

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

Part IV – Enforcement



Family Law



GUIDE TO GOOD PRACTICE

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

PART IV – ENFORCEMENT

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EXECUTIVE SUMMARY

- 1. Measures available in the requested State, their content and the conditions for their application**
 - 1.1 Rapid and effective mechanisms should be available for locating an abducted child. Such measures should be available at every stage of the proceedings, including the enforcement stage.**
 - 1.2 Rapid and effective mechanisms should be available for protecting an abducted child while return proceedings are pending, in particular with a view to preventing the abducting parent from taking the child into hiding. Such measures should be available at every stage of the proceedings, including the enforcement stage.**
 - 1.3 At all stages of the proceedings the court should consider whether a need for protective measures exists to prevent the concealment or removal of the child from the jurisdiction of the court.**
 - 1.4 Effective mechanisms should be available for preparing an abducted child for return. Such measures should be available at every stage of the proceedings, including the enforcement stage. If necessary, co-operation with the authorities of the State of habitual residence to ensure continuing protection of the child after the return should also be considered.**
 - 1.5 Rapid and effective mechanisms should be available for enforcing a return order, including a range of effective coercive measures.**
 - 1.6 Additional conditions or requirements for enforcing a return order through the use of coercive measures should be avoided or limited.**
 - 1.7 Additional administrative burdens placed on the applicant with regard to the enforcement of a return order (such as the need for a formal application for enforcement or for any additional requirements and authorisations, the need for a renewal of an application for legal aid, etc.) should be avoided or limited.**
 - 1.8 Where the return order needs to be served upon the respondent before coercive measures may be applied, consideration should be given to the possibility, in appropriate cases, of serving it at the moment that the enforcement officer proceeds to enforcement.**
 - 1.9 No legalisation or similar formality may be required in the context of the Convention, including for a power of attorney or other document authorising a person designated by the applicant to take the child.**
- 2. Legal challenges available against return orders or against their enforcement**
 - 2.1 Concentration of jurisdiction**
 - 2.1.1 In legal systems where certain orders concerning enforcement (either an authorisation to enforce, or the order of specific coercive measures) have to be made by a court other than the court that decided the application for return (a specialised enforcement court), the possible benefits of a concentration of jurisdiction at the enforcement court level should be carefully balanced against the advantages of proximity of the enforcement court to the place of enforcement.**

- 4.1 A court, when making a return order, should carefully choose the appropriate option for returning the child. In all but exceptional circumstances the order should require the immediate return of the child as delays can further harm and cause confusion for the child and can provide an opportunity for the abducting parent to re-abduct the child.
 - 4.2 A court, when making a return order, should make it as detailed and specific as possible, including practical details of the return and the coercive measures to be applied if necessary.
 - 4.3 The practical arrangements which are necessary for the implementation of the return order should preferably be decided after the judge has heard the submissions of the parties and considered their respective proposals. Courts are encouraged to invite the parties to make such proposals and, if possible, to agree on the practical arrangements to be incorporated in the return order.
 - 4.4 Where appropriate, the court might consider including a hierarchical scale of different options in the return order.
 - 4.5 Questions concerning the child's travel documents should be clarified well before the enforcement stage, preferably before, or at the time of, making the return order.
 - 4.6 There should be a possibility for the authorities of the State(s) concerned to issue a provisional "*laissez-passer*" for one-time use to enable the child to leave the country and be returned to the State of habitual residence.
5. Promoting voluntary compliance
- 5.1 Having regard to the benefits to the child of an amicable settlement, the Central Authority and the court should, from the outset and throughout the proceedings including the appeal stage, work as appropriate with the parties or their legal advisers and give consideration to the possibility of a mediated or other form of voluntary settlement, without prejudice to the overriding obligation to avoid undue delay in the litigation.
 - 5.2 At the enforcement stage, efforts to reach an amicable outcome, in particular agreement on the modalities of return and on voluntary compliance, should continue. To that effect, the court, the Central Authority and the enforcement officers should work as appropriate with the parties or their legal advisers and give consideration to the possibility of a mediated or other agreement. However, this should be without prejudice to the overriding obligation to avoid undue delay in implementing the return order.
 - 5.3 Where appropriate, courts should request the assistance of professionals from psycho-social professions as well as professional mediators with a view to achieving an amicable settlement and / or preparing the parties involved, in particular the child, for the return. Such assistance should be available at every stage of the proceedings if necessary, including the enforcement stage. It should, however, be sought as early as possible during the proceedings.
 - 5.4 Effective mechanisms should be available to ensure the enforceability in the relevant States of agreements reached by the parties so as to be able to proceed to enforcement without delay if the agreement is not complied with.

