

**GUIDE TO GOOD PRACTICE**

*under the Hague Convention of 25 October 1980 on the Civil  
Aspects of International Child Abduction*

**PART II – IMPLEMENTING MEASURES**





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For the Hague Conference on Private International Law  
Permanent Bureau | Bureau Permanent  
6, Scheveningseweg 2517 KT The Hague | La Haye The Netherlands | Pays-Bas  
telephone | téléphone +31 (0)70 363 3303 fax | télécopieur +31 (0)70 360 4867  
e-mail | courriel [secretariat@hcch.net](mailto:secretariat@hcch.net) website | site internet <http://www.hcch.net>

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## **1. SUMMARY: KEY OPERATING PRINCIPLES**

### **1.1 Resources and powers**

It may be useful for implementing measures to:

- set out the powers and functions of the relevant authorities;
- ensure that all actors are provided with sufficient resources;
- create any competent authorities or lay down specific procedures.

### **1.2 Co-operation**

- Internal operation may be improved through effective communication and co-operation among national authorities.
- External operation may be improved through effective communication and co-operation between authorities in different jurisdictions.
- Co-operation may be enhanced through meetings and exchange of information.

### **1.3 Communication**

- The Convention's objectives and legal implications should be clearly communicated to those who are affected by, or who may have to apply, the Convention.
- Sufficient publicity and information surrounding the entry into force of the Convention should be made available to the public.
- Central Authority contact details and updates should be communicated to the Permanent Bureau.
- Descriptions of national legal and administrative procedures should be made available.

### **1.4 Consistency**

- The Convention should be implemented and interpreted consistently throughout the Contracting States.

### **1.5 Expeditious procedures**

- Expeditiousness is essential at all stages of the Convention process including appeals.
- Contracting States should use the most expeditious procedures available to achieve the objects of the Convention.
- Almost all aspects of implementation may have a bearing on the speed with which applications are processed.

**1.6 Transparency**

- States Parties should make available descriptions of their legal and administrative procedures.
- Transparency of process promotes the building of mutual understanding and confidence.

**1.7 Progressive implementation**

- The process of implementation should be seen as a continuing process of development and improvement.
- Contracting States should continue to evaluate the operation of the Convention within their domestic systems and consider ways in which to improve the functioning of the Convention.

## 2. SUMMARY: THE PATH TO SIGNATURE AND RATIFICATION OR ACCESSION

### 2.1 Understanding the terminology of the Hague Convention

- Any State may become a *State Party/Contracting State* to the Convention.
- A State that was a Member of the Hague Conference on 25 October 1980 may *sign and ratify* the Convention.
- A State that was not a Member of the Hague Conference on 25 October 1980 may *accede* to the Convention.
- A State Party must *expressly accept* an accession for the Convention to have effect between that State and a newly acceding State.
- A State must deposit its instrument of ratification or accession with the Ministry of Foreign Affairs in the Netherlands (the *depository*).
- All Contracting States have the same obligations under the Convention.

### 2.2 Steps to take before ratification of, or accession to, the Convention or shortly thereafter

- 2.2.1 When contemplating becoming a Party to the Convention consult with experts and consider how the Convention will fit within the existing domestic legal framework.
- 2.2.2 When preparing implementing measures consult with the relevant government agencies, ensure that all actors are provided with sufficient resources and powers to carry out their duties and verify whether amendments to existing domestic rules are necessary.
- 2.2.3 Implementing measures should be put in place and all relevant bodies established and informed of their respective roles by the time the Convention enters into force.
- 2.2.4 The Convention enters into force three months after the instrument of ratification or accession is deposited with the depository.
- 2.2.5 Acceding States are encouraged to answer the standard questionnaire to facilitate the acceptance of their accession by existing Contracting States.
- 2.2.6 After the Convention enters into force continue to monitor its application and functioning and respond to implementation difficulties. Training and education of those responsible for implementing the Convention is an important component of effective implementation.

### 3. SUMMARY: METHODS OF IMPLEMENTATION

- 3.1 Regardless of whether the Convention is self-executing within national systems, implementing measures (including the Rules of Court and Codes of Civil Procedure) are suggested as a means by which to assist the effective implementation of the Convention. This may include measures to clarify the roles of the different bodies and authorities (*i.e.* the creation of any competent authorities, the jurisdiction of courts), prescribe procedure under the Convention (*i.e.* incoming applications, provision of legal aid) and direct the relevant bodies to carry out their Convention obligations.
- 3.2 For *monist States* using the *automatic incorporation method*, there should be sufficient publicity and information surrounding the entry into force of the Convention and information regarding the Convention available to the public.
- 3.3 *Dualist States* may give effect to the Convention through incorporation or transformation by legislation
  - 3.3.1 *Dualist States* using the *incorporation approach* may enact specific provisions deemed necessary for the appropriate application of the treaty by domestic bodies or authorities.
  - 3.3.2 For *dualist States* using the *transformation method*, discrepancies between the Convention and domestic law leading to different interpretations should be avoided. Measures should be taken to ensure that the Convention will be interpreted in its international context.
- 3.4 Implementation should be seen as a continuing process of development and improvement. Contracting States should continue to evaluate the operation of the Convention within their domestic systems and, if appropriate, modify or amend existing implementing measures.

#### **4. SUMMARY: CENTRAL AUTHORITIES**

4.1 The establishment of a Central Authority will require an implementing measure of some sort. Consideration should be given to ensuring that Central Authorities are given sufficient powers and resources to carry out their obligations

4.1.1 The Central Authority should be designated at the time of ratification or accession and established at the time the Convention enters into force (Central Authorities should be ready to send and receive applications). The contact details (and respective roles in Federal States where multiple Central Authorities may be appointed) should be notified to the depositary and to the Permanent Bureau. The Permanent Bureau should be kept informed of any subsequent changes to the contact details.

4.1.2 States have a wide discretion to decide where to locate the Central Authority.

4.2 Implementing measures should provide Central Authorities with a mandate which is sufficiently broad and with ample powers to carry out their obligations and functions effectively.

4.2.1 The Convention clearly sets out the obligations of Central Authorities.

4.2.2 Implementing measures in a number of States specify the powers and functions of Central Authorities which are explicit or implicit in the Convention. These include the power to:

4.2.2.1 Receive and transmit applications

4.2.2.2 Request information

4.2.2.3 Take action following receipt of application

4.2.2.4 Refuse to accept an application

4.2.2.5 Facilitate legal representation

4.2.2.6 Protect the child

4.2.2.7 Ensure expeditious proceedings

4.2.2.8 Ensure enforcement of decision

4.3 Implementing measures may be used to establish and clarify the use of specific procedures by different bodies and authorities.

**5. SUMMARY: ORGANISATION OF THE COURTS**

- 5.1 Where possible, and practical, under domestic law, implementing legislation may provide for the concentration of Hague return cases in a limited number of courts.
- 5.2 If domestic systems do not allow for concentrated jurisdiction, in law or in practice, it is particularly important that judicial training or briefing be available for judges concerned in Hague proceedings. Regardless of jurisdictional arrangements, judicial training and education on the Convention should be made available.

## 6. SUMMARY: LEGAL PROCEDURAL MATTERS

As far as compatible with domestic law, including due process considerations, provisions in implementing legislation to ensure that Hague return applications are dealt with promptly and expeditiously may include:

- 6.1 Pre-trial procedures: giving trial judges or other authorities adequate powers to obtain information to locate children.
- 6.2 Provisional measures: providing the courts with ample powers to take any necessary provisional measures.
- 6.3 Setting out expedited procedures including provisions which give the courts powers to give a Hague return application priority or concentrating jurisdiction in a limited number of courts.
- 6.4 Case management: as far as constitutionally permitted, setting timetables for decisions.
- 6.5 Rules of evidence
  - 6.5.1 Evidence of foreign law: considering Convention procedures addressing foreign law (Articles 14 and 15) which provide mechanisms to reduce delay.
  - 6.5.2 Documentary evidence: considering Convention procedures allowing documentary evidence from requesting States and thereby eliminating the need to hear oral evidence; save in exceptional cases, placing greater reliance on documentary evidence and sworn statements and less reliance on oral evidence; and in cases where the issue demands oral evidence (conflict in affidavits which goes to a critical point), keeping oral evidence time limited and focused upon the issue.
  - 6.5.3 Personal appearance of the applicant: considering whether a requirement for the applicant's personal appearance at the proceedings would cause undue delay in the consideration of the case.
- 6.6 Fast-track appeals: limiting the time for appeal where necessary; specifying the court or limiting the number of levels to which appeal can be made; and indicating the effect of lodging an appeal against a return order (will the return order be stayed while an appeal is pending?).
- 6.7 Enforcement: considering whether the enforcement mechanisms within the domestic system need to be supplemented (*i.e.* including provisions for contempt of court, fine or imprisonment, power to order disclosure of child's whereabouts, issuing warrant for the child, expanding role of Public Prosecutor); and in systems where additional enforcement steps are required, ensuring that the applicant is aware of the need for separate enforcement procedures. To this end, it is important to recognise the necessity that return orders be enforced, *i.e.*, that return actually be effected not just ordered.

**7. SUMMARY: LEGAL AID AND ASSISTANCE**

- 7.1 In States which have not made a reservation to Article 26(3), implementing measures should ensure the availability of appropriate legal advice. States which have made such a reservation may encourage private practitioners to offer independent, private representation to qualified applicants on a reduced fee or pro bono basis. Regardless of a reservation to Article 26(3), implementing measures should provide for timely and effective access to the court or administrative tribunal.
- 7.2 Clear descriptions should be provided by each country, of their legal and administrative procedures, legal aid arrangements and eligibility guidelines. These should be made known to Central Authorities in other Contracting States and made available on a website.
- 7.3 The issue of costs may be addressed in implementing measures.

## **8. SUMMARY: AIDS TO INTERPRETATION**

An international approach is necessary for consistent interpretation and application of the Convention. Use of supplementary explanatory material as an aid to interpretation is encouraged when drafting implementing legislation and measures. To this end, use of the following supplementary material is encouraged:

- 8.1 The Explanatory Report of the Convention (The Pérez-Vera Report). It may also be useful to include a reference to the Explanatory Report in implementing legislation and measures;
- 8.2 International jurisprudence;
- 8.3 Reports of Special Commission Meetings;
- 8.4 Academic writings.

**9. SUMMARY: FACILITATING ACCEPTANCE OF ACCESSIONS**

States which were not Members of the Hague Conference on 25 October 1980 may accede to the Convention. This accession will have effect only between the acceding State and those Contracting States which have formally declared their acceptance of the accession.

- 9.1 Acceding States should provide information on their ability to carry out Convention obligations to facilitate acceptance of their accession by other Contracting States.
- 9.2 Acceding States are encouraged to provide the information requested in the standard questionnaire before or soon after accession and communicate it to the Permanent Bureau and, if so requested, directly to other Contracting States.
- 9.3 Existing Contracting States, or where appropriate their Central Authorities, sometimes transmit the questionnaire directly to newly acceding States. Where this occurs it is helpful if the request is accompanied, as part of an exchange, by information concerning the operation of the Convention in the requesting State.

## 10. SUMMARY: IMPLEMENTATION: A CONTINUING PROCESS

- 10.1 Central Authorities or other relevant bodies are encouraged to develop educational and training programmes for persons responsible for implementing the Convention (judges, lawyers, locating agencies, social services and others concerned) and to resolve difficulties which might have appeared in its practical application.
- 10.1.1 International judicial conferences are to be encouraged as a means of improving knowledge and developing mutual understanding and confidence between judges.
- 10.1.2 The Permanent Bureau may be contacted to provide information or assistance with education and training for judges, government officials, Central Authority personnel and practitioners with regard to the operation of specific instruments developed by the Hague Conference.
- 10.2 Attendance and participation at the Special Commission Meetings to review the operation of the Convention is recommended. The review meetings facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice.
- 10.3 Essential information for training and education may be found in several resources, including:
- 10.3.1 Website of the Hague Conference;
- 10.3.2 International Child Abduction Database (INCADAT);
- 10.3.3 The Judges' Newsletter on International Child Protection.
- 10.4 Continue to monitor the application and functioning of the Convention and respond to any implementation difficulties that may arise.\*

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\* See Conclusion 2.1, Fourth Special Commission, recommending that implementation, whether national or regional, should always be seen as a continuing process of development and improvement, even if the text of the Convention itself remains unchanged. See also, *infra*, Chapter 2.6.



# IMPLEMENTING MEASURES

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## **GLOSSARY**

## INTRODUCTION

There are now more than seventy States Parties to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The States Parties meet together periodically in a Special Commission organised by the Permanent Bureau of the Hague Conference on Private International Law, to review, and make recommendations on, practice under the Convention. The reports of these Special Commission meetings, which have been held in 1989, 1993, 1997 and 2001, are available on the website of the Hague Conference on Private International Law at <<http://www.hcch.net/e/conventions/reports28e.html>>.

During the fourth of these review meetings, held at The Hague on 22-28 March 2001, the following recommendation was made:

*“Contracting States to the Convention should co-operate with each other and with the Permanent Bureau to develop a good practice guide which expands on Article 7 of the Convention. This guide would be a practical, “how-to” guide, to help implement the Convention. It would concentrate on operational issues and be targeted particularly at new Contracting States. It would not be binding nor infringe upon the independence of the judiciary. The methodology should be left to the Permanent Bureau.”*

The project to establish a Guide to Good Practice under the 1980 Convention began with the completion in 2002 of Part I - Central Authority Practice and Part II - Implementing Measures. A recommendation was made at the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* held at The Hague from 27 September to 1 October 2002 to develop a Guide for transfrontier access/contact matters. The Permanent Bureau was also requested to prepare reports on the need for Guides covering prevention of abductions, enforcement of return orders, and judicial co-operation.



Part II of the Guide to Good Practice raises matters that need to be considered when implementing the Convention within national systems. Its objective is to draw attention to arrangements, practices and procedures which have been found in practice to be useful in implementing and operating the Convention successfully in different jurisdictions.

The provisions of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* are cast in language sufficiently precise and neutral that they may be easily applied by domestic courts and authorities. What is necessary to incorporate the Convention into the domestic order of any State Party is a matter which depends on the constitutional order of each State (*see, infra*, Chapter 3). Whatever the constitutional position, some implementing measures will be needed for the Convention to operate efficiently.

For example, the obligation on Contracting States to designate a Central Authority obviously requires certain implementing measures. Also Article 2 of the Convention, which imposes the general obligation on Contracting States to “take all appropriate measures to secure within their territories the implementation of the objects of the Convention,”<sup>1</sup> requires consideration of what those measures should be. Article 2

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<sup>1</sup> See the Pérez-Vera Report, para 62: “...this article sets forth a general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally found in

further provides that Contracting States "shall use the most expeditious procedures available." To this end, experience has shown that special implementing measures, such as the concentration of "Hague" return cases within a limited number of courts or the application of fast-track procedures, may be vital for the successful operation of the Convention.

While nothing in this Guide may be construed as binding on a particular Contracting State, all States are encouraged, whether contemplating becoming Parties to the Convention or already Parties, to organise their legal and procedural structures in such a way as to ensure the effective operation of the Convention.<sup>2</sup> The Guide may also provide suggestions for "good practice" for those States that have already implemented the Convention into domestic law.



The development of this Part of the Guide was assisted by advice from a large number of national experts. The Permanent Bureau would like to thank these individuals for their help and advice.<sup>\*</sup> Particular thanks are due to Marion Ely, Legal Officer with the Permanent Bureau, who carried out the principal work on this Part of the Guide.



**Part II of the Guide to Good Practice was prepared by the Permanent Bureau and then considered and approved by a Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* held at The Hague from 27 September to 1 October 2002.**

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conventions, does not require that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Contracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided." Elisa Pérez-Vera, *Explanatory Report* on the Child Abduction Convention, in 3 Hague Conference on private international law: Actes et Documents de la Quatorzième Session 426 (1982).

<sup>2</sup> See Conclusion IV, First Special Commission.

