was passed even before any formal order could be passed on the petition filed by the wife seeking divorce. This order was followed by another order of the U.K. Court giving peremptory direction to the wife to produce the two daughters before the U.K. Court and was supplemented by a penal notice to her. It was thereafter that the husband moved the Madras High Court for a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters. On the following considerations as extracted hereinbelow, relief as prayed for by the husband was granted:

"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to

the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

27. Vis-a-vis the renditions in V. Ravi Chandran, Shilpa Aggarwa and Arathi Bandi, this Court in Nithya Anand Raghavan distinguished the facts involved therein from the one under its scrutiny. While underlining that the considerations which impelled the court to adopt its summary approach/jurisdiction in directing the return of the child to its native country, did not in any way discount or undermine the predominant criterion of welfare and interest of the child even to outweigh neuter or offset the principle of comity of courts, it disapproved the primacy sought to be accorded to the order of the foreign court on the issue of custody of minor in Surya Vadanam though negated earlier in Dhanwanti Joshi and reiterated that whether it was a case of summary enquiry or an elaborate enquiry, the paramount consideration was the interest and welfare of the child so much so that the preexisting order of a foreign court could be taken note of only as one of the factors. The alacrity or the expedition with which the applicant/parent moves the foreign court or the domestic court concerned, for custody as a relevant factor was also not accepted to be of any definitive bearing. This notion of "first strike principle" was not subscribed to and further the extrapolation of that principle to the courts in India as predicated in Surya Vadanam was also held to be in-apposite by adverting inter alia to section [14](#) of the Guardians And Wards Act, 1890 and section [10](#) of the Civil Procedure Code.

28. The following passage from Nithya Anand Raghavan discarding the invocation of "first strike" principle as a definitive factor in furtherance of the applicability of the principle of comity of courts is quoted as hereunder:

*"66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare."*

In conclusion, qua the decisions relied upon by the respondent-father, the facts contained therein were held to be distinguishable and it was observed that though the factual backdrop as obtained therein necessitated the court to issue direction to return the child to the native State, it did not follow that in deserving cases, the Courts in India were denuded of their powers to decline the relief to relocate the child to the native State merely because of a pre-existing order of foreign court of competent jurisdiction. The law laid down in Dhanwanti Joshi and approved by a three Judge Bench of this Court in V. Ravi Chandran was enounced to be the good law, thus reiterating that so far as non-convention countries are concerned, the court in the country in which the child is removed while examining the issue of its repatriation to its native country, would essentially bear in mind that the welfare of the child was of paramount importance and that the existing order

of foreign court was only a factor to be taken note of. It was reiterated that the summary jurisdiction to return the child could be exercised in cases where the child had been removed from his native land to another country where his native language is not spoken or the child gets divorced from social customs and contacts to which he is accustomed or if his education in his native land is interrupted and the child is subjected to foreign system of education, thus adversely impacting upon his psychological state and overall process of growth. Though a prompt and expeditious move on the part of the applicant parent for the repatriation of the child in a court in the country to which it had been removed may be a relevant factor, the overwhelming and determinative consideration unfailingly has to be in the interest and welfare of the child. It was observed that in the facts of the case, the minor child after attaining majority would be free to exercise her choice to go to U.K and stay with her father but till that eventuality, she should stay in the custody of mother unless the court of competent jurisdiction trying the issue of custody of the child did order to the contrary. Visitation right to the respondent-father however was granted and directions were issued so as to facilitate the participation of the appellant-mother in the pending proceedings before the U.K. Court, inter alia by requiring the respondent-husband to bear the necessary costs to meet the expenditure towards all relevant aspects related thereto. The impugned judgment of the High Court issuing the writ of habeas corpus in favour of the respondent-husband was thus set aside.

29. The dialectics and determinations in Nithya Anand Raghavan have been alluded to in pervasive details as the adjudication therein by a Bench of larger coram has forensically analyzed all the comprehensible facets of the issue, to which we deferentially subscribe.