6. The child

- 6.1** Where appropriate, having regard to the abducted child's age and maturity, the wishes and feelings of the child should be explored at an early stage of the return proceedings and, where a return is ordered, should duly be taken into account when considering how best to implement the return.
- 6.2** In accordance with his / her age and maturity, the child should, as far as possible, be kept fully informed about enforcement proceedings and what will happen once he / she returns to the State of habitual residence.

7. Co-operation among courts, authorities and other actors within the requested State

- 7.1** Where the system permits, the court responsible for making a return order should exercise supervision over the process of implementation. Where the court does not have this responsibility, another court (*e.g.*, a specialised enforcement court) or public authority (*e.g.*, the Central Authority) should assume it. The authority responsible for effecting a return should endeavour to achieve it in accordance with the terms of the return order and at the earliest practicable date consistent with the order.
- 7.2** Where the application of coercive measures is envisaged, enforcement officers should have at their disposal comprehensive information concerning the facts of the particular case and the court order to be enforced. They should also be familiar with the aims of the Convention.
- 7.3** Before proceeding to enforcement, it should be considered whether other professionals (*e.g.*, the psycho-social professions, mediators, interpreters, a judge where appropriate, etc.) need to be involved in either the preparation of enforcement and / or at the actual scene of enforcement. The professional actually carrying out the enforcement should be able to call upon the assistance of such other professionals if required. However, the need for the involvement of additional professionals should always be weighed against any delay which might be occasioned by their involvement.
- 7.4** It should also be possible to involve other professionals where the need for the involvement of such other professionals only materialises *once enforcement has already started*.
- 7.5** All professionals involved in the enforcement of a return order should be aware of each other's role and responsibilities. They should closely co-operate throughout the proceedings.
- 7.6** Whoever is responsible for deciding who shall be present at the actual scene of enforcement (*e.g.*, the court, the Central Authority, the enforcement officer) should carefully consider whether the presence of the applicant is likely to be helpful or whether there is a risk that it might instead complicate matters in the particular case.

8. Cross-border co-operation to ensure safe return

- 8.1** A court considering the return of a child should be provided, through the Central Authorities or other appropriate channels, with information concerning the protective measures and services available in the requesting State, where this is needed to assist in securing the safe return of the child.

- 8.2** To this end, courts are encouraged to make use of national, regional and international judicial networks and liaison judges and to seek the assistance of Central Authorities where appropriate.
- 8.3** The requesting State should do what it can to create conditions for a return order to be made, for example:
- by ensuring that the impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which is capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges;
 - by making it possible to grant mirror orders or other orders ensuring the protection of the child following return; and
 - by encouraging its courts and administrative authorities to apply these rules with a view to favouring the return of the child – where appropriate accompanied by the abducting parent.
- 8.4** Authorities of the requesting and requested State (*i.e.*, the court before which the application for return is pending, both Central Authorities and, where appropriate, the courts of the requesting State) should communicate with each other as early as possible during the return proceedings with a view to making the practical and legal arrangements which are necessary for the safe return of the child. These arrangements should preferably be in place before the return order is made.

9. Training and education

- 9.1** The professionals responsible for enforcing a return order should receive appropriate training.
- 9.2** The professionals responsible for enforcing a return order should be aware of the role of other relevant professionals in their jurisdiction (for example, social workers, psychologists, interpreters) who could assist in the enforcement and its preparation. Interdisciplinary training which brings together representatives of these different professions is recommended.
- 9.3** All professionals involved in Hague return proceedings and the enforcement of return orders should be made aware of the objects of the Convention.
- 9.4** All professionals involved in Hague return proceedings and the enforcement of return orders should be made aware of the possible pressure of the media and / or parent initiatives and support groups in such cases, and should be prepared to deal with this pressure.
- 9.5** Problems can occur when judges, lawyers and other professionals are unfamiliar with the Hague return process. There is merit in a properly trained and educated specialist group of judges and lawyers undertaking this work so as to reduce delays and add integrity to the process.
- 9.6** It is recommended that practice guidelines, manuals, checklists and / or other documents should be developed which can be of assistance to the different professionals involved in the enforcement of Hague return orders.

INTRODUCTION

Introduction

A. BACKGROUND WORK OF THE HAGUE CONFERENCE ON THE ENFORCEMENT OF RETURN ORDERS MADE UNDER THE CONVENTION¹

1. At the meeting of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which was held at The Hague from 27 September to 1 October 2002 the following recommendation was adopted:

“The Permanent Bureau should continue to gather information on the practice of the enforcement of return orders in different Contracting States. The Permanent Bureau should prepare a report on this subject with a view to the development of a Guide to Good Practice.”²

2. As a first step, between Summer 2004 and Autumn 2006 a comparative legal study³ on the enforcement of orders made under the Convention was carried out by Andrea Schulz, then First Secretary at the Permanent Bureau. This was done by way of a Questionnaire to which 46 jurisdictions responded.⁴ At the same time, at the request of the Permanent Bureau and sponsored by the International Centre for Missing and Exploited Children, empirical research on the enforcement of Hague Convention orders (including access orders) was carried out by Professor Nigel Lowe of Cardiff University⁵ in a number of Contracting States.⁶