<sup>\*</sup> Thanks in particular are extended to Peter Beaton (Scottish Executive Justice Department, United Kingdom), Béatrice Biondi (Ministère de la Justice, France), Alegría Borrás (Universidad de Barcelona, Spain), Andreas Bucher (Université de Genève, Switzerland), María del Carmen Seoane de Chiodi (Ministerio de Relaciones Exteriores Comercio, Internacional y Culto, Argentina), Manon Dostie (Ministry of Justice, Canada), Adair Dyer (Former Deputy Secretary General of the Hague Conference, United States), Barbara Hechter (Office of the Chief Family Advocate, South Africa), Matthias Heger (Bundesministerium der Justiz, Germany), Martha Hutchens (Department of State, United States), Dorothea van Iterson (Ministerie van Justitie, The Netherlands), The Honourable Judge Patrick Mahony (Family Court of New Zealand), Peter McEleavy (University of Aberdeen, United Kingdom), Laura McPolin (Northern Ireland Court Services, United Kingdom), Laura Mulheron (Scottish Executive Justice Department, United Kingdom), Nicolette Rusca-Clerc (Office fédéral de la Justice, Switzerland), Werner Schütz (Bundesministerium für Justiz, Austria), The Rt Honourable Lord Justice Mathew Thorpe (Court of Appeals of England and Wales, United Kingdom), Kathleen Wilson (Department of State, United States), Ian Wingfield (Department of Justice, Hong Kong Special Administrative Region, China); Cathy Wong (Department of Justice, Hong Kong Special Administrative Region, China) and Sarah Armstrong and Valériane Oreamuno (Permanent Bureau).

## **1. SUMMARY: KEY OPERATING PRINCIPLES**

### **1.1 Resources and powers**

It may be useful for implementing measures to:

- set out the powers and functions of the relevant authorities;
- ensure that all actors are provided with sufficient resources;
- create any competent authorities or lay down specific procedures.

### **1.2 Co-operation**

- Internal operation may be improved through effective communication and co-operation among national authorities.
- External operation may be improved through effective communication and co-operation between authorities in different jurisdictions.
- Co-operation may be enhanced through meetings and exchange of information.

### **1.3 Communication**

- The Convention's objectives and legal implications should be clearly communicated to those who are affected by, or who may have to apply, the Convention.
- Sufficient publicity and information surrounding the entry into force of the Convention should be made available to the public.
- Central Authority contact details and updates should be communicated to the Permanent Bureau.
- Descriptions of national legal and administrative procedures should be made available.

### **1.4 Consistency**

- The Convention should be implemented and interpreted consistently throughout the Contracting States.

### **1.5 Expeditious procedures**

- Expeditiousness is essential at all stages of the Convention process including appeals.

- Contracting States should use the most expeditious procedures available to achieve the objects of the Convention.
- Almost all aspects of implementation may have a bearing on the speed with which applications are processed.

### **1.6 Transparency**

- States Parties should make available descriptions of their legal and administrative procedures.
- Transparency of process promotes the building of mutual understanding and confidence.

### **1.7 Progressive implementation**

- The process of implementation should be seen as a continuing process of development and improvement.
- Contracting States should continue to evaluate the operation of the Convention within their domestic systems and consider ways in which to improve the functioning of the Convention.

## 1. KEY OPERATING PRINCIPLES

There are several key operating principles which apply generally to the implementation of the Convention and which should be observed when consideration is being given to implementing legislation and measures. They may be summarised as follows:

- resources and powers
- co-operation
- communication
- consistency
- expeditious procedures
- transparency
- progressive implementation

### 1.1 Resources and powers

Implementing legislation and measures should provide all actors involved in the operation of the Convention with sufficient powers and resources to support the effective functioning of the Convention.

The Central Authority should be properly established and provided with the resources and powers to enable it to fulfil its obligations under the Convention.<sup>3</sup> Implementing measures in a number of States set out in detail the powers and functions of Central Authorities which are explicit in the Convention, as well as other powers and functions which are seen as implicit or serving an auxiliary function.<sup>4</sup>

It may be particularly useful for implementing measures to create any competent authorities, to determine which courts have jurisdiction, to lay down procedures for dealing with incoming applications, to provide for legal aid under the Convention and to regulate the appeal and enforcement processes.<sup>5</sup>

As far as constitutionally permitted, it may be advantageous for implementing measures to give courts adequate powers to take any necessary provisional measures and ample powers to give priority to Hague return applications.<sup>6</sup>

### 1.2 Co-operation

#### ***Improving co-operation internally***

The responsibilities of authorities such as, *inter alia*, the Central Authorities, courts, practitioners, welfare agencies and police are all interdependent. Each authority plays

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<sup>3</sup> See Conclusion 1.1, Fourth Special Commission.

<sup>4</sup> See, *infra*, Chapter 4.

<sup>5</sup> See, *infra*, Chapters 4, 5, 6 and 7.

<sup>6</sup> See, *infra*, Chapter 6.

an important role under the Convention and effective communication and co-operation among these authorities is crucial.

#### ***Improving co-operation externally***

The Convention cannot function properly without the fullest co-operation among Central Authorities in the different Contracting States. To an increasing extent co-operation between courts in different jurisdictions is becoming a feature in Convention cases.

#### ***Improving co-operation through meetings and exchange of information***

Co-operation is also improved through meetings and exchange of information, including the Special Commission Meetings to review the operation of the Convention (called periodically by the Hague Conference), other meetings of Central Authorities, international seminars and judicial conferences. These international meetings help to facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice. They help the development of mutual understanding and confidence between Central Authorities, judges and others, which is necessary to support the effective functioning of the Convention.<sup>7</sup>

### **1.3 Communication**

Contracting States should ensure that those who are affected by, or who may have to apply, the Convention, are made fully aware of the Convention's objectives and legal implications. Sufficient publicity and information surrounding the entry into force of the Convention should be made available to the public.<sup>8</sup>

The contact details for all Central Authorities, and the designation of the principal Central Authority, if applicable, as well as any changes in those details should be communicated without delay to the Permanent Bureau of the Hague Conference.<sup>9</sup>

Clear descriptions should be provided by each country, of their legal and administrative procedures, legal aid arrangements, eligibility guidelines and any applicable forms, and this information should be made available to Central Authorities in other Contracting States.<sup>10</sup>

### **1.4 Consistency**

#### ***Consistent implementation and interpretation of the Convention***

The provisions of the Convention should be implemented bearing in mind the goal of international consistency in application of the Convention and in its interpretation.<sup>11</sup>

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<sup>7</sup> See, *infra*, Chapter 10.

<sup>8</sup> See, *infra*, Chapter 3.

<sup>9</sup> See, *infra*, Chapter 4.

<sup>10</sup> See, *infra*, Chapter 7.

<sup>11</sup> See, *infra*, Chapters 8 and 10.

## 1.5 Expeditious procedures

### ***Expediency is essential at all stages of the Convention process including appeals***

To the extent consistent with considerations of due process, Article 2 of the Convention requires the use by Contracting States of the most expeditious procedures available to achieve the objects of the Convention. In particular, judicial and administrative authorities are under the obligation to process return applications expeditiously.<sup>12</sup> Expeditious procedures should be viewed as procedures which are both fast and efficient.

Almost all aspects of implementation (*e.g.* the investment of adequate resources and powers in Central Authorities, the allocation of jurisdiction among courts/administrative authorities, the procedures to be followed both at first instance and on appeal, and the ready availability of appropriate advice, assistance and representation)<sup>13</sup> may have a bearing on the speed with which applications are processed.

## 1.6 Transparency

Transparency of process requires that States Parties be made aware of the legal and administrative procedures in other Contracting States.

The dissemination and publication of relevant information provides for transparency of process and offers a valuable resource for States which do not have extensive practical experience of the Convention.<sup>14</sup>

Transparency of process promotes the building of mutual understanding and confidence.

## 1.7 Progressive implementation

All Contracting States should see the process of implementation, whether national or regional, as a continuing process of development and improvement. Contracting States that have already implemented the Convention should continue to evaluate the operation of the Convention within their domestic systems. Contracting States should continue to consider ways in which to improve the functioning of the Convention, if appropriate, through modification or amendment of existing implementation measures.<sup>15</sup>

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<sup>12</sup> Article 11.

<sup>13</sup> *See, infra*, Chapters 4, 5, 6 and 7.

<sup>14</sup> *See, infra*, Chapter 9.

<sup>15</sup> *See* Conclusion 2.1, Fourth Special Commission.

## 2. SUMMARY: THE PATH TO SIGNATURE AND RATIFICATION OR ACCESSION

### 2.1 Understanding the terminology of the Hague Convention

- Any State may become a *State Party/Contracting State* to the Convention.
- A State that was a Member of the Hague Conference on 25 October 1980 may *sign and ratify* the Convention.
- A State that was not a Member of the Hague Conference on 25 October 1980 may *accede* to the Convention.
- A State Party must *expressly accept* an accession for the Convention to have effect between that State and a newly acceding State.
- A State must deposit its instrument of ratification or accession with the Ministry of Foreign Affairs in the Netherlands (the *depository*).
- All Contracting States have the same obligations under the Convention.

### 2.2 Steps to take before ratification of, or accession to, the Convention or shortly thereafter

- 2.2.1 When contemplating becoming a Party to the Convention consult with experts and consider how the Convention will fit within the existing domestic legal framework.
- 2.2.2 When preparing implementing measures consult with the relevant government agencies, ensure that all actors are provided with sufficient resources and powers to carry out their duties and verify whether amendments to existing domestic rules are necessary.
- 2.2.3 Implementing measures should be put in place and all relevant bodies established and informed of their respective roles by the time the Convention enters into force.
- 2.2.4 The Convention enters into force three months after the instrument of ratification or accession is deposited with the depository.
- 2.2.5 Acceding States are encouraged to answer the standard questionnaire to facilitate the acceptance of their accession by existing Contracting States.
- 2.2.6 After the Convention enters into force continue to monitor its application and functioning and respond to implementation difficulties. Training and education of those responsible for implementing the Convention is an important component of effective implementation.

## 2. THE PATH TO SIGNATURE AND RATIFICATION OR ACCESSION

### 2.1 Understanding the terminology of the Hague Convention

- It is possible for a State to become a Party to the 1980 Hague Convention without being a Member of the Hague Conference.
- By *signing* the 1980 Convention, a State expresses, in principle, its intention to become a Party to the Convention. However, signature does not oblige a State to ratify the Convention.<sup>16</sup>
- *Signature followed by ratification*: Ratification requires the Convention to be approved through the parliamentary/legislative branch of a national government. It involves the legal obligation for the ratifying State to apply the Convention. According to the terms of the 1980 Convention, ratification is reserved for States that were Members of the Hague Conference during the Session in which the Convention was adopted.<sup>17</sup>
- *Accession*: Others States wishing to become a Party to the 1980 Convention may accede.<sup>18</sup> Accession is the process by which a State which was not a Member State of the Hague Conference at the time the Convention was adopted (25 October 1980) may nevertheless become a full Party to the Convention and be bound to its terms.
- Acceptance by a State that is already Party to the Convention (by ratification or by accession) of any subsequent accession is necessary for the Convention to have effect between the State Party and the newly acceding State.<sup>19</sup> A newly acceding State has no power to accept the accession of States which have acceded previously.<sup>20</sup>
- The entering into force of the Convention requires the deposit by a State of an instrument of ratification, acceptance, approval or accession with the depositary of the Hague Conventions, the Ministry of Foreign Affairs of the Kingdom of the Netherlands.<sup>21</sup>
- All States that have signed and ratified or that have acceded to the Convention are considered Contracting States to the Convention. Parties to the Convention do not receive different treatment according to the manner

<sup>16</sup> Article 18 of the *Vienna Convention on the Law of Treaties* obliges States, once an expression of consent to be bound by the treaty has been made, not to defeat the object and purpose of the treaty prior to its entry into force.

<sup>17</sup> Article 37; States that were Member States of the Hague Conference at the time the Convention was adopted (on 25 October 1980).

<sup>18</sup> Article 38(1); States that cannot sign and ratify may only accede.

<sup>19</sup> Article 38(4); *see also, infra*, Section 9.1. The requirement of express acceptance creates a certain amount of bi-lateralisation for acceding States.

<sup>20</sup> However acceptance of previous accessions is necessary by any Member State newly ratifying, accepting or approving the Convention (Article 38(4)) for the Convention to have effect between those States.

<sup>21</sup> Article 38.

in which they became Parties. Once the Convention is in force between two States the obligations are the same whether the States concerned ratified or acceded to the Convention.

## **2.2 Steps to take before signature and ratification of, or accession to, the Convention or shortly thereafter**

### **2.2.1 Contemplating becoming a Party**

- Consult with the Permanent Bureau of the Hague Conference and other States Parties on the benefits of the Convention.
- Consider whether any existing domestic laws create obstacles or impediments to the implementation and operation of the Convention.
- In a federal system, ensure that there is sufficient support and consent in the various provinces, territories or states to implement the Convention uniformly and co-operatively.
- Consider in which office to designate the Central Authority.<sup>22</sup>
- Reflect on how the Central Authority will operate in the existing legal framework.
- Consult with different stakeholders, government and non-government agencies to obtain support and approval to ratify or accede to the Convention.

### **2.2.2 Preparing implementing measures**

- Consult with the relevant government agencies when drafting appropriate implementing legislation or preparing other measures.
- Determine what powers and functions are to be given to the Central Authority and what human and material resources it should have available.<sup>23</sup>
- Ensure that the Central Authority has sufficient powers to carry out its duties.<sup>24</sup>
- Consider which courts will have jurisdiction.<sup>25</sup>

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<sup>22</sup> See, *infra*, Chapter 4.1; see Guide to Good Practice, Part I: Chapter 2.3.

<sup>23</sup> See Guide to Good Practice, Part I: Chapters 1.1, 2.4 and 2.5.

<sup>24</sup> See, *infra*, Chapter 4.2.

<sup>25</sup> See, *infra*, Chapter 5.

- Verify whether amendments to existing legislation, Rules of Court or Code of Civil Procedure are necessary.<sup>26</sup>

### **2.2.3 Implementing measures by the time of entry into force**

- Ensure that the appropriate implementing measures are put in place, or are enacted and in force, by the time the Convention enters into force for the Contracting State.
- The Central Authority should be designated at the time of ratification or accession to the Convention.<sup>27</sup>
- Make certain that all relevant bodies are informed of the date of entry into force (*e.g.* courts, police).
- Ensure all relevant bodies are aware of their respective roles in implementing the Convention (*e.g.* welfare agencies, police).
- Publicise and disseminate information on the Convention to the public.

### **2.2.4 Entering into force**

- Lodge the instrument of ratification<sup>28</sup> or accession<sup>29</sup> and any relevant declarations with the depositary and send a copy to the Permanent Bureau.
- The Convention will enter into force for an acceding State on the first day of the third calendar month after the deposit of its instrument of accession.<sup>30</sup>
- The Central Authority for the Convention should be established and ready to send and receive applications at the time the Convention enters into force for the Contracting State.<sup>31</sup>
- Notify the Permanent Bureau of the designation of the Central Authority.

### **2.2.5 Acceding States**

- When an acceding State has lodged its instrument of accession, other Contracting States will decide whether or not to accept the new accession.<sup>32</sup>

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<sup>26</sup> See, *infra*, Chapter 6.

<sup>27</sup> See Guide to Good Practice, Part I: Chapter 2.2.

<sup>28</sup> Article 37.

<sup>29</sup> Article 38.

<sup>30</sup> Article 38(3).

<sup>31</sup> See Guide to Good Practice, Part I: Chapter 2.2.

<sup>32</sup> Article 38(4).

- To facilitate the acceptance of accession, States are encouraged to answer the standard questionnaire for newly acceding States and to send their responses directly to the Permanent Bureau and to any Contracting State which requests it.<sup>33</sup>
- Contracting States may rely on the responses to the questionnaire by the newly acceding States to decide whether or not to accept a new accession.
- The Convention will enter into force between the acceding State and any State that has declared its acceptance of the accession approximately three months after the deposit of the declaration of acceptance.<sup>34</sup>

### **2.2.6 Implementation after coming into force**

- Provide appropriate training and education to those persons responsible for implementing the Convention (*e.g.* Central Authorities, judges, lawyers, locating agencies, social services).<sup>35</sup>
- Make available up-dated information about the Convention to the public by establishing a website or publishing a brochure or flyer.<sup>36</sup>
- Put in place monitoring mechanisms to collect case law and statistics.<sup>37</sup>
- Continue to monitor the application and functioning of the Convention and respond to any implementation difficulties that may arise.<sup>38</sup>

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<sup>33</sup> See, *infra*, Section 9.2. The questionnaire is also available on the website of the Hague Conference at <<http://www.hcch.net/e/conventions/menu28e.html>>.