30. The decisions cited at the Bar and heretofore, traversed present fact situations with fringe variations, the common and core issue being the justifiability or otherwise factually and/or legally, of the relocation of a child removed from its native country to India on the basis of the principle of comity of courts and doctrines of "intimate contact" and "closest concern".

31. The following observations in ***Ruchi Majoo v. Sanjeev Majoo, 2011(3) R.C.R.(Civil) 122 : 2011(3) Recent Apex Judgments (R.A.J.) 223 : (2011) 6 SCC 479*** bearing on the *parens patriae* jurisdiction of Indian courts in cases involving custody of minor children are apt as well:

"Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of section 13 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. *The duty of a court exercising its parens patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.*"

32. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer *res integra* that the ever overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances *ex facie* justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless



discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attenuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.

33. The doctrines of "intimate contact" and "closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc., with the portent of mutilative bearing on the process of its overall growth and grooming.

34. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration.

35. Reverting to the present facts, the materials as available, do substantiate lingering dissensions between the parties. They are living separately since 2014 with one child each in their company and charge. The children are US citizens by birth. Noticeably, the child Aadvik, who is the subject matter of the lis and custody was barely 2½ years old when he came over to India and had stayed here since then. Today, he is a little over 5 years old. In other words, he has spent half of his life at this age, in India. Considering his infant years of stay in US, we construe it to be too little for the required integration of his with the social, physical, psychological, cultural and academic environment of US to get totally upturned by his transition to this country, so much so that unless he is immediately repatriated, his inherent potentials and faculties would suffer an immeasurable set back. The respondent-mother also is not favourably disposed to return to India, she being a working lady in US and is also disinclined to restore her matrimonial home. The younger son is with her. There is no convincing material on record that the continuation of the child in the company and custody of the appellant in India would be irreparably prejudicial to him. The e-mails exchanged by the parties as have been placed on records do suggest that they had been in touch since the child was brought to India and even after the first order dated 28.05.2015 was passed by the court in US. In the said e-mails, they have fondly and keenly referred to both the sons staying in each other's company, expressing concern about their illness and general well-being as well. As has been claimed by the appellant, the child is growing in a congenial environment in the loving company of his grand-parents and other relatives. He has been admitted to a reputed school and contrary to the nuclear family environment in US, he is exposed to a natural process of grooming in the association of his elders, friends, peers and playmates, which is irrefutably indispensable for comprehensive and conducive development of his mental and physical faculties. The issue with regard to the repatriation of a child, as the precedential explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.

36. Noticeably, a proceeding by the appellant seeking custody of the child under the Guardian and Wards Act, 1890 has been instituted, which is pending in the court of the Principal Judge, Family Court, Rohini, Delhi. This we mention, as the present adjudication pertains to a challenge to the determination made in a writ petition for habeas corpus and not one to decide on the entitlement in law for the custody of the child.

37. In Nithya Anand Raghavan as well, this Court while maintaining the custody of the child in favour of the mother in preference to the applicant-father had required the mother to participate in the proceeding before the foreign court initiated by the respondent-father therein. It was observed that the custody of the child would remain with the respondent-mother till it attained majority, leaving it at liberty then to choose its parent to reside with. The arrangement approved by this Court was also made subject to the decision with regard to its custody, if made by a

competent Court.

38. In the overwhelming facts and circumstances, we see no reason to take a different view or course. In view of order dated 03.05.2016 of this Court, the child has remained in the custody of the appellant-father. To reiterate, no material has been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the respondent-mother in the native country is obligatorily called for in its interest and welfare. The High Court, as the impugned judgment and order would demonstrate, did not at all apply itself to examine the facts and circumstances and the other materials on record bearing on the issue of welfare of the child which are unmistakably of paramount significance and instead seems to have been impelled by the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" de hors thereto. The appellant being the biological father of Aadvik, his custody of the child can by no means in law be construed as illegal or unlawful drawing the invocation of a superior Court's jurisdiction to issue a writ in the nature of habeas corpus. We are, in the textual facts and on an in-depth analysis of the attendant circumstances, thus of the view that the dislodgment of the child as directed by the impugned decision would be harmful to it. Having regard to the nature of the proceedings before the US Court, the intervening developments thereafter and most importantly the prevailing state of affairs, we are of the opinion that the child, till he attains majority, ought to continue in the custody, charge and care of the appellant, subject to any order to the contrary, if passed by a court of competent jurisdiction in an appropriate proceeding deciding the issue of its custody in accordance with law. The High Court thus, in our estimate, erred in law and on facts in passing the impugned verdict.