3. Jointly, the two research projects identified certain structural problems as well as existing good practice with regard to the enforcement of Hague return orders.⁷ A number of respondents to the Questionnaire issued by the Permanent Bureau underlined how much they would welcome a Guide to Good Practice on enforcement. Consequently, guiding principles were proposed to the Fifth Meeting of the Special Commission to study the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which could form the basis for a Guide to Good Practice on Enforcement.⁸

¹ Any reference in this Guide to “the Convention” is to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

² See “Report and Conclusions of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (27 September – 1 October 2002)”, drawn up by the Permanent Bureau, March 2003, at pp. 45-46 (available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings”), para. 1 c).

³ See A. Schulz, “Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study”, Prel. Doc. No 6 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings”).

⁴ Argentina, Austria, Bahamas, Belarus, Bosnia & Herzegovina, Bulgaria, Canada (Federal Central Authority, Alberta, Manitoba, Quebec, Saskatchewan), Chile, China (Hong Kong SAR, Macao SAR), Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom (England & Wales, Isle of Man, Montserrat, Northern Ireland, Scotland), United States of America. The response from Bosnia and Herzegovina was received after completion of the study (*ibid.*). All responses are available at < www.hcch.net > under “Child Abduction Section” then “Questionnaires and responses”.

⁵ See N. Lowe, S. Patterson and K. Horosova, “Enforcement of Orders made under the 1980 Convention – An Empirical Study”, commissioned by the Permanent Bureau and sponsored by the International Centre for Missing and Exploited Children, Info. Doc. No 1 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings” and “Preliminary Documents”) and the subsequent “Good Practice Report on Enforcement Under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*”, 2007, by the same authors (available at < www.icmec.org >).

⁶ Contracting States are States which have ratified or acceded to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

⁷ Hague return orders are orders for the return of a child or children to the State of his / her / their habitual residence made pursuant to an application under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

⁸ A. Schulz, “Enforcement of Orders made under the 1980 Convention – Towards Principles of Good Practice”, Prel. Doc. No 7 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings”).

The principles drew on the comparative law research carried out by the Permanent Bureau, on the empirical research carried out by Professor Nigel Lowe and the Cardiff team and on the national reports from 14 States concerning enforcement which were contained in the Spring 2004 issue of *The Judges' Newsletter*. Furthermore, Conclusions and Recommendations adopted by previous Special Commissions to study the operation of the Convention⁹ and judicial seminars¹⁰ were taken into account.

4. The Special Commission, having discussed the issue in detail, adopted the following Conclusions and Recommendations:¹¹

1.5.1 The Special Commission encourages support for the principles of good practice set out in Preliminary Document No 7.

1.5.2 The Special Commission recommends that the Permanent Bureau be invited to draw up a draft Guide to Good Practice on Enforcement Issues based on Preliminary Document No 7 which takes into account the discussions on the proposed principles during the Fifth Meeting of the Special Commission and any additional information received on experiences in Contracting States. The draft should be completed with the assistance of a group of experts. As a starting point, this group should include Nigel Lowe (Consultant to the Permanent Bureau), Irène Lambreth (Belgium), Sandra Zed Finless (Canada), Suzanne Lee Kong Yin (China – Hong Kong SAR), Peter Beaton (European Community – Commission), Markku Helin (Finland), Eberhard Carl (Germany), Leslie Kaufman (Israel), Peter Boshier (New Zealand), Petunia Seabi (South Africa), Mariano Banos (United States of America) and Ricardo Pérez Manrique (Uruguay). Before publication, the draft Guide to Good Practice should be circulated to Member States of the Hague Conference as well as other Contracting States of the 1980 Hague Convention for their comments.

1.5.3 The Special Commission welcomes the comparative legal study carried out by the Permanent Bureau and the empirical study carried out by Professor Lowe on the enforcement of orders made under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. It expresses its appreciation to the authors of the studies and to the International Centre for Missing and Exploited Children which provided the funding for the empirical study.

5. This Guide to Good Practice has been prepared in response to the request of the Special Commission, following the procedures set out above. It is hoped that it will assist Contracting States in implementing an efficient system to enforce Hague return orders in the best interests of the children concerned. Whilst it is acknowledged that this Part of the Guide to Good Practice is more technical and detailed in its approach to the subject-matter than previous Parts, it is considered that this reflects the complexity and diversity of the approaches adopted by States to the issue of enforcement. With this in mind it is hoped that, where possible, States will take measures to simplify their law and procedures in relation to enforcement in accordance with the principles set out in this Part.