<sup>34</sup> Article 38(5).

<sup>35</sup> See, *infra*, Chapter 10.

<sup>36</sup> See Conclusion 1.8, Fourth Special Commission.

<sup>37</sup> Such steps would facilitate the dissemination of information on the International Child Abduction Database (INCADAT) and the International Child Abduction Statistical Database (INCASTAT) (both available on the website of the Hague Conference <<http://www.hcch.net/e/conventions/menu28e.html>>).

<sup>38</sup> See Conclusion 2.1, Fourth Special Commission, recommending that implementation, whether national or regional, should always be seen as a continuing process of development and improvement, even if the text of the Convention itself remains unchanged.

### 3. SUMMARY: METHODS OF IMPLEMENTATION

- 3.1 Regardless of whether the Convention is self-executing within national systems, implementing measures (including the Rules of Court and Codes of Civil Procedure) are suggested as a means by which to assist the effective implementation of the Convention. This may include measures to clarify the roles of the different bodies and authorities (*i.e.* the creation of any competent authorities, the jurisdiction of courts), prescribe procedure under the Convention (*i.e.* incoming applications, provision of legal aid) and direct the relevant bodies to carry out their Convention obligations.
- 3.2. For *monist States* using the *automatic incorporation method*, there should be sufficient publicity and information surrounding the entry into force of the Convention and information regarding the Convention available to the public.
- 3.3. *Dualist States* may give effect to the Convention through incorporation or transformation by legislation
  - 3.3.1 *Dualist States* using the *incorporation approach* may enact specific provisions deemed necessary for the appropriate application of the treaty by domestic bodies or authorities.
  - 3.3.2 For *dualist States* using the *transformation method*, discrepancies between the Convention and domestic law leading to different interpretations should be avoided. Measures should be taken to ensure that the Convention will be interpreted in its international context.
- 3.4 Implementation should be seen as a continuing process of development and improvement. Contracting States should continue to evaluate the operation of the Convention within their domestic systems and, if appropriate, modify or amend existing implementing measures.

### 3. METHODS OF IMPLEMENTATION

As with all Hague Conventions on private international law, the provisions of the 1980 Convention are, with the exception of those which obviously require implementing measures, cast in language sufficiently precise and neutral to enable the courts and authorities to apply them without the need for incorporation in domestic law by legislation. In other words, the provisions of the Convention are designed to be essentially self-executing. However, what brings the Convention into force within the domestic legal order of a given State Party will depend on that State's legal and constitutional requirements.

Whatever the constitutional position experience has shown that, even in those countries where treaties are regarded as self-executing, additional implementing measures are extremely useful in translating the Convention's provisions into practice. For instance, either through implementing legislation or other measures, it may be particularly useful to create any competent authorities, to determine which courts have jurisdiction, to lay down procedures for dealing with incoming applications, to provide for legal aid under the Convention<sup>39</sup> and to regulate the appeal and enforcement processes.

#### 3.1 Form of implementation

In some States the Convention will enter into force in domestic law, without any intermediate step, once ratification or accession takes effect (*i.e.* monist States). In other States the Convention will need to be incorporated in domestic law by legislation (*i.e.* dualist States).<sup>40</sup> In the case of dualist States, different kinds of implementing legislation can be contemplated. Some constitutions contain both dualist and monist elements.<sup>41</sup>

Where the provisions of the Convention are being transformed into national law or where a legislative act is necessary to give effect to a treaty, there is a risk that the international and domestic mechanisms may not be synchronised. In the dualist system, whether based on incorporation or transformation, a divergence may occur in two directions: the treaty is ratified but the necessary legislation is not enacted; or the legislation is passed, but ratification does not occur.<sup>42</sup> As a result care must be taken to ensure that the two processes are brought into line.

#### 3.2 Monist approach (automatic incorporation)

Under the constitutional provisions of some monist States once an international treaty has been concluded in accordance with the constitution, approved by competent State organs and has entered into force at the international level for that State, it will, without the need for intervening legislation, become part of domestic law. When legislation is

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<sup>39</sup> See N. Lowe and S. Armstrong, *Good Practice in Handling Hague Abduction Convention Return Applications*, (Sponsored by the International Centre for Missing and Exploited Children, 2002) [hereinafter the 'Lowe Report'], Chapter 2. See Germany (ss 1-13).

<sup>40</sup> See H. van Loon, 'The Hague Conventions on Private International Law', Volume 7 in Francis G. Jacobs and Shelly Roberts, *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987), at 221-43.

<sup>41</sup> See A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), at 145.

<sup>42</sup> See van Loon, *supra* note 40, at 230.

not needed, such treaties are described as "self-executing".<sup>43</sup> In some monist States further measures (legislative, administrative or fiscal) may be needed for the treaty to have full effect in domestic law.<sup>44</sup>

In many monist States following ratification or accession the Hague Convention has effect in domestic law immediately on the date of entry into force at the international level.<sup>45</sup> It is applied directly by the judicial and administrative authorities and consequently creates rights and claims for private citizens.<sup>46</sup>

If this method is employed, States have a particular responsibility to ensure that those who are affected by, or who may have to apply the Convention, are made aware of the Convention's contents, date of entry into force, reservations and designated Authorities.

The failure to adopt specific legislation or rules has sometimes lead to difficulties in effectively carrying the Convention into practice.<sup>47</sup>

### **3.3 Dualist approach (incorporation or transformation by legislation)**

Under the constitutional provisions of dualist States, an international treaty must be given effect by incorporating the rights and obligations set out in the treaty into domestic law through legislation. In this category, a statute may directly enact the provisions of the treaty by setting out the treaty as a schedule to the enacting legislation. A statute may also transform the treaty into domestic legislation by employing its own substantive provisions to give effect to the treaty without enacting the text of the treaty itself.<sup>48</sup>

An international treaty may also be given effect by transformation through implementing legislation, the provisions of which are in accordance with, but not necessarily expressed in the same terms as, the Convention. The treaty provisions are thus used as a basis for drafting a new law or a set of rules to be applied within the Contracting State. Under this approach, the text of the treaty will not necessarily be found in a schedule to the act.

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<sup>43</sup> Aust, *supra* note 41, at 146.

<sup>44</sup> *Id.*

<sup>45</sup> See Aust, *supra* note 41, at 146. "Although there are many variations in how the monist approach is expressed in constitutions, three main features are common to most. First, although the constitution requires the treaty to have first been approved by parliament, there are exceptions for certain types of treaties or certain circumstances. Secondly, a distinction is made between treaties according to their nature or subject matter, some being regarded as being self-executing, others requiring legislation before they can have full effect in domestic law. Thirdly, a self-executing treaty may constitute supreme law and override any inconsistent domestic legislation, whether existing or future, though in some States where parliament is supreme later legislation can override a self-executing treaty."

<sup>46</sup> See M. Savolainen, 'The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland', *Nordic Journal of International Law*, Volume 66 (Kluwer, 1997), at 122.

<sup>47</sup> See Aust, *supra* note 41, at 157. "Under a monist system it may be many years after the treaty entered into force for a State that [...] a determination is made by a court deciding usually on application by a citizen, whether a provision is self-executing."

<sup>48</sup> I. Brownlie, *Principles of Public International Law* (Clarendon Press, 1990), at 48.

### 3.3.1 Implications of the incorporation approach

Where implementation by legislation is employed, setting out the text of the Convention in a schedule to the act, it will at the same time be possible to enact more specific provisions deemed necessary for the appropriate application of the treaty by domestic bodies or authorities. For example, such specific provisions may cover the creation of any competent authorities, the jurisdiction of courts, procedures for dealing with incoming applications and the provision of legal aid under the Convention.<sup>49</sup>

This method encourages an international approach; the incorporation of the actual text of the Convention as a schedule to the act enables direct reference to the articles of the Convention in their context and facilitates international consistency in interpretation of the Convention.

### 3.3.2 Implications of the transformation approach

While the use of established domestic structure and terminology may make the Convention rules more accessible to judges, lawyers and the parties, discrepancies between international and domestic law must be avoided. There are several issues requiring close attention if the Convention rules are reproduced in an internal transformation statute:

- Every effort should be made to ensure that the Convention will be capable of being interpreted within its international context.
- The carefully drafted provisions of the Convention should not be altered in such a way that the application of the domestic rule might lead to results which are incompatible with the provisions of the Convention.<sup>50</sup>
- All essential Convention provisions should be included in the domestic implementing legislation; provisions not included in the legislation will have no force in domestic law.
- Domestic provisions should be drafted in accordance with the objectives of the Convention. To this end, use of the Explanatory Report of the Convention, the Pérez-Vera Report, is valuable.<sup>51</sup>

## 3.4 A continuing process of implementation

The successful operation of the 1980 Hague Convention requires that the Convention be consistently applied by all States Parties. The national and regional legal frameworks in which the Convention has to operate may be subject to significant changes. Contracting States that have already implemented the Convention should continue to evaluate the operation of the Convention within their domestic systems. To this end, implementation should be seen as a continuing process of development and

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<sup>49</sup> See Lowe Report, *supra* note 39, Chapter 2.

<sup>50</sup> See Savolainen, *supra* note 46, at 123. See Article 27 of the *Vienna Convention on the Law of Treaties*, stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

<sup>51</sup> See, *infra*, Chapter 8. The Convention and the Pérez-Vera Report are available in English, French and Spanish. See <<http://www.hcch.net/conventions/e/menu28e.html>>.

improvement<sup>52</sup> and Contracting States should continue to consider ways in which to improve the functioning of the Convention, if appropriate, through modification or amendment of existing implementing measures.<sup>53</sup>

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<sup>52</sup> Conclusion 2.1, Fourth Special Commission.

<sup>53</sup> *See, supra*, Chapter 1.6.

**4. SUMMARY: CENTRAL AUTHORITIES**

- 4.1 The establishment of a Central Authority will require an implementing measure of some sort. Consideration should be given to ensuring that Central Authorities are given sufficient powers and resources to carry out their obligations
- 4.1.1 The Central Authority should be designated at the time of ratification or accession and established at the time the Convention enters into force (Central Authorities should be ready to send and receive applications). The contact details (and respective roles in Federal States where multiple Central Authorities may be appointed) should be notified to the depositary and to the Permanent Bureau. The Permanent Bureau should be kept informed of any subsequent changes to the contact details.
- 4.1.2 States have a wide discretion to decide where to locate the Central Authority.
- 4.2 Implementing measures should provide Central Authorities with a mandate which is sufficiently broad and with ample powers to carry out their obligations and functions effectively.
- 4.2.1 The Convention clearly sets out the obligations of Central Authorities.
- 4.2.2 Implementing measures in a number of States specify the powers and functions of Central Authorities which are explicit or implicit in the Convention. These include the power to:
- 4.2.2.1 Receive and transmit applications
  - 4.2.2.2 Request information
  - 4.2.2.3 Take action following receipt of application
  - 4.2.2.4 Refuse to accept an application
  - 4.2.2.5 Facilitate legal representation
  - 4.2.2.6 Protect the child
  - 4.2.2.7 Ensure expeditious proceedings
  - 4.2.2.8 Ensure enforcement of decision
- 4.3 Implementing measures may be used to establish and clarify the use of specific procedures by different bodies and authorities.

## 4. CENTRAL AUTHORITIES

### 4.1 Establishment

The creation of a Central Authority to facilitate the operation of the Convention is mandatory for all Contracting States.<sup>54</sup> The designation, creation and establishment of a Central Authority will require an implementing measure of some sort. Depending on the domestic system of each State, this may be done by way of legislation or can be purely an administrative process.

Consideration should be given in the context of implementation to ensuring that the Central Authority is properly established and provided with the resources and powers to enable it to fulfil its obligations under the Convention.<sup>55</sup> See *Guide to Good Practice, Part I: Chapter 2*, for a detailed discussion.

#### 4.1.1 Designation of the Central Authorities

Most Contracting States designate only one office or administrative structure to act in the capacity of the Central Authority for the whole of the State. The Central Authority should be designated at the time of ratification or accession to the Convention, and established and ready to send and receive applications at the time the Convention enters into force for the Contracting State.<sup>56</sup>

Where a Contracting State is a Federal State,<sup>57</sup> a State with more than one system of law, or a State having autonomous territorial organisations, it is free to appoint more than one Central Authority and to specify the territorial extent of their powers.<sup>58</sup> Where a Contracting State has established more than one Central Authority, the State must designate the Central Authority to which incoming applications should be directed.<sup>59</sup> If more than one Central Authority is appointed, the roles, functions and powers of each Central Authority should be clearly defined in the implementing measures. The internal transfer of applications between Central Authorities is a particular function that should be clarified.<sup>60</sup> Information about the respective roles, functions, powers of the Central Authorities should be provided to the Permanent Bureau and made available to other Contracting States.

Following designation of the Central Authorities the contact details for all Central Authorities, and the designation of the principal Central Authority if applicable, should be communicated without delay to the Permanent Bureau of the Hague Conference.<sup>61</sup> It is very important for the Hague Conference website and mailing lists to be kept up-to-

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<sup>54</sup> Article 6(1) states that Contracting States "shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities" (emphasis added).

<sup>55</sup> See Conclusion 1.1, Fourth Special Commission. Article 7 outlines the principal obligations of Central Authorities; see also Article 9.

<sup>56</sup> See *Guide to Good Practice, Part I: Chapter 2.2*.

<sup>57</sup> Australia and Canada have designated a Central Authority in each state, province or territory and have also established a Federal Central Authority. See *Lowe Report, supra* note 39, Chapter 2.

<sup>58</sup> Article 6(2). Although Federal States, Germany (s 1), Mexico and the United States of America (s 11606) have designated only one Central Authority in their implementing legislation. In the United States, while the United States Department of State is the designated Central Authority, incoming applications are in fact routed through the National Center for Missing and Exploited Children (NCMEC).

<sup>59</sup> Article 6(2). See United Kingdom (s 3(2)); Australia (Reg 13).

<sup>60</sup> See United Kingdom (s 3(3)).

<sup>61</sup> See Conclusion 1.2, Fourth Special Commission.

date with the most current information. It would be useful for the Central Authorities to establish a website containing all essential information for other Contracting States and persons affected by child abduction.

### **4.1.2 Where to locate the Central Authority**

The Convention gives States a wide discretion as to where to locate their Central Authority. The implementing measures in many States designate offices within the Ministries of Justice as the Central Authority.<sup>62</sup> Other States utilise Departments of Foreign Affairs,<sup>63</sup> Social Affairs and Community Services,<sup>64</sup> as well as Federal Prosecutor's Offices<sup>65</sup> and Police Departments.<sup>66</sup> (See *Good Practice Guide, Part I: Chapter 2.3.2*).

## **4.2 Obligations, powers and functions**

The Central Authorities designated by the Contracting States play a key role in enabling the Convention to function successfully. To this end, the implementing measures should provide Central Authorities with a mandate which is sufficiently broad and with ample powers to carry out their obligations and functions effectively.<sup>67</sup> See *Good Practice Guide, Part I: Chapter 2*, for a detailed discussion.

### **4.2.1 Convention obligations**

Article 7(2) details the principal tasks that Central Authorities must take "all appropriate measures" to realise.<sup>68</sup> While several States list the duties set out in Article 7 in their implementing measures,<sup>69</sup> other States incorporate those duties by indicating that Central Authorities "shall carry out the duties which they are required to carry out under the Convention".<sup>70</sup>

### **4.2.2 Powers and functions specified in implementing measures**

Implementing measures in a number of States set out in detail the powers and functions of Central Authorities which are explicit in the Convention, as well as other powers and functions which are seen as implicit or serving an auxiliary function.

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<sup>62</sup> Austria (s 2), Canada (most Provinces), France, Finland (s 35(1)), China (Hong Kong Special Administrative Region) (s 5(1)), Iceland (Art 5), Italy (Art 3), Netherlands (s 4(2)), South Africa (s 3), Sri Lanka (s 4), Switzerland, Turkey.