39. The impugned judgment and order is thus set aside. We however direct that the parties would participate in the pending proceedings relating to the custody of the child, if the same is pursued and the court below, before which the same is pending, would decide the same in accordance with law expeditiously without being influenced in any way, by the observations and findings recorded in this determination.

40. The appeal is thus allowed.

MINUTES OF MEETING OF THE COMMITTEE TO EXAMINE  
THE CIVIL OF INTERNATIONAL CHILD ABDUCTION BILL, 2016  
HELD ON 18.4.2018 ASPECTS AT CHANDIGARH JUDICIAL  
ACADEMY, SECTOR 43, CHANDIGARH

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Present: Hon'ble Mr. Justice Rajesh Bindal  
Judge, Punjab and Haryana High Court

Hon'ble Mr. Justice Mukta Gupta,  
Judge, Delhi High Court

Hon'ble Mrs. Justice Anita Chaudhry,  
Judge, Punjab and Haryana High Court

Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.)  
Chairman, Punjab State NRI Commission, Chandigarh

Ms. Astha Saxena, ICAS,  
Joint Secretary, Ministry of Women and Child Development  
Govt. of India, New Delhi

Ms. Uma Sekhar, ILS,  
Joint Secretary (Law & Treaty), Ministry of External Affairs,  
North Block, New Delhi

Mr. A. K. Upadhyya,  
Addl. Law Officer to Chairman of Law Commission,  
Law Commission of India, New Delhi

Mr. Sudhir Kumar Gupta,  
Deputy Secretary, Ministry of Home Affairs, New Delhi

Ms. Meenaxee Raj, HCS (Member Secretary),  
Joint Director (Admn.), Urban Local Bodies, Haryana

Dr. Balram K. Gupta,  
Director (Academics), Chandigarh Judicial Academy  
Chandigarh

Mr. Anil Malhotra, Advocate  
Punjab & Haryana High Court, Chandigarh

...

The meeting was attended by all the members except Mr. P. K. Bahera, Deputy Legal Advisor, Department of Legal Affairs, Ministry of Law and Justice, Govt. of India and Ms. Rekha Sharma, Chairperson, National Commission for Women. The members based at Delhi participated in the meeting through Video Conferencing.

At the outset, the Chairperson invited attention of the house to the earlier draft of the report circulated to all the members in the month of February 2018, to which no member had sent any suggestion/responses. Therefore, the same were deemed to be final, subject to corrections. Thereafter, the Chairperson read the contents of draft report to all the members. Every Chapter was discussed in detail, with special emphasis on the recommendations to be made by the Committee as per the terms of reference and the draft Bill. The suggestions given by members were incorporated in the draft report at appropriate places and corrections were carried out. Thereafter the report was finalized.

However, the representative of Ministry of External Affairs, Ms. Uma Sekhar, ILS, sought time to respond to the draft report after seeking approval from her Ministry, as she felt she wasn't competent to consent to the draft on her own.

Considering the fact that all other members of the Committee unanimously agreed to the draft report and it would be unjust to delay submission of report any further, the said member was advised by the Chairperson to send her report/observations, if any, separately to the Ministry of Women and Child Development, Government of India.

All other members agreed that the report be submitted to the Ministry forthwith.

(Rajesh Bindal)  
Judge

(Mukta Gupta)  
Judge

(Anita Chaudhry)  
Judge

(Rakesh Kumar Garg)

(Astha Saxena)

(Uma Sekhar)

(A. K. Upadhya)

(Sudhir Kumar Gupta)

(Meenaxee Raj)

(Balram K. Gupta)

(Anil Malhotra)