⁹ See "Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)", drawn up by the Permanent Bureau, para. 53; "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001)", drawn up by the Permanent Bureau, Conclusions 3.9-3.11, all available at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

¹⁰ See in particular the Conclusions of the Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Noordwijk, 19-22 October 2003, which was dedicated to enforcement issues, available at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children", Conclusions Nos 1 c, 4-8. The Conclusions and Recommendations adopted at some other judicial seminars and conferences to a limited extent also touch upon enforcement (De Ruwenberg 2001, Malta 2004, Malta 2006, The Hague 2006 (for participants from the Southern and Eastern African Region), all available *ibid.*).

¹¹ See "Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)", drawn up by the Permanent Bureau, March 2007, available at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

6. The responses to the Questionnaire on the enforcement of orders made under the Convention, circulated by the Permanent Bureau in 2004 in preparation of this Part of the Guide to Good Practice, dealt mainly with the enforcement of *return* orders which consequently is the focus of this Guide. However, many of the principles of good practice for the enforcement of return orders also apply to the enforcement of contact orders. The enforcement of orders granting *access / contact* is dealt with in Chapter 7 of *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children*¹² which is reproduced as an Annex to this Guide.

7. The Permanent Bureau would like to thank the many Central Authorities designated under the Convention and the experts¹³ whose accumulated wisdom and experience contributed to the Guide. Particular thanks are due to Andrea Schulz, former First Secretary at the Permanent Bureau, who carried out the principal work on this Part of the Guide and to Professor Nigel Lowe, Samantha Patterson and Katarina Horosova for their work on the Empirical Study and Good Practice Report.¹⁴ Thanks are also due to Eimear Long and Hannah Baker who, as Legal Officers at the Permanent Bureau, helped to prepare this Guide for publication.



8. 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 consider, in light of the Guide, how best to ensure the effective enforcement of return orders made under the Convention.



¹² *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Jordan Publishing, 2009), hereinafter, "Guide to Good Practice on Transfrontier Contact", also available at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

¹³ Comments were received from Ms Mari Aalto (European Commission, European Union), Mr James Bischoff (U.S. Department of State), Mr Peter Boshier (Principal Family Court Judge of New Zealand), Ms Leslie Kaufman (Central Authority of Israel), Miss Sau Kong Lee (Department of Justice, Hong Kong SAR) and Ms Sandra Zed Finless (Federal Central Authority of Canada).

¹⁴ *Op. cit.* note 5.

B. OVERVIEW OF FACTORS WHICH MAY DELAY ENFORCEMENT¹⁵

9. It may be helpful to have a closer look at the problems identified by the two research projects used in the preparation of this Guide. Difficulties in enforcing a return order¹⁶ can arise from numerous sources.

The return order

- The return order does not specify the exact details of the child's handover or return, such as how it is to be effected, within what timeframe or the precise location in the State of the habitual residence to which the child should be returned.

Processing of requests by Central and other authorities

- Enforcement is delayed by the lack of a response from authorities (including the police, enforcement officers and others involved in enforcement) to a request for enforcement or due to other unexplained delays by authorities when taking certain necessary steps.

Appeals

- Enforcement is delayed because several levels of legal challenge exist and it is not possible to enforce a return order until these have all been exhausted.
- Enforcement is delayed because the appellate court(s) take(s) a long time to decide the appeal.
- The appeal system / legal system is used by the abducting parent to delay enforcement, e.g., by a relocation within the State which leads to a change of venue for the proceedings.

Coercive measures – their content and conditions for their application

- In some legal systems there is a lack of effective coercive measures.
- In some legal systems a specific court order is required for *each* enforcement attempt.
- In some legal systems a requirement of formal service can cause further unnecessary delays between notice of enforcement and the implementation of enforcement.
- In some legal systems different authorisations, decisions and approvals are required before enforcement can take place.
- In some legal systems these authorisations, decisions and approvals, and / or the decisions ordering specific coercive measures, are subject to legal challenges independent of the return order itself, and such a legal challenge suspends enforcement.

The child

- The child objects to being returned despite a return having been ordered and refuses to travel / co-operate.

¹⁵ For a definition of what enforcement means in this context see the terminology section, *infra*, Part C.

¹⁶ For the enforcement of access / contact orders see Chapter 7 of the Guide to Good Practice on Transfrontier Contact, *op. cit.* note 12, which is reproduced as an Annex to this Guide.

The abducting parent

- The abducting parent takes the child into hiding, either while return proceedings are pending or after a return has been ordered.
- The abducting parent removes the child to another country, either while return proceedings are pending or after a return has been ordered, sometimes by transiting through the return country.
- The abducting parent engages in obstructive behaviour to delay or avoid enforcement (e.g., refusing to reveal travel plans, changing travel plans, claiming moving difficulties, refusing to sign visa or passport applications).
- Enforcement is delayed because of pressure from the public and / or the media, or for fear of creating media interest or involvement.
- Enforcement of the return order is delayed because the abducting parent cannot re-enter the country of habitual residence (e.g., for immigration reasons or because of a criminal warrant) in a case where he or she is supposed to return with the child.