<sup>63</sup> Mexico, United States (s 11606) (The U.S. Central Authority was established by Executive Order No. 12648, August 11, 1988).

<sup>64</sup> Canada: Prince Edward Island (s 28(3)).

<sup>65</sup> Germany (s 1). It should be noted that this particular designation was due to a specific allocation of powers between federal and state agencies.

<sup>66</sup> In the states of Western and Southern Australia

<sup>67</sup> See Conclusion 1.1, Fourth Special Commission; see also Conclusions from the Second Special Commission.

<sup>68</sup> See Guide to Good Practice, Part I: Appendix 2, *Obligations on Central Authorities*.

<sup>69</sup> Canada: Quebec (s 8), Sri Lanka (s 5).

<sup>70</sup> Australia (Reg 5(1)), Iceland (Art 5).

#### 4.2.2.1 Receive and transmit applications

Implementing measures may give Central Authorities power to:

- receive and transmit applications<sup>71</sup> to the relevant administrative authorities<sup>72</sup> or to the relevant internal Central Authority,<sup>73</sup> or
- transmit applications to the appropriate authority in a specified country if there is reason to believe that the child is in another country.<sup>74</sup>

#### 4.2.2.2 Request information

In the context of a request to provide information relating to a child under Article 7(d) of the Convention, a Central Authority may be given power to:

- request a report from an appropriate person, authority or court with respect to any matters which appear to be relevant;<sup>75</sup> or
- request more information from the requesting Central Authority.<sup>76</sup>

#### 4.2.2.3 Action following receipt of application

Implementing measures may outline action that Central Authorities may take after receiving an application in accordance with Article 7 of the Convention. This may include measures to:

- request assistance from civil service agencies, State Police and other agencies;<sup>77</sup>
- apply to the Public Prosecutor or court for police assistance in locating the child;<sup>78</sup>
- ensure the safety of the child and prevent prejudice to any interested party;<sup>79</sup>
- secure the voluntary return of the child;<sup>80</sup>
- bring about an amicable resolution;<sup>81</sup> and

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<sup>71</sup> Australia (Reg 11(1)), Canada: Quebec (s 13), Denmark (s 3(1)), Finland (s 36), China (Hong Kong Special Administrative Region) (s 5(2)), Iceland (Art 5), Ireland (ss 9(1), 10(1)), Italy (art. 7(2)), New Zealand (Regs 9, 10), Norway (s 4(1)), United Kingdom (s 3(2)).

<sup>72</sup> Iceland (Art 5).

<sup>73</sup> United Kingdom (s 3(3)).

<sup>74</sup> Sri Lanka (s 6).

<sup>75</sup> Germany (s 3(1)), United Kingdom (ss 3(c), 6(a) and 6(b)), Zimbabwe (s 7).

<sup>76</sup> New Zealand (s 11).

<sup>77</sup> Italy (art 3(2)).

<sup>78</sup> Canada: Quebec (s 10), Finland (s 35(2)), Germany (s 3(1)), New Zealand (s 9(1)). In several countries, it could also be possible to apply to the population register for information, including, *inter alia*, in Sweden, Germany and France.

<sup>79</sup> New Zealand (s 10).

<sup>80</sup> Australia (Reg 13(4)(c)), Germany (s 3(1)), New Zealand (s 10).

<sup>81</sup> Australia (Reg 13(4)(a)), New Zealand (s 10).

- facilitate the making of an application to the court by or on behalf of the applicant.<sup>82</sup>

Some implementing measures give the Central Authority wide ranging powers in applying to the court for any order that the responsible Central Authority considers to be appropriate to give effect to the Convention,<sup>83</sup> or to take on behalf of the applicant any action required under the Convention.<sup>84</sup>

#### 4.2.2.4 Refusal to accept an application

Central Authorities may refuse to accept an application "when it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded".<sup>85</sup> If an application is rejected, the Central Authority must notify the applicant with due speed.<sup>86</sup> Implementing measures may or may not indicate where an applicant, whose application is rejected by the Central Authority, may appeal such a decision.<sup>87</sup> Implementing measures could also specify that the refusal of a requested Central Authority to accept an application under Article 27 does not prevent the applicant from applying directly to the requested country's competent judicial or administrative authority,<sup>88</sup> and that the latter authority in such a case is not bound by the decision of the requested Central Authority.

#### 4.2.2.5 Facilitate legal representation

It may be useful to specify the role of Central Authorities in initiating or facilitating the institution of proceedings for return of the child when drafting implementation measures.

- The Central Authority may apply directly to the court for a return order,<sup>89</sup> act as the applicant in the case or represent the applicant parent<sup>90</sup> or act in the capacity of *amicus curiae*.
- In some Contracting States the Central Authority can give instructions to government counsel who can act on behalf of the applicant, in close liaison with the Central Authority before the court.<sup>91</sup>

<sup>82</sup> New Zealand (s 10).

<sup>83</sup> Australian Regulation 14 provides that the responsible Central Authority may apply to the court for "an order for the return of the child; an order for the issue of a warrant for the apprehension or detention of the child (including the ability to stop, enter and search any vehicle, vessel or aircraft; or enter and search premises); an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention."

<sup>84</sup> Ireland (ss 9(2), 10(2)), Netherlands (s 5(1)), New Zealand (s 9).

<sup>85</sup> Article 27 of the Convention is not meant to be used in such a way that the Central Authority decides on factual issues in place of a court. If there is a reasonable legal issue which could be developed further through the submission of evidence to a court, the Central Authority should have the application submitted to the court for determination of that issue, rather than prejudging the court's ruling. The word "manifest" in Article 27 should be interpreted narrowly and resort to Article 29 should not normally be required. *See* Guide to Good Practice, Part I: Chapter 4. *See also* Australia (Reg 13(2)), Canada: Quebec (s 16), Sri Lanka (s 7).

<sup>86</sup> Australia (Reg 13(3)), Netherlands (s 6(1)).

<sup>87</sup> *See* Germany (s 4) indicating where an applicant may appeal.

<sup>88</sup> *See* Article 29. *See* Italy (art. 7(6)).

<sup>89</sup> Sri Lanka (s 9).

<sup>90</sup> Finland (s 36(1)), Zimbabwe (s 8).

- In other Contracting States the Central Authority assists the applicant in finding competent counsel to handle the case.<sup>92</sup>

#### 4.2.2.6 Protect the child

Under the Convention, Central Authorities have a general obligation to protect the child from harm.<sup>93</sup> Some implementing measures give effect to this obligation by indicating that where the Central Authority takes charge of a child who has been wrongfully removed or retained in accordance with Article 3 of the Convention, a designated director may provide for the care and maintenance of the child.<sup>94</sup> See *Guide to Good Practice, Part I: Chapter 4.15* for a detailed discussion.<sup>95</sup>

#### 4.2.2.7 Ensure expeditious proceedings

Article 11(2) of the Convention provides that if the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant or the requested Central Authority, on its own initiative or if asked by the requesting Central Authority, has the right to request an explanation of the reasons for the delay. Some implementing measures are more explicit than Article 11(2) by requiring that the court must upon request by the Central Authority or the applicant, explain the reasons for delay.<sup>96</sup>

#### 4.2.2.8 Ensure enforcement of decision

Social and police authorities may be required to provide all necessary assistance to the Central Authority in securing the enforcement of the return order or preventing the removal of the child outside the country prior to the return.<sup>97</sup>

### 4.3 Procedure

In respect of the procedural aspects of the Convention, it may be useful for implementing measures to establish and clarify the use of specific procedures by different bodies and authorities designated under the Convention.<sup>98</sup>

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<sup>91</sup> France.

<sup>92</sup> Finland (s 36(1)), New Zealand (s 23).

<sup>93</sup> Article 7(b).

<sup>94</sup> Canada: Alberta (s 5), Quebec (s 11).

<sup>95</sup> See also, *infra*, Chapter 6.2.

<sup>96</sup> Australia (Reg 15(4)), Finland (s 37(1)).

<sup>97</sup> Finland (s 35(2)), Italy (art. 7(5)).

<sup>98</sup> See *Guide to Good Practice, Part I: Chapters 3-5* for a detailed discussion.

**5. SUMMARY: ORGANISATION OF THE COURTS**

- 5.1 Where possible, and practical, under domestic law, implementing legislation may provide for the concentration of Hague return cases in a limited number of courts.
- 5.2 If domestic systems do not allow for concentrated jurisdiction, in law or in practice, it is particularly important that judicial training or briefing be available for judges concerned in Hague proceedings. Regardless of jurisdictional arrangements, judicial training and education on the Convention should be made available.

## 5. ORGANISATION OF THE COURTS

In determining which judicial or administrative authorities should have jurisdiction to consider applications for return orders under the Convention, the key operating principles of the Convention, particularly those of speed and consistency, must be considered.

Implementing measures may be taken to concentrate jurisdiction for Convention cases in a particular court or in a limited number of courts. A limited jurisdiction for Convention cases has been found in many Contracting States to assist with the expeditious resolution of Convention proceedings.

### 5.1 Concentrated jurisdiction

In a growing number of Contracting Parties to the 1980 Convention, States have concentrated jurisdiction to consider Hague applications in a limited number of courts and administrative bodies within their State. The Fourth Special Commission agreed to a Recommendation calling upon Contracting States to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts.<sup>99</sup>

The principal advantages to be gained in Convention cases by such a concentration of jurisdiction are:

- an accumulation of experience among the judges concerned; and, as a result,
- the development of mutual confidence between judges and authorities in different legal systems;<sup>100</sup>
- the creation of a high level of interdisciplinary understanding of Convention objectives, in particular the distinction from custody proceedings;
- mitigation against delay; and
- greater consistency of practice by judges and lawyers.

The Conclusions from the Fourth Special Commission, as well as Conclusions from a number of judicial seminars<sup>101</sup> stress the importance and desirability of concentrating jurisdiction in Hague return cases. The Fourth Special Commission called upon Contracting States to bear in mind the considerable advantages to be gained by a

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<sup>99</sup> See Conclusion 3.1, Fourth Special Commission.

<sup>100</sup> See Conclusion 1, International Judicial Seminar on the *1980 Hague Convention on the Civil Aspects of International Child Abduction*, De Ruwenberg, Netherlands, 20-23 October 2001 [hereinafter 'De Ruwenberg 2001']; Conclusion 1(d), Common Law Judicial Conference on International Parental Child Abduction, Washington, D.C., 17-21 September 2000 [hereinafter 'Washington 2000']; see also Conclusion 4, The Judges' Seminar on International Protection of the Child, De Ruwenberg, Netherlands, 3-6 June 2000 [hereinafter 'De Ruwenberg 2000'].

<sup>101</sup> Including, *inter alia*, De Ruwenberg 2001; De Ruwenberg 2000; Washington 2000; Francophone-Anglophone Family Law Judicial Conference, Dartington Hall, England, 4-7 June 2001; and The Third United Kingdom-German Conference on Family Law, Edinburgh, Scotland, September 2000. The Conclusions from the aforementioned judicial conferences are available at <<http://www.hcch.net/e/conventions/seminar.html>>.

concentration of jurisdiction to deal with Hague return cases within a limited number of courts.<sup>102</sup>

The positive experience of several countries that have concentrated jurisdiction over Hague return cases to a limited number of courts and judges has been widely recognised.<sup>103</sup> The further progress in this direction already made in several Contracting States is welcomed;<sup>104</sup> so too is the consideration being given to this matter in other States.<sup>105</sup> In several countries other special arrangements exist.<sup>106</sup> For example, jurisdiction may be limited to the superior court level or to a specialised family court or to otherwise specified courts or judges.<sup>107</sup>

## 5.2 Other organisational arrangements

In States where domestic legal systems may not allow for a concentration of jurisdiction, it is *particularly* important that judges concerned in Hague proceedings be offered appropriate training or education.<sup>108</sup> Judicial training and education are effective tools to assist judges in understanding the Convention and consequently to render decisions more in accordance with the aims of the Convention.<sup>109</sup> Training and education may also highlight the important available resources and tools, such as the Pérez-Vera Report and the International Child Abduction Database, which may provide aid in consistency of interpretation. Without such training, coherent and consistent interpretation and application of the Convention may be at risk.<sup>110</sup>

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<sup>102</sup> Conclusion 3.1, Fourth Special Commission.

<sup>103</sup> The system in England and Wales of concentration of jurisdiction in the High Court and limiting the number of judges involved in handling Hague cases is a model of efficiency. See United Kingdom (s 4). The Australian model, of concentration of jurisdiction in one federal court, is well suited to a federated State with a large geographic area. See Washington 2000.

<sup>104</sup> In the Federal Republic of Germany, on 1 July 1999 the amended version of the Implementation Act of 1990 entered into force [the Implementation Act of 1999]. This Act concentrated competence to hear Hague cases in 24 courts of first instance in Germany. *Id.* at art. 1 (amending § 5 of the Implementation Act of 1990). Prior to amending the Act, more than 600 family courts had jurisdiction at first instance. In March 2002 legislation in France concentrated jurisdiction for Hague return cases in a single court within each Court of Appeal's jurisdiction. See LOI no 2002-305 du 4 mars 2002 relative à l'autorité parentale (1), J.O. Numéro 54 du 5 Mars 2002 page 4161.

<sup>105</sup> See Conclusion 1, De Ruwenberg 2001.

<sup>106</sup> In Australia, although there is the potential under the implementing legislation for many different judges to hear Hague cases, practice has restricted the number of courts, causing the system to operate well. Where constitutionally permitted, this practice may be usefully considered in other jurisdictions where legislation has not been used to limit jurisdiction.

<sup>107</sup> Cyprus has modified its legal system to limit jurisdiction to its two Family Courts; in Finland (s 31), China (Hong Kong Special Administrative Region) (s 6), Hungary (Art 3(2) of the decree no. 7/1988. (VIII. 1) of the Ministry of Justice), Ireland (s 7(1)), Mauritius (s 5(1)), Sri Lanka (s 9), the United Kingdom (s 4) and Zimbabwe (s 6) only one court has jurisdiction at first instance to decide on Hague Convention cases.

<sup>108</sup> See Conclusion 3.2, Fourth Special Commission; Conclusion 1, De Ruwenberg 2001.

<sup>109</sup> Some States based upon federal systems, for example the United States, may have constitutional difficulties concentrating jurisdiction and therefore have focused efforts on judicial training and education. In addition, the United States Central Authority routinely provides information packages to judges hearing Hague cases.

<sup>110</sup> See, *infra*, Chapter 10. See Guide to Good Practice, Part I: Chapter 1.3.4 indicating that publication of information about the practice and procedure in each country concerning the operation of the Convention should be encouraged including, *inter alia*, publicising information about the judicial procedures and court systems.

## 6. SUMMARY: LEGAL PROCEDURAL MATTERS

As far as compatible with domestic law, including due process considerations, provisions in implementing legislation to ensure that Hague return applications are dealt with promptly and expeditiously may include:

- 6.1 Pre-trial procedures: giving trial judges or other authorities adequate powers to obtain information to locate children.
- 6.2 Provisional measures: providing the courts with ample powers to take any necessary provisional measures.
- 6.3 Setting out expedited procedures including provisions which give the courts powers to give a Hague return application priority or concentrating jurisdiction in a limited number of courts.
- 6.4 Case management: as far as constitutionally permitted, setting timetables for decisions.
- 6.5 Rules of evidence
  - 6.5.1 Evidence of foreign law: considering Convention procedures addressing foreign law (Articles 14 and 15) which provide mechanisms to reduce delay.
  - 6.5.2 Documentary evidence: considering Convention procedures allowing documentary evidence from requesting States and thereby eliminating the need to hear oral evidence; save in exceptional cases, placing greater reliance on documentary evidence and sworn statements and less reliance on oral evidence; and in cases where the issue demands oral evidence (conflict in affidavits which goes to a critical point), keeping oral evidence time limited and focused upon the issue.
  - 6.5.3 Personal appearance of the applicant: considering whether a requirement for the applicant's personal appearance at the proceedings would cause undue delay in the consideration of the case.
- 6.6 Fast-track appeals: limiting the time for appeal where necessary; specifying the court or limiting the number of levels to which appeal can be made; and indicating the effect of lodging an appeal against a return order (will the return order be stayed while an appeal is pending?).
- 6.7 Enforcement: considering whether the enforcement mechanisms within the domestic system need to be supplemented (*i.e.* including provisions for contempt of court, fine or imprisonment, power to order disclosure of child's whereabouts, issuing warrant for the child, expanding role of Public Prosecutor); and in systems where additional enforcement steps are required, ensuring that the applicant is aware of the need for separate enforcement procedures. To this end, it is important to recognise the necessity that return orders be enforced, *i.e.*, that return actually be effected not just ordered.

## 6. LEGAL PROCEDURAL MATTERS

As with all Chapters in the Guide to Good Practice, the Chapter on Legal Procedural Matters is not intended to be a comprehensive guide. The following are simply examples of good practice found in implementing measures. It is acknowledged that the legal systems of Contracting States vary considerably and therefore the examples given should only be considered if appropriate to, and constitutionally permitted by, the individual Contracting State.

### 6.1 Pre-trial procedures

To minimise delay in the initial location of the child, and thereby facilitate the initiation of return proceedings, implementing legislation may include provisions giving trial judges ample powers to locate a child.<sup>111</sup> Legislation may articulate powers for trial judges to direct third parties to disclose information about the location of children,<sup>112</sup> or to issue a warrant for the authorities to make appropriate inquiries.<sup>113</sup>

### 6.2 Provisional measures

Provisional measures may play a very important role in the successful and speedy progression of a Hague return case. In some cases it may be necessary for the courts to protect the welfare of the child prior to a final ruling. In other instances it could be necessary for the courts to guard against flight by the parent and child from the jurisdiction or concealment within the jurisdiction. To this end, implementing legislation may provide the possibility for a judge to make an order preventing the removal of the child to defeat a return application,<sup>114</sup> or to order a child to be placed in temporary protective custody if there is a danger that the child will be removed from the jurisdiction or hidden within the jurisdiction prior to a court order.<sup>115</sup> Legislation may also provide that relevant authorities may apply to the court for an order to detain the child in the jurisdiction<sup>116</sup> or for an order to place the child in protective custody with a view towards protecting the child from abuse.<sup>117</sup>

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<sup>111</sup> In some States however the child must be located before a specific court can be seized (Austria). See *also* Guide to Good Practice, Part I: Chapter 4.10.

<sup>112</sup> Ireland (s 36(1)) provides that where "there is not available to the Court adequate information as to the whereabouts of the child, the Court may order any person who, it has reason to believe, may have relevant information to disclose it to the Court."

<sup>113</sup> Canada: Quebec (s 10) provides that "[o]n motion by the Attorney General or a person designated by him, a judge of the Superior Court may issue a warrant ordering a peace officer to make the necessary inquiries in view of discovering the whereabouts of a child..."

<sup>114</sup> New Zealand (Reg 25).

<sup>115</sup> Netherlands (s 13(4)).

<sup>116</sup> Australia (Reg 14), Ireland (s 37).

<sup>117</sup> Canada: Quebec (s 10).

### 6.3 Most expeditious proceedings

Contracting States are under the obligation to process return applications expeditiously.<sup>118</sup> This obligation extends also to appeal procedures.<sup>119</sup> A pivotal factor in the successful application of the Convention is the speedy disposal of applications.<sup>120</sup>

The last sentence of Article 2 of the Convention specifies one of the particular implementation measures envisaged for securing the objects of the Convention, namely the use by Contracting States of the most expeditious procedures available to achieve the objects of the Convention.

Implementing legislation may include new provisions to facilitate the expeditious handling by courts of Hague cases. Several States' statutes, regulations, Rules of Court or Codes of Civil Procedure contain provisions which give the courts powers to give a Hague return application priority,<sup>121</sup> to take any necessary provisional measures<sup>122</sup> and set out expedited procedures.<sup>123</sup>

In some States, provision is made for all Convention cases to go specifically to designated courts in order to ensure that cases are heard by judges who have sufficient knowledge of the Convention's provisions and to expedite proceedings.<sup>124</sup>

### 6.4 Case management

Prompt decision making under the Convention serves the best interests of children.<sup>125</sup> To ensure that return applications are dealt with expeditiously at first instance and on appeal, some practical or legal measures for strict case management may be necessary.<sup>126</sup> These may include, where constitutionally permitted, requiring or calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications,<sup>127</sup> requiring firm management by judges, both at trial and appellate levels, of the progress of return proceedings and giving Hague return cases preferential listing in court.<sup>128</sup>

<sup>118</sup> Article 11.

<sup>119</sup> Conclusion 3.3, Fourth Special Commission.

<sup>120</sup> Unfortunately in some countries, applications can take many months to resolve. Some cases, especially where an appeal is involved may take years to resolve. This is contrary to the wording and spirit of the Convention. *See also* the Lowe Report, *supra* note 39, Chapter 6.4.

<sup>121</sup> *See* Australia (Reg 15(2)) stating "[a] court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows."

<sup>122</sup> Germany (s 6(2)), China (Hong Kong Special Administrative Region), United Kingdom (s 5).

<sup>123</sup> Australia (Reg 15(4)), Italy (art. 7(3)). With regard to Rules of Court, the United Kingdom Family Proceedings Rules 1991, r 6.10 states: "The hearing of the originating summons under which an application under the Hague Convention or the European Convention is made may be adjourned for a period not exceeding 21 days at any one time."

<sup>124</sup> *See, supra*, Chapter 5.

<sup>125</sup> *See* Conclusion 2, Washington 2000: "Prompt decision-making under the Hague Child Abduction Convention serves the best interests of children. It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of return cases under the Convention. Trial and appellate courts should set and adhere to timetables that ensure the expeditious determination of Hague applications." *See also* Conclusion 3, De Ruwenberg 2001.

<sup>126</sup> For example, in New Zealand immediately after an application is filed it is allocated to a judge nominated through the Principal Family Court Judge. This judge is responsible for all aspects of case management including timetabling directions and then hearing and deciding the case.

<sup>127</sup> Conclusion 3.4, Fourth Special Commission; Conclusion 3, De Ruwenberg 2001; *see also* Conclusion 2, Washington 2000.

<sup>128</sup> Conclusion 3.5, Fourth Special Commission; Conclusion 3, De Ruwenberg 2001; *see also* Conclusion 2,

## 6.5 Rules of evidence

Rules and practices concerning the taking and admission of evidence, including the evidence of experts, should be applied in return proceedings with regard to the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return.<sup>129</sup>

### 6.5.1 Evidence of foreign law

#### **Article 14: judicial notice of law and decisions**

Under the Convention, the removal or retention of a child is to be considered wrongful where it is in breach of custody rights attributed under the law of the State in which the child was habitually resident immediately before the removal or retention. As a result, the competent authorities of requested States will have to take that law into consideration when deciding whether a child should be returned.

The purpose of Article 14 is to simplify proof of that law or the recognition of foreign decisions, thereby enabling the competent authorities to act expeditiously in proceedings for the return of children. Implementing legislation does sometimes reflect Article 14 by providing that courts may take judicial notice of foreign law, or of judicial or administrative decisions, directly without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which could otherwise be applicable.<sup>130</sup> Legislation may also allow for decisions and determinations of authorities of Contracting States to be admissible as evidence.<sup>131</sup>

#### **Article 15: declarations of wrongful removal**

Article 15 provides for the possibility of requesting from the authorities of the child's habitual residence a declaration on the wrongful nature of the removal. The purpose of Article 15 is to help the requested judicial or administrative authorities reach a decision in those cases where there is uncertainty whether the removal or retention of a child was wrongful under the law of the State of the child's habitual residence.<sup>132</sup>

In some domestic legal systems it is not possible to make "declaratory judgments" unless explicitly provided for in implementing legislation. Certain countries have therefore provided specifically in their implementing legislation that their courts may make such declaratory orders.<sup>133</sup>

Some common law countries will permit an ex parte application for an Article 15 declaration to be made. It may well defeat the purpose of the Convention if a court could only make such a declaration after a defended hearing.

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Washington 2000.

<sup>129</sup> Conclusion 3.7, Fourth Special Commission.

<sup>130</sup> Canada: Ontario (s 45), China (Hong Kong Special Administrative Region) (s 9), Mauritius (s 8(1)), Ireland (s 5), Sri Lanka (s 15(2)).

<sup>131</sup> Australia (Reg 29(3)), Ireland (s 5), United Kingdom (s 7).

<sup>132</sup> See China (Hong Kong Special Administrative Region) (s 10), Ireland (s 15(1)), Sri Lanka (S 16), United Kingdom (s 8), Zimbabwe (s 10).

<sup>133</sup> Finland (s 47). It is interesting to note that the Swiss Central Authority, the Federal Office of Justice, may provide a declaration according to which the removal may be considered wrongful if it has taken place in violation of the Swiss Civil Code. The Swiss Central Authority may equally accept other Central Authorities Article 15 declarations and may transmit those declarations to the court. See also Guide to Good Practice, Part I: Chapter 3.15.

### 6.5.2 Documentary evidence

*"Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody."<sup>134</sup>*

The Convention relaxes certain evidentiary rules as a way of speeding up return proceedings. Article 30 of the Convention is intended to facilitate the introduction of documentary evidence, including affidavits. Under Article 30, any application submitted to the Central Authority or petition submitted to the court, along with any documents or information appended thereto, are admissible in court. States are encouraged to ensure, where necessary through implementing legislation, that such documentary evidence can be given due weight under the national evidence rules.

Hague return cases lend themselves to determination by summary proceedings. A full trial, consisting of an evidentiary hearing, will normally not be necessary or desirable. Legislation may provide that affidavit evidence, transcripts of oral evidence and legal argument from the requesting State are admissible as evidence of fact.<sup>135</sup> Rules adopted in several jurisdictions provide for expedited hearings to this effect.<sup>136</sup>

In a number of countries, Hague return proceedings are now conducted primarily on the basis of written submissions and evidence. In order to expedite proceedings, rules have been developed in some countries (often by the judiciary) to define and limit the circumstances in which oral evidence may be admitted.<sup>137</sup> Oral testimony does not necessarily cause undue delay under strict judicial control. Much may depend on the issue.<sup>138</sup> For example, in some jurisdictions oral evidence is more likely to be admitted if there is conflicting documentary evidence by the parties which cannot be resolved without cross-examination or oral evidence.<sup>139</sup> If that is the case, as a general matter, both parties should be given a chance to be heard.

<sup>134</sup> Conclusion 7, Second Special Commission.

<sup>135</sup> Australian Regulation 29 provides for the admissibility of an application, attachments to, and other documents forwarded in support of, that application as evidence of the facts stated in the application or document. In addition, affidavits of witnesses outside Australia are admissible despite non-attendance for cross-examination.

<sup>136</sup> The Irish legislation outlines the Rules of Court in its legislation. "38. (1) Proceedings under Part II or III of this Act shall be commenced in a summary manner. (2) Rules of court may make provision for the expeditious hearing of an application under Part II or III of this Act." See also the legislation from the United Kingdom: "10(1) An authority having power to make rules of court may make such provision for giving effect to this Part of this Act as appears to that authority to be necessary or expedient."

<sup>137</sup> In practice, courts in Australia and the United Kingdom have set precedents for limiting the presentation of oral evidence. See *Re E. (A Minor) (Abduction)* [1989] 1 FLR 135 (English Court of Appeal) [INCADAT cite: HC/E/UKe 121]; *Re F. (A Minor) (Child Abduction)* [1992] 1 FLR 548 (English Court of Appeal) [INCADAT cite: HC/E/UKe 40]; *Gsponer v. Johnstone* (1988) 12 Fam. LR 755 (Australian Full Family Court at Melbourne) [INCADAT cite: HC/E/AU 255]. See P. Beaumont and P. McElevay, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), at 257-8.

<sup>138</sup> This Part of the Guide to Good Practice is not intended to address Article 13(2) and hearing the views of the child. See Conclusion 3.8, Fourth Special Commission indicating that: "[t]here are considerable differences of approach to the question of interviewing the child concerned..."

<sup>139</sup> See the amended Rules of the Court of Session (Scotland) 1994, Ch. 70, which came into force on 5 August 1996. Under the amended rules, Convention petitions are now to be decided on the basis of affidavit evidence alone. Oral evidence will only be heard with regard to a particular issue if "special cause

In some jurisdictions where the Convention is functioning very effectively, hearings may be based on affidavits as evidence-in-chief in most instances and conducted without oral testimony, particularly from expert witnesses. When oral evidence is given, usually where there is an unresolvable clash in affidavit evidence on a crucial point, it is highly focused and time limited. In other States no special rules exist. In many systems the individual judge trying the case has a degree of discretion.<sup>140</sup>

In respect of expert evidence, Convention procedures allow evidence of the laws of requesting States (Article 14) thereby eliminating the need to hear oral evidence on that point. The need for expert evidence must be examined within the framework of the Convention and the need to act in a speedy fashion.

### 6.5.3 Personal appearance of the applicant

Due to the international character of Convention cases and the geographical distances involved, the legal requirement in some countries of the applicant's personal appearance at the proceedings in the requested State may cause delay in the proceedings and add excessive expenditure for the applicant.<sup>141</sup> A requirement for the applicant's personal appearance at the proceedings may, in some cases, have the effect of rendering the Convention remedy unavailable. In many instances it may not be necessary for both parents to be physically present at a return hearing, but rather the left-behind parent could be represented to assure full consideration of relevant issues.

The use of affidavit evidence for overseas applicants may facilitate the proceedings. In such cases it is important that no adverse inference is to arise because the overseas applicant is unavailable for cross-examination on his or her affidavit evidence.<sup>142</sup> To this end, some jurisdictions have court rules which allow for cross-examination of the applicant in his/her own jurisdiction with transmission of the transcript to the requested State for use at the hearing of the application for return.<sup>143</sup>

## 6.6 Fast-track appeals

Experience has shown that the appeal process in Hague cases can cause long delays before a final determination of the matter. This may be so even though a first instance decision has been made promptly. The Convention requirement of expeditious proceedings applies equally to the appeal process.<sup>144</sup> There is a difference between systems which provide for timely, reasonable appellate review and those where courts

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is shown." Rule 70.6(5)(b). See Beaumont and McEleavy, *supra* note 137, at 184.

<sup>140</sup> See Preliminary Document No 5 for the attention of the Special Commission of March 2001, *Checklist of issues raised and recommendations made in response to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 2001 Special Commission*, at 15-18 indicating that the individual judge trying the case should be given discretion concerning the need for oral evidence, provided that the judge did not derogate from the speed required.

<sup>141</sup> In Australia (Reg 29(1)(b)) and Canada the applicant's presence is not required. In Scotland, for example, it is possible for Convention cases to be decided on affidavits only (Amended Rules of the Court of Session (Scotland) 1994, Ch. 70). In this regard, the varying extent of difficulties between intercontinental abductions and relatively local abductions (*e.g.* between France and Germany) should be recognised.

<sup>142</sup> See Australia (Reg 29(2)(b)).

<sup>143</sup> See Manitoba Court of Queen's Bench Rule 34.07 (Canada). Other jurisdictions may allow for testimony via videoconferencing in cases where the parent is unable to travel or cannot afford to do so.

<sup>144</sup> Conclusion 3.3, Fourth Special Commission.

of appeal can be readily misused by abductors to delay returns. The latter, obviously, is inconsistent with the objectives of the Convention.

Provisions to encourage speed within the appeals process may include limiting the time for appeal from an adverse decision,<sup>145</sup> requiring permission for appeal<sup>146</sup> and specifying the court or limiting the number of courts to which appeal can be made. Contracting States should also ensure that implementing measures are in place for the immediate enforcement of a return order, even though an appeal may be sought, unless a stay has been granted.<sup>147</sup> This may discourage abuse of the appeal process to delay the return of the child.

## 6.7 Enforcement

Delays in enforcement of return orders, or their non-enforcement, in certain Contracting States are matters of serious concern.<sup>148</sup> Difficulties often arise when an order for return is made, but the order makes no, or inadequate, provision for putting the return into practical effect.

It is recommended that State Parties ensure that there are simple and effective mechanisms to enforce orders for the return of children within their domestic systems<sup>149</sup> or by providing for such within the implementing legislation. To this end, it is important to recognise the necessity that return orders be enforced, *i.e.*, that return actually be effected not just ordered.