The applicant and the requesting State

- Enforcement is delayed because the applicant parent changes his / her mind about pursuing the enforcement of the return order.
- Enforcement is delayed because the applicant parent does not seek the enforcement of the return order.
- The court ordered the surrender of the child to the applicant or a person designated by him or her but none of them is present at the time and place fixed for enforcement, for example, because the applicant is unable to or cannot afford to travel (or the applicant fails to designate a person).
- Enforcement is delayed due to non-compliance with conditions / undertakings contained in the return order, or due to a need to secure a mirror order¹⁷ in the requesting State (e.g., the applicant fails to make any required payment or to comply with other conditions or there is a lengthy process to secure mirror orders).
- The presence of the applicant at the scene of enforcement leads to an escalation of the conflict which makes enforcement fail.

Criminal proceedings in the requesting State

- An arrest warrant or criminal charge against the abducting parent in the State of the habitual residence acts as a disincentive for the abducting parent to promptly and voluntarily return the child.
- The applicant is unable or unwilling to seek the withdrawal of a criminal warrant or the authorities of the requesting State refuse to withdraw it.

Other practical and legal issues

- Enforcement is delayed because neither party can fund travel arrangements or because neither party can afford accommodation.
- At the actual scene of enforcement, when confronted with a situation of family crisis, the enforcement officer is not prepared to apply coercive measures.

¹⁷ This is an order made by the courts in the requesting State that is identical or similar to an order made in the requested State. As such, the orders are fully enforceable and effective in their respective countries.

- At the actual scene of enforcement no communication is possible between the enforcement officer and the abducting parent and / or the child because of language problems.
- At the actual scene of enforcement, other actors involved (e.g., professional social workers) are reluctant to co-operate in coercive enforcement.

10. From this overview it becomes clear that some of the problems encountered have their source in the underlying legal provisions while others are more of a practical or factual nature and could be remedied without a change of the law. This Guide to Good Practice reflects this distinction. The principles are presented in the following order:

- The content and conditions for the application of coercive measures
- Legal challenges available against return orders or against their enforcement
- The effect of legal challenges on the enforceability of return orders
- The enforcement procedure and the actors involved
- Promoting voluntary compliance
- The child
- Co-operation within the requested State
- Cross-border co-operation to ensure safe return
- Training and education

C. TERMINOLOGY

11. It is worth noting that in this Guide “enforcement” is used as meaning “implementation by coercive measures”, *i.e.*, “execution”. The implementation of a return through voluntary compliance is therefore not considered as “enforcement” for the purposes of this Guide. Nevertheless, it has to be emphasised that voluntary compliance with a return order will normally be the solution which best serves the interest of the child. It should also be noted that although the term “abducting *parent*” is used throughout this Guide, a person other than a parent may be responsible for the wrongful removal or retention of a child under the Convention. Further, the term “abducting parent” has been used in the Guide to include those who are alleged to have wrongfully removed or retained a child under the Convention.

12. Finally, where the footnotes refer to names of States or territorial units without further indication of a source, the information was drawn from the responses to the 2004 Questionnaire¹⁸ or from comments provided by States in response to the Draft Guide. Further details on the respective States in a comparative perspective can be found in A. Schulz, “Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study”, Preliminary Document No 6 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006).¹⁹

¹⁸ Forty-six different jurisdictions responded to the 2004 Questionnaire. *Op. cit.* note 4.

¹⁹ *Op. cit.* note 3.

THE GUIDE

The Guide

1. MEASURES AVAILABLE IN THE REQUESTED STATE, THEIR CONTENT AND THE CONDITIONS FOR THEIR APPLICATION

1.1 Rapid and effective mechanisms should be available for locating an abducted child. Such measures should be available at every stage of the proceedings, including the enforcement stage.

13. While proceedings are pending and once a court has made a return order, it is important to be able to locate the child quickly with a view to implementing the return order. Useful measures and powers to this effect are described in the Guide to Good Practice on Central Authority Practice, particularly under Principle 4.10 and in Appendix 5.1.²⁰ That Guide also highlights that effective location powers are important *at every stage* of the proceedings.

14. First, before a return application is filed with a court, the prompt location of the child is important in order to determine the appropriate forum and to ensure that proceedings are commenced within the one-year period mentioned in Article 12.

15. Secondly, while court proceedings are pending the abducting parent may abscond with the child and it will be important to locate them as soon as possible to ensure that the return proceedings and a subsequent return order are not frustrated.²¹ In this respect, it would be useful for the court seized with the return proceedings to retain territorial jurisdiction (venue) at least until it is established that the child is in another Contracting State. Preferably, removal of the child within the requested Contracting State should not bring the return proceedings pending before a court to an end because of a loss of territorial jurisdiction. Otherwise it would be easy for the abducting parent to frustrate return by removing the child, making it necessary for new court proceedings to be brought every time.