Several jurisdictions have put in place procedures to ensure that return orders are enforced promptly and effectively once they are final and absolute (*i.e.* there is no further appeal allowed or the time limit for the appeal is exhausted) or if the court has ordered the immediate execution of the order.<sup>150</sup>

In practice, the courts in several jurisdictions, upon ordering a return, set out in detail the manner in which the return is to take effect.<sup>151</sup> In preparing judges to carry out their role States should underline the importance for the trial judge to draw up clear orders which deal with the practicalities of return (*e.g.* specifying the date and time of return).<sup>152</sup> To this end, some courts applying the Convention look to undertakings made by the party seeking return in order to minimise the possible impact on children.<sup>153</sup>

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<sup>145</sup> In the United Kingdom, appeals must also be lodged within 14 days of the First Instance decision. Resolution of appeals is expedited through fast-tracking. Convention appeals can be scheduled for final determination within a week of the appeal being lodged, particularly when an immediate return order has been issued. There is an overall target of six weeks for resolution. *See also* Austria (an appeal must be lodged within 14 days), Cyprus Family Court Procedural Rules 2002 (s 5), Finland (s 42), Germany (ANCJ s 22(1)), Netherlands (s 6(2)).

<sup>146</sup> In systems requiring permission for appeal, appeals are dealt with at an early stage through a 'permission filter'. This filtering process can expedite cases with weak bases for appeal.

<sup>147</sup> Germany (s 8(1)), Finland (ss 43-46). *See* Italy (art. 7(4)): "The Court's order shall be promptly enforceable and it can be further appealed against before the Court of Cassation. The filing of an appeal shall not stay the enforcement of the order."

<sup>148</sup> Conclusion 3.9, Fourth Special Commission.

<sup>149</sup> *See* Conclusion 4, Washington 2000. *See, for example,* Iceland (Art 16).

<sup>150</sup> *See* Finland (s 46), Italy (art. 7(4)), United States (§§ 11601 et seq.).

<sup>151</sup> *See* Conclusion 3.10, Fourth Special Commission providing that "[i]t should be made possible for courts, when making return orders, to include provisions to ensure that the order leads to the prompt and effective return of the child."

<sup>152</sup> *See* Australia (Reg 20(1)).

<sup>153</sup> *See* the Canadian Supreme Court case Thomson v. Thomson, [1994] 3 S.C.R. 551 [INCADAT cite: HC/E/CA 11]. The applicant should be canvassed about whether or not he/she is prepared to enter any undertakings to facilitate return.

Courts may also put into place arrangements to ensure that the abductor is unable to disappear with the child between the date of the order and the date of return. Other punitive measures to discourage avoidance of a return order include penalties for contempt of court, fine<sup>154</sup> or imprisonment.<sup>155</sup> The role of the State Attorney/Public Prosecutor may also be expanded to provide for co-ordination with other organisations<sup>156</sup> or to authorise the commencement of proceedings to locate or obtain the return of a child.<sup>157</sup> Contracting States may be able to use other resources such as law enforcement or private agencies to facilitate return.<sup>158</sup>

In other jurisdictions, enforcement is possible through the threat of a coercive enforcement penalty, an order for coercive detention or the authorisation for the use of force.<sup>159</sup> In several jurisdictions the court may order the issue of a warrant for the apprehension or detention of the child.<sup>160</sup>

In legal systems where the applicant is required to take steps to have a decision enforced<sup>161</sup> and/or to have specific enforcement measures ordered,<sup>162</sup> it is recommended to ensure that the applicant is made aware of these additional requirements. States are encouraged to avoid delay with regard to enforcement of return orders.<sup>163</sup>

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<sup>154</sup> Sweden (s 18).

<sup>155</sup> See Canada, Ireland, United Kingdom and the United States.

<sup>156</sup> Italy (art. 7(5)).

<sup>157</sup> See Netherlands (s 9(1)), United States (UCCJEA s 315).

<sup>158</sup> For instance in Manitoba (Canada) *Child Find Manitoba* has assisted in acting as a liaison between the abducting parent and the applicant to organise specific details of return.

<sup>159</sup> Germany (ANCJ s 33 and SorgeRÜbkAG s 8).

<sup>160</sup> Australia (Reg 14), Canada: Quebec (s 10), Ireland (s 37), New Zealand (Reg 26(1)), Sweden (s 19).

<sup>161</sup> See Guide to Good Practice, Part I: Chapter 3.16 indicating that "[i]n some countries after a return order is made, the applicant has to initiate further legal proceedings to have the order enforced. Many requesting countries have not been aware of the need for this additional step, through lack of information from the requested country." In some countries the applicant is required to take the decision to a bailiff or enforcement officer himself; in other countries the court would assume this responsibility.

<sup>162</sup> In Germany, for example, each individual enforcement measure has to be set out by a court decision. If the order is not subsequently complied with, the enforcement court must order that the order be enforced.

<sup>163</sup> Where possible under national law, the setting out of a specific enforcement measure in the case of non-compliance could, for example, be included into the original return order as a precautionary measure.

**7. SUMMARY: LEGAL AID AND ASSISTANCE**

- 7.1 In States which have not made a reservation to Article 26(3), implementing measures should ensure the availability of appropriate legal advice. States which have made such a reservation may encourage private practitioners to offer independent, private representation to qualified applicants on a reduced fee or pro bono basis. Regardless of a reservation to Article 26(3), implementing measures should provide for timely and effective access to the court or administrative tribunal.
- 7.2 Clear descriptions should be provided by each country, of their legal and administrative procedures, legal aid arrangements and eligibility guidelines. These should be made known to Central Authorities in other Contracting States and made available on a website.
- 7.3 The issue of costs may be addressed in implementing measures.

## 7. LEGAL AID AND ASSISTANCE

Ideally all applicants seeking Hague relief should have access to legal representation by cost-effective, experienced and knowledgeable legal counsel.<sup>164</sup> The ready availability of appropriate legal aid, advice and representation is an essential component in facilitating swift proceedings. Funding or other practical arrangements, such as direct representation, ensure that the parties are able to have ready access to the court and to engage in a court process quickly and efficiently.

In States where an applicant for a return order is in effect unable to bring his/her application promptly before the courts in the requested State, this constitutes a serious hindrance to the rapid and efficient operation of the Convention. Such States are encouraged to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved.<sup>165</sup>

### 7.1 Legal aid reservation

Under Article 26(2) of the Convention Central Authorities and other public services of Contracting States may not impose any charges on applicants in relation to applications submitted under the Convention, including costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. By making a reservation under Article 26(3), a Contracting State may declare that it is not bound to assume any costs resulting from the participation of legal counsel or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

In those Contracting States where a comprehensive domestic legal aid system is not available, a reservation to Article 26(3) of the Convention may negatively affect the operation of the Convention if other means are not implemented to assist applicants whose income levels might otherwise result in their being unable to obtain legal counsel.<sup>166</sup> In some States efforts have been made to recruit practitioners through municipal bar associations to provide *pro bono* (free) or reduced legal fee assistance in Hague return cases in order to remedy the lack of legal aid.

In countries that have not made a reservation under Article 26(3), the assumption is that there is no charge made by the authorities for dealing with a Hague application. In these countries, where a lawyer is appointed to represent the applicant, the Contracting State should pay the cost.<sup>167</sup>

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<sup>164</sup> See Conclusion 7 from the Washington 2000 Conference stating: "Left-behind parents who seek a child's return under the Hague Child Abduction Convention need speedy and effective access to the courts. Lack of legal representation is a significant obstacle to invoking the Convention's remedies. To overcome this obstacle, left-behind parents should be provided promptly with experienced legal representation, where possible at the expense of the requested State."

<sup>165</sup> Conclusion 3.6, Fourth Special Commission.

<sup>166</sup> Conclusions from the First and Second Special Commissions stated: "26(3)...Countries with broad territories and either no legal aid system or territorially non-unified legal aid had experienced or might experience in the future difficulties in obtaining legal representation for applicants who could not afford legal fees. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved."

<sup>167</sup> As of June 2003 the following Contracting States have not made a reservation under Article 26(3): Argentina, Australia, Austria, Bahamas, Belgium, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada (Manitoba), Chile, China (Macau Special Administrative Region), Colombia, Costa Rica, Croatia, Cyprus, Ecuador, Fiji, The Former Yugoslav Republic of Macedonia, Georgia, Hungary, Ireland, Italy, Latvia, Malta,

Some Contracting States have made a reservation under Article 26(3) but in practice have implemented schemes providing reduced or no fee legal assistance to applicants. In these systems, applicants may be provided with experienced legal representation at no cost from a panel of experienced lawyers.<sup>168</sup>

## 7.2 Provision of legal aid and advice

The implementing measures, in States that have not made a reservation under Article 26(3)<sup>169</sup> as well as in States that have made a reservation,<sup>170</sup> may specifically include the Convention obligation that the costs of the Convention proceedings fall under the existing domestic legal aid system.<sup>171</sup> However efficient implementation of the Convention may require some modification. To this end, some States have eliminated application of means/merits tests, which may be used in other areas to determine qualifications for legal aid eligibility, which are unduly time consuming.<sup>172</sup>

Whether or not a State has made a reservation under Article 26, implementing measures may provide that the Central Authority represent the applicant free of cost.<sup>173</sup> Several States provide, notwithstanding their reservation, free legal representation for Hague return applicants by the Public Prosecutor in the region where the child is living.<sup>174</sup> Other States that have made a reservation under Article 26 provide free representation to those applicants who qualify for legal aid in their home State.<sup>175</sup> Some States even provide free legal aid for outgoing cases.<sup>176</sup>

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Mexico, Nicaragua, Paraguay, Peru, Portugal, Romania, Slovenia, Spain, Switzerland, Thailand, Trinidad and Tobago, Turkmenistan, Uruguay and Yugoslavia (the Federal Republic of).

<sup>168</sup> The domestic legislation in the United Kingdom provides free legal representation in Convention cases and direct representation by private lawyers. In New Zealand the fees and expenses of counsel for the applicant are paid by the Crown through the Family Court. In the United States efforts are made to assist the applicant in locating pro bono or reduced legal fee assistance.

<sup>169</sup> See, *supra*, note 167. For example, the Irish Civil Legal Aid Act 1995 (s 28(5)) grants legal aid to applicants under the Hague Convention where the Central Authority is under an obligation to provide legal assistance.

<sup>170</sup> As of June 2003 the following Contracting States have made a reservation under Article 26(3): Belarus, Belize, Canada (except Manitoba), China (Hong Kong Special Administrative Region), Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Israel, Luxembourg, Mauritius, Republic of Moldova, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Saint Kitts and Nevis, Slovakia, South Africa, Sri Lanka, Sweden, Turkey, United Kingdom, United States, Uzbekistan, Venezuela and Zimbabwe. See the implementing legislation of China (Hong Kong Special Administrative Region) (s 13), South Africa, United Kingdom (s 11), Zimbabwe (s 13), and Canada: [Alberta (s 3); British Columbia (s 4); New Brunswick (s 3); Newfoundland (s 3); Nova Scotia (s 4); Northwest Territories (s 5); Ontario (s 3); Quebec (s 37); Saskatchewan (s 5); Yukon (s 2)].

<sup>171</sup> Germany (s 13), Netherlands (s 16). New Zealand's implementing legislation provides legal aid and representation for Hague applicants by requiring that unrepresented applicants seeking the return of children abducted to New Zealand be appointed legal representation (s 23). See the practice of the United Kingdom.

<sup>172</sup> For instance the United Kingdom and Ireland.

<sup>173</sup> Netherlands (ss 5(1), 5(3)). In Australia this assistance may include funding all related costs of the application and proceedings such as translations and specialist reports. Furthermore, there are no eligibility requirements for legal representation or assistance for applicants. In Canada, the province of Manitoba did not make an Article 26(3) reservation and applicants may be represented by the Central Authority (Crown Counsel with the Family Law Branch). See Part 3 of the Australian Regulations. See also Chile, the Czech Republic.

<sup>174</sup> France, Greece, the Netherlands. In France, the Central Authority can give instructions to the Procureur of the Republic who can act on behalf of the applicant, in close liaison with the Central Authority, before the court.

<sup>175</sup> Canada: Alberta, British Columbia, Quebec.

<sup>176</sup> Austria, Sweden.

It would be useful if all Contracting States could make available to foreign applicants information on their legal and administrative procedures and legal aid arrangements and eligibility guidelines. The forms for requesting legal aid should be available on the Central Authority website or via fax by request.<sup>177</sup>

### **7.3 Costs**

Implementing measures may also specifically include the Convention's possibility to shift the financial burden so that where the return of a child is ordered, the court may order the respondent to pay necessary expenses, including legal fees, court costs and travel expenses,<sup>178</sup> unless the respondent proves that this would be clearly inappropriate.<sup>179</sup>

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<sup>177</sup> See Guide to Good Practice, Part I: Chapter 4.13. It would be useful to indicate whether a new legal aid application is necessary in the case of appeal. See Italy.

<sup>178</sup> Article 26(4).

<sup>179</sup> United States (§ 11607). Under Article 700 of the Nouveau Code de procédure civile, French judges have an inherent discretion to award costs against a losing party in civil proceedings. See also Australia (Reg 30), Austria, New Zealand (Reg 28), South Africa (ss 8(1) and (2)), Sri Lanka (s 18) and Turkey.

**8. SUMMARY: AIDS TO INTERPRETATION**

An international approach is necessary for consistent interpretation and application of the Convention. Use of supplementary explanatory material as an aid to interpretation is encouraged when drafting implementing legislation and measures. To this end, use of the following supplementary material is encouraged:

- 8.1 The Explanatory Report of the Convention (The Pérez-Vera Report). It may also be useful to include a reference to the Explanatory Report in implementing legislation and measures;
- 8.2 International jurisprudence;
- 8.3 Reports of Special Commission Meetings;
- 8.4 Academic writings.

## 8. AIDS TO INTERPRETATION

Article 31 of the *Vienna Convention on the Law of Treaties* provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>180</sup> Article 32 of the same Convention provides that, in certain circumstances, recourse may be had to supplementary means to confirm the meaning resulting from the application of Article 31, including the *travaux préparatoires*.<sup>181</sup> Any subsequent agreement or practice which establishes the agreement of the parties constitutes part of the "context" of the treaty for the purposes of interpretation.<sup>182</sup>

### 8.1 Explanatory Report of the Convention: The Pérez-Vera Report

The *travaux préparatoires* of a treaty are an important aid in the process of interpretation.<sup>183</sup> They are a particularly important resource in developing implementing legislation and measures. In this regard, the value of the Pérez-Vera Report<sup>184</sup> as an aid to the consistent interpretation and understanding of the 1980 Convention has been emphasised.<sup>185</sup> The primary role of the Pérez-Vera Report is to provide clarification as to the objectives of Convention provisions.

In the context of similar international treaties, the practice is sometimes adopted of making specific references in implementing legislation to aids to interpretation. Such an approach may usefully be considered when drafting implementing legislation and measures for the 1980 Convention.<sup>186</sup>

### 8.2 International jurisprudence

International instruments like the 1980 Convention pose considerable challenges in terms of their consistent interpretation. The Convention operates in a great spectrum of legal systems with differing legal cultures and a variety of approaches to legal practice and procedure. The ideal of consistency requires as a minimum that the courts and other authorities responsible for putting the Convention into effect have ready access

<sup>180</sup> The International Court of Justice has held that the principles embodied in Articles 31 and 32 of the Vienna Convention reflect customary international law (*Libya v. Chad*, ICJ Reports (1994), p. 4, at para. 41). See also the *Beagle Channel* case, Her Majesty's Stationary Office, 1977, p. 7; 52 ILR, p. 93; the *La Bretagne* case, 82 ILR, pp. 590, 612; the *Golder* case, European Court of Human Rights, Series A, No. 18, p. 14; 57 ILR, pp. 201, 213-14 and the *Lithgow* case, European Court of Human Rights, Series A, No. 102, para. 114; 75 ILR, pp. 438, 482-83. See M. Shaw, *International Law* (Cambridge University Press, 1997), at 633.

<sup>181</sup> Article 32 of the Vienna Convention provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

<sup>182</sup> See Article 31 of the Vienna Convention.

<sup>183</sup> Aust, *supra* note 41, at 197.

<sup>184</sup> Elisa Pérez-Vera, *Explanatory Report on the Child Abduction Convention*, in 3 Hague Conference on private international law: Actes et Documents de la Quatorzième Session 426 (1982).

<sup>185</sup> Conclusion 4.2, Fourth Special Commission. The Pérez-Vera Report is available in English, French and Spanish at <<http://www.hcch.net/e/conventions/menu28e.html>>.

<sup>186</sup> See the Australian *Acts Interpretation Act* 1901 (Cth) at s 15AB. In Austria the Pérez-Vera Report is attached to the implementing measures.

to reliable information about what is occurring in other States. The International Child Abduction Database (INCADAT) was designed to fulfil this need.<sup>187</sup>

An international approach is necessary for consistent interpretation and application of the Convention. To this end, it may be useful for implementing legislation to allow for judicial notice to be taken of international cases or research and writings.<sup>188</sup>

### 8.3 Reports of Special Commission Meetings

As an interpretative aid, resort may be made to the reports of the Special Commission Meetings held by the Hague Conference to review the operation of the Convention. The Conclusions and Recommendations from the four meetings of the Special Commission are available on the Hague Conference website<sup>189</sup> and are included in Appendix 1 of the Guide to Good Practice, Part I.

### 8.4 Academic writings

The website of the Hague Conference also provides an extensive bibliography including information on books, articles and conference papers of interest, and includes links to other national abduction websites which list similar bibliographies.<sup>190</sup>

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<sup>187</sup> See Chapter 10. Judges, Central Authorities, practitioners, academics and other interested persons are able to access the on-line database free of charge (*available at* <<http://www.incadat.com>>).

<sup>188</sup> Many judicial decisions made under the Convention make reference to the Pérez-Vera Report as an aid to interpretation. See, *inter alia*, the High Court of Australia case of *De L. v. Director-General, NSW Department of Community Services* (1996) FLC 92-706 [INCADAT cite: HC/E/AU 93]; the Canadian Supreme Court cases of *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 577-578 [INCADAT cite: HC/E/CA 11] and *W.(V.) v. S.(D.)*, (1996) 2 S.C.R. 108 [INCADAT cite: HC/E/CA 12]; the Federal Court of Germany case of *BGHZ 145, 97 ff.* (*Entscheidungen des Bundesgerichtshofs*) in *Zivilsachen* vol. 145 p. 97 ss. (16.08.2000); the United Kingdom's House of Lords case in *Re H. (A Minor) (Abduction: Rights of Custody)* [2000] 2 WLR 337; [2000] 2 All ER 1 [INCADAT cite: HC/E/UKe 268] (relying on a variety of different aids to interpretation, including foreign case law and the Report of the Third Special Commission to Review the Operation of the Convention); and the United States Court of Appeals for the Ninth Circuit in *Mozes v. Mozes* (9th Cir. Jan. 9, 2001) [INCADAT cite: HC/E/USf 301].

<sup>189</sup> <<http://www.hcch.net/e/conventions/menu28e.html>>.

<sup>190</sup> *Id.*

**9. SUMMARY: FACILITATING ACCEPTANCE OF ACCESSIONS**

States which were not Members of the Hague Conference on 25 October 1980 may accede to the Convention. This accession will have effect only between the acceding State and those Contracting States which have formally declared their acceptance of the accession.

- 9.1 Acceding States should provide information on their ability to carry out Convention obligations to facilitate acceptance of their accession by other Contracting States.
- 9.2 Acceding States are encouraged to provide the information requested in the standard questionnaire before or soon after accession and communicate it to the Permanent Bureau and, if so requested, directly to other Contracting States.
- 9.3 Existing Contracting States, or where appropriate their Central Authorities, sometimes transmit the questionnaire directly to newly acceding States. Where this occurs it is helpful if the request is accompanied, as part of an exchange, by information concerning the operation of the Convention in the requesting State.

## 9. FACILITATING ACCEPTANCE OF ACCESSIONS

### 9.1 Steps to encourage acceptance of accessions

All States which were Member States of the Hague Conference on Private International Law at the time the Convention was adopted (25 October 1980) are entitled to ratify the Convention.<sup>191</sup>

Article 38 provides that any other State, in other words, States which were not Members of the Hague Conference on Private International Law on 25 October 1980, may accede to the Convention. However, the accession will have effect only between the acceding State and those Contracting States which have formally declared their acceptance of the accession.<sup>192</sup>

A minority of Contracting States accept accessions without enquiring with regard to the newly acceding State's ability to carry out their Convention obligations. Among the reasons given are that the Convention should have the broadest possible application. The large majority of Contracting States now undertake some enquiries before accepting an accession. A number of States have now introduced assessment procedures to determine the newly acceding State's ability to carry out Convention obligations. In many States, the Ministry of Foreign Affairs, or its equivalent, is involved in seeking the relevant information and making the decision on acceptance.

To facilitate the acceptance of accessions, the provision of relevant information to existing Contracting States is extremely important. An efficient manner in which to do this is through the standard questionnaire (*see below* at section 9.2.1).

### 9.2 Standard questionnaire for newly acceding States

The Conclusions and Recommendations from the Fourth Special Commission set out information, in the form of a questionnaire, that an acceding State is encouraged to provide to Contracting States to facilitate acceptance of their accession.<sup>193</sup>

While completion of the questionnaire is entirely voluntary, the provision of the information requested in the questionnaire could speed-up the acceptance by existing Contracting States of newly acceding States and offers a valuable resource for States which do not have extensive practical experience of the Convention.

Existing Contracting States, or where appropriate their Central Authorities, sometimes transmit the questionnaire directly to newly acceding States. Where this occurs it is helpful if the request is accompanied, as part of an exchange, by information concerning the operation of the Convention in the requesting State.

Conclusion 2.2, Fourth Special Commission:

"In order to assist newly-acceding States to implement the Convention effectively, and to provide relevant information to existing Contracting States in considering whether to accept accessions in accordance with Article 38 of the Convention, the Special

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<sup>191</sup> Article 37.

<sup>192</sup> Article 38(4).

<sup>193</sup> See Conclusion 2.2, Fourth Special Commission.

Commission gives its approval to a questionnaire to be addressed to newly acceding States, on the following understandings:

- a. that the Permanent Bureau would make the questionnaire available on the Hague Conference website and draw it to the attention of States which are known to be considering accession or which have recently acceded to the Convention;
- b. that it should be made clear that the provision of a response to the questionnaire is not compulsory but is recommended;
- c. that it would be for the State addressed to decide whether to communicate any response it makes through the Permanent Bureau to other Contracting States, or directly to such States as it may choose;
- d. that existing Contracting States which have already acceded to the Convention might also use this facility, if they so wish, as a possible means of expediting the process of acceptance in their case."

The approved questionnaire, below, is also available on the Hague Conference website at <<http://www.hcch.net/e/conventions/menu28e.html>>.

### **9.2.1 The questionnaire**

#### I. Implementing legislation

- (a) Is implementing legislation necessary to bring the Convention into force in domestic law?
- (b) If so, has the necessary legislation been enacted, and is it in force? (Please provide a copy or indicate where copies of the legislation may be obtained.)

#### II. Locating children

Please indicate the agencies involved and the processes available for the location of missing children in your country.

#### III. Central Authority

- (a) The designation and contact details of the Central Authority.
- (b) Contact persons within the Central Authority, languages spoken, contact details for each.
- (c) Please indicate measures taken to ensure that the Central Authority is in a position to carry out the functions set out in Article 7 of the Convention?

#### IV. Judicial procedures

- (a) Which courts/administrative bodies within your system have been given jurisdiction to consider applications for return orders (and questions of access) under the Convention?
- (b) What measures exist to ensure that return applications will be dealt with expeditiously at first instance and on appeal?
- (c) What facilities are available to foreign applicants to assist them in bringing their applications before the courts, and in particular is legal aid available and, if so, on what conditions?

V. Enforcement procedures

What procedures and measures exist for the enforcement of:

- (a) a return order?
- (b) a contact/access order?

VI. Substantive law

- (a) What are the legal criteria by which custody and contact determinations are made?
- (b) Is there a difference in the legal status of mothers and fathers in custody or contact cases?

VII. Social services and child protection services

Please describe the services which exist for the assessment, care and protection of children in the context of international child abduction.

Please indicate the services available for the protection (if necessary) of returning children, as well as the services available (including legal advice and representation) to a parent accompanying the child on return.

VIII. Information and training

What measures are being taken to ensure that persons responsible for implementing the Convention (*e.g.* judges and Central Authority personnel) have received appropriate information and training? (Note: the Permanent Bureau may be contacted for information in relation to forms of assistance which may be available for this purpose.)

**10. SUMMARY: IMPLEMENTATION: A CONTINUING PROCESS**

- 10.1 Central Authorities or other relevant bodies are encouraged to develop educational and training programmes for persons responsible for implementing the Convention (judges, lawyers, locating agencies, social services and others concerned) and to resolve difficulties which might have appeared in its practical application.
- 10.1.1 International judicial conferences are to be encouraged as a means of improving knowledge and developing mutual understanding and confidence between judges.
- 10.1.2 The Permanent Bureau may be contacted to provide information or assistance with education and training for judges, government officials, Central Authority personnel and practitioners with regard to the operation of specific instruments developed by the Hague Conference.
- 10.2 Attendance and participation at the Special Commission Meetings to review the operation of the Convention is recommended. The review meetings facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice.
- 10.3 Essential information for training and education may be found in several resources, including:
- 10.3.1 Website of the Hague Conference;
- 10.3.2 International Child Abduction Database (INCADAT);
- 10.3.3 The Judges' Newsletter on International Child Protection.
- 10.4 Continue to monitor the application and functioning of the Convention and respond to any implementation difficulties that may arise.<sup>194</sup>

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<sup>194</sup> See Conclusion 2.1, Fourth Special Commission, recommending that implementation, whether national or regional, should always be seen as a continuing process of development and improvement, even if the text of the Convention itself remains unchanged. See also, *infra*, Chapter 2.6.

## 10. IMPLEMENTATION: A CONTINUING PROCESS

### 10.1 Education and training

Awareness among the authorities involved in Hague return cases of the provisions and underlying objectives of the Convention is one of the keys to its successful operation. Education of the general public and the legal and welfare professions about the Convention remains a priority, not only in new Convention countries, but in long established Contracting States as well.<sup>195</sup> Considerable and ongoing efforts must be made in order to promote fuller understanding of the Convention on the part of judges, lawyers and administrative authorities, and to make parents and other persons exercising responsibility for children aware of its existence.<sup>196</sup>

Central Authorities or other relevant bodies are encouraged to develop educational and training programmes for persons responsible for implementing the Convention (judges, lawyers, locating agencies, social services and others concerned) which might also help to resolve difficulties which have arisen in its practical application. Expert international family law advisory groups, bringing together senior judges, practitioners and researchers, provide an effective forum for policy and training discussion and may be capable of keeping under review problems arising under the Convention.<sup>197</sup>

To this end, attention should be drawn to the many ways in which training has been provided in recent years to those involved in the operation of the Convention.<sup>198</sup>

#### 10.1.1 *Judicial education*

The noted increase in recent years in the holding of judicial (and other) seminars and conferences at the national, regional and international levels is welcomed. The importance of such seminars as well as the contribution which they make to the development of mutual understanding and confidence between judges necessary to support the effective functioning of the Convention should be underlined.<sup>199</sup>

International judicial conferences are to be encouraged as a means of improving knowledge and facilitating the development of suitable networks.<sup>200</sup> Such seminars provide an excellent opportunity for judges from different jurisdictions to reflect on and discuss current developments in international child protection. They also provide a

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<sup>195</sup> Conclusion II, First Special Commission.

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g.*, in England and Wales the International Family Law Committee established by the President of the Family Division.

<sup>198</sup> *See* Guide to Good Practice, Part I: Chapter 6.2 outlining the role that Central Authorities may play in education and training. Central Authorities have disseminated information through, *inter alia*, raising the profile of the Central Authorities and the Convention, organising seminars, positively involving the media and press, distributing brochures and encouraging networks of specialist lawyers.

<sup>199</sup> Conclusion 2.10, Fourth Special Commission

<sup>200</sup> Lowe Report, *supra* note 39, Chapter 4. *See* Conclusion 5.5, Fourth Special Commission: "Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority." *See also* Conclusion 5.6, Fourth Special Commission: "Contracting States should actively encourage international judicial co-operation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases [...]." *See also* Conclusion 8, De Ruwenberg 2001.

unique opportunity to bridge some of the differences in legal cultures and to promote the mutual understanding and confidence between judges which is necessary for the effective operation of international instruments.<sup>201</sup>

A good deal of work has been done in developing training or familiarisation programmes for the judiciary in Hague matters. Apart from national judicial training programmes, several governments,<sup>202</sup> regional organisations<sup>203</sup> and non-governmental organisations<sup>204</sup> have also been active. The Permanent Bureau of the Hague Conference has been involved in many of these initiatives.<sup>205</sup>

The Hague Conference, with over a century of experience as an International Organisation, provides an institutional framework for co-operation among nations in the field of private international law. The Permanent Bureau may be contacted to provide information or assistance with education and training for judges, government officials, Central Authority personnel and practitioners with regard to the operation of specific instruments developed by the Hague Conference. Such services include facilitating discussions, making appropriate contacts, designing scientific and legal education programmes or providing on-the-spot training.

## 10.2 Monitoring and review

The Permanent Bureau of the Hague Conference provides support and monitoring for the Convention. The Permanent Bureau provides technical assistance and gives policy advice to States on the implementation of the Convention; monitors the operation of the Convention and facilitates its review by providing a forum to interested States and other international governmental and non-governmental organisations; encourages consistent interpretation and application of the Convention by collecting and analysing case law, current practice and statistics,<sup>206</sup> and maintains information concerning the status of the Convention and the Central and other national Authorities appointed to carry the duties under the Convention.

States are encouraged to assist the Permanent Bureau by putting in place monitoring mechanisms. This may take the form of forming advisory groups to keep under review problems arising under the Convention and collecting and analysing case law and statistics surrounding the Convention.

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<sup>201</sup> See, *inter alia*, Conclusion 12, De Ruwenberg 2001; Conclusion 1, De Ruwenberg 2000; Conclusion 5, De Ruwenberg 1998; Conclusion 1, Washington 2000; Francophone-Anglophone Family Law Judicial Conference, Dartington Hall, England, 4-7 June 2001; and Conclusion 5, The Third United Kingdom-German Conference on Family Law, Edinburgh, Scotland, September 2000.

<sup>202</sup> Among the programmes sponsored by governments were the bilateral Anglo-German judicial meeting held in England in 1997 and the US State Department's Common Law Judicial Conference on International Child Custody held in September 2000 (Washington 2000).

<sup>203</sup> The European Union, through its Technical Assistance Information Exchange Office of the European Community (TAIEX) programme, supports training initiatives in some of its applicant countries in Eastern Europe. It provides a service that informs countries of Community legal texts and assesses whether applicant countries' legislation conforms with Community legislation.

<sup>204</sup> The International Bar Association has organised seminars in several jurisdictions. Reunite, the English charity, has a particular interest in developing programmes for new Hague countries and is currently providing education and training to countries from Southern Africa.

<sup>205</sup> The Permanent Bureau has also organised and facilitated international judicial conferences at, *inter alia*, De Ruwenberg 2001, De Ruwenberg 2000 and De Ruwenberg 1998.

<sup>206</sup> Through the International Child Abduction Database (INCADAT) and the International Child Abduction Statistical Database (INCASTAT).

A Special Commission meeting to review the operation of the Convention may periodically be called.<sup>207</sup> The Special Commissions are designed to bring together the Central Authorities, judges,<sup>208</sup> practitioners, government and non-governmental organisations which play key roles in the operation of the Convention in each Contracting State. Such review meetings help to facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice. Differences of approach, where they exist, may be revealed and the way opened to greater mutual trust and understanding between Contracting States, as well as greater consistency in interpretation and practice.