16. Thirdly, if court proceedings have already been instituted or have even resulted in a return order and the child then needs to be located (again), some authority should assume a co-ordinating role. This could be, e.g., the Central Authority²² or the court. It appears that in most jurisdictions the police will be requested to search for the child.²³ This can involve specific police forces or bodies such as Interpol²⁴ or the FBI²⁵ or other law enforcement

²⁰ *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I - Central Authority Practice* (Jordan Publishing, 2003), hereinafter, "Guide to Good Practice on Central Authority Practice", also available at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice". These measures may include, *inter alia*, the following (see Appendix 5.1 to the Guide to Good Practice on Central Authority Practice): 1. Checking the Population Register (used by some European countries). 2. Enlisting the aid of local police (if an address is known). 3. Enlisting the aid of the national police, as they often have a specialist unit for missing children or family matters. 4. In the **United Kingdom (England & Wales)** and **Australia**, it is possible to apply to court to subpoena a person believed to have information about the location of a child. The person must then appear before the court and disclose the information. 5. In **Quebec (Canada)**, there is a provincial police co-ordinator who will contact the local police to appoint a person to look for a child in a particular area. 6. Police in some countries can make discreet inquiries regarding a child. 7. In some countries, it is possible to pay private investigators to assist in locating missing children. Some Central Authorities will pay the investigator's costs.

²¹ In the case of *Sylvester v. Austria*, Applications Nos 36812/97 and 40104/98, 24 April 2004 [INCADAT cite: HC/E/ 502], the European Court of Human Rights criticised the Austrian authorities for not taking any steps to locate the child after the abducting mother had changed their residence following an unsuccessful attempt at enforcement. The court found that this and other delays in enforcement had resulted in a breach of the applicant parent's right to family life.

²² This is the case in, e.g., **Austria, Bahamas, Canada (Alberta, Manitoba, Nova Scotia, Quebec, Saskatchewan), Cyprus, Finland, Greece, Malta, Netherlands, New Zealand, Norway, Romania, South Africa, Sweden, Switzerland, Turkey, United Kingdom (Scotland), United States of America.**

²³ **Argentina, Austria, Bahamas, Bulgaria, Canada (Alberta, Manitoba, Nova Scotia, Quebec, Saskatchewan), Chile, China (Hong Kong SAR), Macao SAR, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, New Zealand, Norway, Panama, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom (Isle of Man, Northern Ireland), United States of America.** In **Belgium** a department of the federal police competent in the field of international co-operation undertakes any investigations required to locate a child. This department liaises directly with officers abroad.

²⁴ Mentioned by **Argentina, Chile, Italy, Latvia, Lithuania and Sweden.** **Italy, Lithuania** and **Sweden** specified that Interpol would only be involved where it was thought that the child had been removed to another country.

authorities.²⁶ The customary techniques for locating missing persons will then be applied.²⁷ If necessary, border authorities should be alerted.²⁸ Where domestic, regional or international electronic police search systems exist, using these to locate the child and / or abducting parent should be considered.²⁹ Another type of measure to be considered is a “disclosure order” which orders a person who may have information about the whereabouts of the child and / or the abducting parent to provide such information.³⁰

- 1.2 Rapid and effective mechanisms should be available for protecting an abducted child while return proceedings are pending, in particular with a view to preventing the abducting parent from taking the child into hiding. Such measures should be available at every stage of the proceedings, including the enforcement stage.**
- 1.3 At all stages of the proceedings the court should consider whether a need for protective measures exists to prevent the concealment or removal of the child from the jurisdiction of the court.**
- 1.4 Effective mechanisms should be available for preparing an abducted child for return. Such measures should be available at every stage of the proceedings, including the enforcement stage. If necessary, co-operation with the authorities of the State of habitual residence to ensure continuing protection of the child after the return should also be considered.³¹**

17. Once a return order has been made, it is important to be able to quickly protect the child against any further danger, including the risk of being taken into hiding. Other protective measures, e.g., ensuring contact between the child and the left-behind parent, may be equally important but they are not the object of this Part of the Guide to Good Practice which focuses on measures to ensure the enforcement of the return order.

18. Useful measures and powers to the effect mentioned above are described under Principle 4.15 of the Guide to Good Practice on Central Authority Practice,³² Principle 6.2 of the Guide to Good Practice on Implementing Measures³³ and in great detail in the Guide to Good Practice on Preventive Measures.³⁴ Those sections also highlight the importance of the availability of effective protective measures at every stage of the proceedings.

²⁵ **United States of America.**

²⁶ **Canada (Manitoba), Latvia, United States of America.** In the **United States of America**, U.S. Customs and Border Protection may be contacted and can take action pursuant to a court order.

²⁷ **Bulgaria, France, Lithuania, Luxembourg, Malta, Monaco and New Zealand** referred to the use of such techniques in their responses to the 2004 Questionnaire.

²⁸ **Argentina, Canada (Manitoba, Nova Scotia, Quebec), China (Hong Kong SAR)** (information provided by Miss Sau Kong Lee), **Latvia, Lithuania and Switzerland.**

²⁹ E.g., the Schengen Information System (SIS) for **Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.** For further details on international child abduction and the Schengen Information System, see *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003), hereinafter, “Guide to Good Practice on Preventive Measures” (also available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”), under Principle 1.2.3, in particular notes 63 *et seq.* In **Switzerland**, the child can also be entered into an electronic search system of the police (RIPOL). In the **United States of America**, the child can be entered into the National Crime Information Center Index.

³⁰ In the **United States of America**, a person ordered to disclose information who does not do so may be able to be punished for contempt of court.

³¹ See further Principle 8 *infra*.

³² *Op. cit.* note 20.

³³ *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003), hereinafter, “Guide to Good Practice on Implementing Measures”. Also available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

³⁴ *Op. cit.* note 29.

19. Such protective measures might include: (1) The deposit of passports or other travel documents with the court³⁵ (or with the applicant's solicitor³⁶ or any other person, agency or authority). However, even in States where the deposit of travel documents can be ordered, it should be noted that the parent may still qualify for a passport and may also still have legal authority to obtain a passport on behalf of the child. The consular authorities of the State of which the abducting parent and the child are nationals should therefore be informed of the order. This will ensure that the authorities are aware of the order when dealing with a request for the issuance of new travel documents and will minimise the risk of the abducting parent obtaining new travel documents for himself or herself or the child and leaving the country.³⁷ (2) The imposition of a requirement that the abducting parent report regularly to a particular authority³⁸ perhaps coupled with a restriction on the abducting parent's freedom of movement such as an obligation to reside in a certain place.³⁹ (3) In some jurisdictions the court can order the abducting parent to pay a bond or deposit⁴⁰ or it can order the abducting parent to bring the child to a certain place, with the penalty of a fine or detention or the threat that the police will retrieve the child if this is not complied with.⁴¹ (4) Another option is a court order prohibiting the child's removal from the jurisdiction, combined with a border alert.⁴² In this regard, an option might be to obtain an order preventing the child from leaving the jurisdiction and asking the border authorities to serve this order on the abducting parent at the border. (5) Another possible measure is the temporary placement of the child under the protection of the child protection authorities, e.g., in an institution or a foster family,⁴³ with the applicant⁴⁴ or with a relative of one of the parents⁴⁵ or any other specified person or in any other way that the court or competent authority finds suitable.⁴⁶ Contact with the abducting parent might be excluded or supervised in such a situation.⁴⁷ Sometimes the child can be removed by the police to a safe placement in such a case.⁴⁸

20. There should also be measures available to prepare an abducted child for the return, where necessary.⁴⁹ Such measures, including psychological assistance, should in particular be considered where the return involves a change of primary carer and / or where contact between the child and the left-behind parent has been cut off for a considerable time, or

³⁵ **Argentina, Canada (Alberta, Manitoba, Nova Scotia, Quebec), China (Hong Kong SAR), Germany, New Zealand, South Africa, Spain, Switzerland, Turkey, United Kingdom (England & Wales), United States of America.** This sometimes covers only travel documents of the child, sometimes also documents of a person likely to take the child out of the country.

³⁶ **Canada (Manitoba), United Kingdom (Northern Ireland, Scotland).** It has to be kept in mind, however, that there are regions where no passport is required for cross-border travel such as within the Schengen Area or within Scandinavia.

³⁷ Reference is made, *inter alia*, to the Children's Passport Issuance Alert Program in the **United States of America** (see < http://travel.state.gov/abduction/prevention/passportissuance/passportissuance_554.html >, last consulted 1 June 2010).

³⁸ **Canada (Alberta), Germany, Panama, Switzerland.** This could include, e.g., the obligation for the abducting parent to report, at regular intervals and accompanied by the child, to child protection authorities, to the police or other authorities as appropriate.