The value of calling Special Commission meetings to review the operation of the Convention has been recognised<sup>209</sup> and support expressed for the holding of additional meetings to address specific issues when these are clearly shown to be necessary.<sup>210</sup> In order to enable the participation of all Contracting States at Special Commission meetings, Contracting States are invited to consider giving support to specific States or contributing to a common fund.<sup>211</sup>

## 10.3 Available resources

### 10.3.1 *Website of the Hague Conference*

The website of the Hague Conference (<<http://www.hcch.net>>) provides access to extensive information and contains the full text of all Hague Conventions adopted after 1951. The Child Abduction Home Page within the website contains the full text of the 1980 Convention, the Pérez-Vera Explanatory Report, Reports of the Special Commission from its three previous meetings, information documents from the Fourth Special Commission, the status of the Convention, the contact information for all designated Central Authorities, a bibliography, translations of the Convention,<sup>212</sup> information on The Hague Project for International Co-operation and the Protection of Children and links to related websites, including INCADAT.

### 10.3.2 *International Child Abduction Database (INCADAT)*

As with any international treaty it is important that the Convention is subject to consistent interpretation in all Contracting States, a factor of greater importance as the geographical scope of the instrument expands to include States on all continents. In the absence of a single court to give authoritative rulings on the interpretation of the Convention, there is the challenge of achieving a reasonable level of consistency in the interpretation of the Convention in the ever-increasing number of States Parties.

To facilitate the goal of consistent interpretation the Hague Conference has set up a database of leading Convention case law from around the world. The database is used by Judges and Central Authorities as well as legal practitioners, researchers and other

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<sup>207</sup> There have been Special Commission meetings to review the operation of the 1980 Convention called in 1989, 1993, 1997 and 2001.

<sup>208</sup> The Fourth Special Commission brought together members of the judiciary for a fruitful exchange.

<sup>209</sup> Conclusion 2.4, Fourth Special Commission.

<sup>210</sup> Conclusion 2.5, Fourth Special Commission.

<sup>211</sup> Conclusion 2.6, Fourth Special Commission.

<sup>212</sup> The Convention is available in English, French and Spanish.

persons interested in this evolving area of international family law.<sup>213</sup> The International Child Abduction Database (INCADAT) can be accessed directly at <<http://www.incadat.com>> or via the Hague Conference website by turning to the pages dealing with the 1980 Convention.<sup>214</sup> Users are required to register before use and are given a password to allow subsequent access. There is no charge for accessing the database.

INCADAT is structured around summaries of the leading cases from the different Contracting States. The summaries, which are set out on a standard form, highlight the full name of the case, the date of the judgment, the judges involved (optional), the name of the court, the level of that court, (whether first instance, appellate, or superior appellate), the States involved, the Articles of the Convention or implementing legislation referred to, and those relied on, as well as the ruling of the court. The summaries also contain a brief synopsis of the factual issues and of the order made. The key element of each summary is the section dealing with the legal basis of the judgment. For ease of use this section is divided into eighteen different categories corresponding with the main provisions and concepts within the Convention.

The summary standard form also allows for a section entitled 'Comments and Subsequent History' where users are referred to other judgments where a similar or contrasting view has been upheld, later developments in the case and academic or other relevant commentaries. Where possible the summaries are followed by the full text of the judgment in its original language which may be printed or downloaded by users.

### **10.3.3      *The Judges' Newsletter on International Child Protection***

The Judges' Newsletter on International Child Protection, published bi-annually by the Permanent Bureau of the Hague Conference,<sup>215</sup> has the objective of promoting co-operation, communication and the exchange of ideas between judges and others who deal with international child protection cases. The Newsletter is distributed to judges, Central Authorities appointed under the Convention, practitioners and others around the world and provides a forum for publication of ideas and information.<sup>216</sup> The Newsletter provides a unique opportunity to facilitate the exchange of ideas, good practice and international developments.

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<sup>213</sup> See Conclusion 8.1, Fourth Special Commission; Conclusion 9, De Ruwenberg 2001; Conclusion 5, De Ruwenberg 2000; Dartington 2001; Conclusion 13, Washington 2000.

<sup>214</sup> Accessible at <<http://www.hcch.net/e/conventions/menu28e.html>>.

<sup>215</sup> The Permanent Bureau would like to extend its appreciation to Butterworths LexisNexis for their generous assistance in this endeavour.

<sup>216</sup> See Conclusion 8.3, Fourth Special Commission; Conclusion 10, De Ruwenberg 2001.

## GLOSSARY

**Explanatory Report of the Convention on the Civil Aspects of International Child Abduction:** ['Pérez-Vera Report']. E. Pérez-Vera, Actes et Documents of the XIVth Session, Volume III, 1982, 426, <<http://www.hcch.net/e/conventions/expl28e.html>>.

**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:** ['Guide to Good Practice, Part I'].

***Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction:*** [the 'Convention' or the '1980 Hague Convention']. All 'Articles' referred to are those of the Convention.

**Permanent Bureau of the Hague Conference on Private International Law:** [the 'Permanent Bureau']. The website of the Hague Conference on Private International Law ['HCPIIL'] is available at <<http://www.hcch.net>>.

**Implementing legislation:** Implementing legislation refers to the range of instruments having the force of law. It is intended to cover a variety of instruments found in civil law and common law systems, such as acts of parliament, statutes, civil or criminal codes, all delegated legislation such as rules and regulations, Rules of Court.

**Implementing measures:** Implementing measures refer to the range of legislative, judicial and administrative measures or procedures necessary to establish the essential legal and administrative framework to fully implement the Convention.

**Rules of Court:** These are a feature of common law systems. A committee of judges and administrators draft procedural rules for the court. The rules provide detailed instructions to deal with various matters such as the manner and time for filing of documents. The Rules of Court are tabled in the legislature, and have the force of law.

### **Special Commission Meetings to Review the Operation of the Convention:**

Conclusions and Recommendations of the First 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*, adopted on 26 October 1989: ['First Special Commission'].

Conclusions and Recommendations of the Second 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*, 1993: ['Second Special Commission'].

Conclusions and Recommendations of the Third 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*, adopted on 21 March 1997: ['Third Special Commission'].

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*, adopted on 28 March 2001: ['Fourth Special Commission'].

**Undertakings:** An undertaking is a promise, or commitment, or assurance given by a person to a court to do, or not to do, certain things. Requested courts in certain jurisdictions will accept, or even require, undertakings from the left behind parent to overcome obstacles to the return of a child. An undertaking formally given to a court will be enforceable in the jurisdiction where it is given, but not usually elsewhere.

## IMPLEMENTING MEASURES TAKEN AT THE DOMESTIC LEVEL TO GIVE EFFECT TO THE 1980 HAGUE CONVENTION

### Australia

The Family Law (Child Abduction Convention) Regulations 1986, authority for which was given by the Family Law Act 1975 (Cth) s 111B; entry into force 1 January 1987; most recent amendments: Family Law Amendment Act 2000: ['Australia'].

### Austria

Bundesgesetz vom 9. Juni 1988 zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung, Law Gazette no. 513 ex 1988: ['Austria'].

### Canada

[Canada: specific province or territory].

Alberta: International Child Abduction Act, S.A. 1986, c. I-6.5

British Columbia: Family Relations Act, R.S.B.C. 1996, c. 128

Manitoba: The Child Custody Enforcement Act, R.S.M. 1987, c. C-360

New Brunswick: International Child Abduction Act, S.N.B. 1982, c. I-12.1

Newfoundland: An Act respecting the Law of Children, R.S.N. 1990, c. C-13

Nova Scotia: Child Abduction Act, R.S.N.S. 1989, c. 67

Northwest Territories: International Child Abduction Act, R.S.N.W.T. 1988 c. I-5

Nunavut: International Child Abduction Act, R.S.N.W.T. 1988, c. I-5

Ontario: Children's Law Reform Act, R.S.O. 1990, c. C-12

Prince Edward Island: Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c. C-33

Quebec: An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q. c. A-23.01

Saskatchewan: The International Child Abduction Act S.S. 1986, c. I-10.1

Yukon: Children's Act, R.S.Y. 1986, c. 22.

### China (Hong Kong Special Administrative Region)

Translation: Child Abduction and Custody Ordinance to give effect in Hong Kong to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, 5 September 1997, L.N. 439 of 1997 (Cap. 512): ['Hong Kong'].

### Cyprus

Translation: The Family Courts (Amendment) Procedural Rules of 2000, Second Supplement of the Official Gazette of the Republic, No. 3599 of 2 May 2002, Procedural Rules Part I: ['Cyprus Family Courts Procedural Rules 2002'].

### Denmark

Translation: Act on International Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children, etc. (International Child Abduction), Act No 793, 27 November 1990: ['Denmark'].

### **Finland**

Laki lapsen huollosta ja tapaamisoikeudesta (1983/361).

Translation: Child Custody and Right of Access Act, 8 April 1983/361: ['Finland'].

### **The Federal Republic of Germany**

Gesetz zur Ausführung von Sorgerechtsübereinkommen und zur Änderung des Gesetzes über die Angelegenheiten der freiwilligen Gerichtsbarkeit sowie anderer Gesetze (SorgeRÜbkAG) of 6 April 1990, BGBl. 1990 I p. 701; as amended by Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz of 13 April 1999, BGBl. 1999 I p. 702.

Translation: Act implementing the Custody Conventions and amending the Act Relating to Matters of Non-Contentious Jurisdiction and other Acts of 6 April 1990, BGBl. 1990 I p. 701, as amended by the Act amending rules on venue under the Act implementing the Custody Convention of 13 April 1999, BGBl. 1999 I p. 702: ['Germany'].

Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit of 17 May 1898, RGBl. 1898, 189 as last amended by Article 6 of the Law of 13 December 2001, BGBl. 2001 I p. 3638.

Translation: The Act Relating to Matters of Non-Contentious Jurisdiction of 17 May 1898, RGBl. 1898, 189 as last amended by Article 6 of the Law of 13 December 2001, BGBl. 2001 I p. 3638: ['Germany: AN CJ'].

### **Iceland**

Translation: Act on the Recognition and Enforcement of Foreign Decisions on the Custody of Children and the Return of Abducted Children, etc., No 160, 27<sup>th</sup> December 1995: ['Iceland'].

### **Ireland**

Child Abduction and Enforcement of Custody Orders Act, 1991, number 6 of 1991: ['Ireland'].

### **Italy**

Legge 15 gennaio 1994, no. 64, Ratifica ed esecuzione della convenzione europea sul riconoscimento e l'esecuzione delle decisioni in materia di affidamento dei minori e di ristabilimento dell'affidamento aperta alla firma a Lussemburgo il 20 maggio 1980, e della convenzione sugli aspetti civili della sottrazione internazionale di minori, aperta alla firma a L'Aja il 25 ottobre 1980; norme di attuazione delle predette convenzioni, nonché della convenzione in materia di protezione dei minori, aperta alla firma a L'Aja il 5 ottobre 1961, e della convenzione in materia di rimpatrio dei minori, aperta alla firma a L'Aja il 28 maggio 1970, Supplemento ordinario alla Gazzetta Ufficiale No. 23 del 29 gennaio 1994, Serie generale.

Translation: Law No. 64 of 15 January 1994, Ratification and implementation of the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, opened for signature in Luxembourg on May 20 1980, and of the Convention on the civil aspects of

international child abduction, opened for signature in The Hague on October 25, 1980, provisions implementing the above-mentioned conventions, as well as the Convention concerning the power of authorities and the applicable law in respect of the protection of minors, opened for signature at The Hague on October 5, 1961, and the Convention on the repatriation of minors, opened for signature at The Hague on May 28, 1970, Ordinary supplement to the Official Law Gazette No. 23 of 29 January 1994, General series: ['Italy'].

### **Malta**

Chapter 410 Child Abduction and Custody Act of the Laws of Malta: ['Malta'].

### **Mauritius**

The Hague Convention on the Civil Aspects of International Child Abduction Act 2000, Act no 19 of 2000, 28 July 2000: ['Mauritius'].

### **Netherlands**

Wet van 2 mei 1990 tot uitvoering van het op 20 mei 1980 te Luxemburg tot stand gekomen Europese Verdrag betreffende de erkenning en de tenuitvoerlegging van beslissingen inzake het gezag over kinderen en betreffende het herstel van het gezag over kinderen, uitvoering van het op 25 oktober 1980 te 's-Gravenhage tot stand gekomen Verdrag inzake de burgerrechtelijke aspecten van internationale ontvoering van kinderen alsmede algemene bepalingen met betrekking tot verzoeken tot teruggeleiding van ontvoerde kinderen over de Nederlandse grens en de uitvoering daarvan.

Translation: Act implementing the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration or custody of children, done at Luxembourg on 20 May 1980 and the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 and containing general provisions concerning applications for the return of abducted children to and from the Netherlands, as well as implementing provisions: [the 'Netherlands'].

### **New Zealand**

Guardianship Amendment Act (No. 2) 1994, Public Act 1994 No 150: ['New Zealand'].

### **Norway**

Translation: Act relating to recognition and enforcement of foreign decisions concerning custody of children, etc., and return of children, Act No 72, 8 July 1988: ['Norway'].

### **United Kingdom of Great Britain and Northern Ireland**

Child Abduction and Custody Act 1985: ['United Kingdom'].

### **United States of America**

International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610 (1989): ['United States'].

**South Africa**

Hague Convention on the Civil Aspects of International Child Abduction Act 1996 (Act 72 of 1996), 6 November 1996: ['South Africa'].

**Spain**

Civil Code and the Civil Proceedings Act (*La Ley de Enjuiciamiento Civil*), amended by The Protection of Children Act, adopted on 15 January 1996: ['Spain'].

**Sri Lanka (Democratic Socialist Republic of)**

Civil Aspects of International Child Abduction Act, No. 10 of 2001: ['Sri Lanka'].

**Sweden**

Translation: Act on Recognition and Enforcement of Foreign Decisions Concerning Custody, etc., and on the Return of Children (SFS 1989: 14), 7 February 1989: ['Sweden'].

**Zimbabwe**

Child Abduction Act, Chapter 5:05, Act 12/1995: ['Zimbabwe'].

**OTHER SERVICES PROVIDED BY THE PERMANENT BUREAU OF THE HAGUE  
CONFERENCE ON PRIVATE INTERNATIONAL LAW**

The Hague Conference on Private International Law: <<http://www.hcch.net>>

The Child Abduction Home Page: <<http://www.hcch.net/e/conventions/menu28e.html>>

The text of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: <<http://www.hcch.net/e/conventions/text28e.html>>

Explanatory Report of the Convention [Pérez-Vera Report]:  
<<http://www.hcch.net/e/conventions/expl28e.html>>

Special Commissions to Review the Operation of the *Hague Convention of 25 October on the Civil Aspects of International Child Abduction*:  
<<http://www.hcch.net/e/conventions/reports28e.html>>

Electronic versions of the Guide to Good Practice:  
<<http://www.hcch.net/e/conventions/guide28e.html>>

Responses to the standard questionnaire for newly acceding States:  
<<http://www.hcch.net/e/conventions/guide28e.html>>

Central Authorities designated under the Convention:  
<<http://www.hcch.net/e/authorities/caabduct.html>>

Full status of the Convention:  
<<http://www.hcch.net/e/status/stat28e.html>>

Concise status of the Convention:  
<<http://www.hcch.net/e/status/abdshte.html>>

The International Child Abduction Database (INCADAT):  
<<http://www.incadat.com>>

The Hague Project for International Co-operation and the Protection of Children:  
<<http://www.hcch.net/e/conventions/project.html>>

Conclusions and Recommendations from Judicial Seminars on the International Protection of Children:  
<<http://www.hcch.net/e/conventions/seminar.html>>

The Judges' Newsletter on International Child Protection:  
<<http://www.hcch.net/e/conventions/news28e.html>>

Bibliography:  
<<http://www.hcch.net/e/conventions/bibl28e.html>>

Links to related websites:  
<<http://www.hcch.net/e/conventions/links28e.html>>

Contact details for the Permanent Bureau of the Hague Conference are as follows:

Hague Conference on Private International Law

Permanent Bureau

Scheveningseweg 6

2517 KT The Hague

The Netherlands

Tel.: +31 (70) 363 3303

Fax: +31 (70) 360 4867

Email: [secretariat@hcch.net](mailto:secretariat@hcch.net)