³⁹ **Germany.**

⁴⁰ **Canada (Manitoba), Spain, United States of America.**

⁴¹ **Finland, Panama, United States of America.**

⁴² **Argentina, Bahamas, Canada (Alberta, Manitoba, Nova Scotia, Quebec), China (Hong Kong SAR), Germany, Greece, Malta, New Zealand, Panama, Spain, Switzerland, Turkey, United Kingdom (Northern Ireland), United States of America.**

⁴³ **Argentina, Belarus, Bulgaria, Canada (Manitoba, Quebec), Chile, Finland, France** (only in exceptional cases where the child is actually in danger), **Georgia, Italy, Luxembourg, Mexico, Netherlands, Spain, Sweden, Switzerland** (as a last resort), **United States of America.**

⁴⁴ **Denmark, United States of America.**

⁴⁵ **Canada (Saskatchewan), United States of America.**

⁴⁶ **Belarus, Canada (Quebec, Saskatchewan), China (Hong Kong SAR), Denmark, New Zealand, Sweden, United Kingdom (Isle of Man), United States of America.** In **Belgium** the Family and Youth Department is in charge of taking protective measures to avoid the hiding or re-abduction of a child. If necessary, the department can urgently seize a judge specialist in youth affairs to enable orders to be made by the court.

⁴⁷ **Canada (Manitoba), China (Hong Kong SAR), United Kingdom (Isle of Man).**

⁴⁸ **Canada (Manitoba, Saskatchewan), New Zealand, United States of America.**

⁴⁹ See also the decision of the European Court of Human Rights in *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, Application No 31679/96 (available at < <http://www.echr.coe.int/echr> >, last consulted 1 June 2010, Report of Judgments and Decisions 2000-I, [INCADAT: HC/E/ 336]), at paras 94, 105, 112 (Romania was held to be in breach of Art. 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter, "European Convention on Human Rights"), having failed to make adequate and effective efforts to enforce the applicant's right to the return of her children, including preparing the children for return).

where the child has been told that the other parent is dead or has abandoned him / her. A change of primary carer which is at least temporary will occur where the abducting parent refuses to return with the child to the country where the applicant parent lives, and / or the court has ordered the surrender of the child to the applicant parent. It will also be likely to arise where the left-behind parent has sole custody. However, where there is a need to prepare the child for the return, the length of time allowed for this should be limited to what is necessary and it should not be allowed to become a cause of delay. In this respect it has to be kept in mind that a child's perception of time is different from that of an adult, and from the child's perspective, a period without contact with the left-behind parent can quickly seem a considerable amount of time.

21. It may also be useful for the authorities organising the return to contact the authorities of the State of the habitual residence to determine what measures, such as psychological assessment and counselling, will be available to the child after the return. Mapping out the immediate plan for the child's wellbeing upon return could reassure the child and the abducting parent and help them to accept a return and reduce the flight risk.

22. It is important that the measures set out under Principles 1.2 to 1.4 be available from at least⁵⁰ the moment that Hague return proceedings are brought in court. The measures should remain available for the duration of these proceedings, including after a return has been ordered but not yet implemented. They may include any measure necessary to protect the child and should be considered where there is an indication that the abducting parent would be unlikely to comply with a return order.⁵¹

1.5 Rapid and effective mechanisms should be available for enforcing a return order, including a range of effective coercive measures.

23. Once a return order has been made, it is important to have effective coercive measures available for enforcing it. As compared with the measures concerning location, protection and prevention, there are not as many "coercive enforcement measures". Comparative research carried out by the Permanent Bureau and the Cardiff team in the legal systems where the Convention is in force showed that in most jurisdictions, one or more of the following coercive measures exist: (1) pecuniary fines,⁵² (2) imprisonment of the abducting parent,⁵³ and (3) the physical removal of the child from the abducting parent by enforcement officers.⁵⁴ The latter will often be followed by a handover of the child to the applicant or a person designated by

⁵⁰ There may also be situations where it is not yet possible to file the Hague return application with the court because some documents or translations are still missing, but it would nevertheless be important to obtain a measure protecting the child from being removed abroad, in particular to a non-Contracting State, or from some imminent danger within the jurisdiction. It should be possible to obtain such measures in these circumstances. Where appropriate the court might set a deadline for the return application to be filed and order that the provisional measures will lapse, or it will lift them later, if the return application is not filed with the court in due course.

⁵¹ **Bulgaria, China (Hong Kong SAR), Mexico, Spain, United States of America.**

⁵² Available, e.g., in **Argentina, Austria, Bulgaria, Canada (Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR), Czech Republic, Denmark, Finland, France** ("*astreinte*": a "recurring fine" whereby the contemnor is fined a fixed sum each day that he / she does not comply with the court order), **Germany, Greece, Latvia, Lithuania, Luxembourg** (*astreinte*), **Mexico, Netherlands, New Zealand, Norway, Romania, Slovakia, Sweden, Switzerland, United Kingdom (Scotland), United States of America.**

⁵³ Available, e.g., in **Austria, Bahamas, Canada (Manitoba, Nova Scotia, Quebec, Saskatchewan), Chile, China (Hong Kong SAR), France** (the criminal proceedings can be initiated by the left-behind parent), **Germany, Greece, Malta, Mexico, Netherlands, New Zealand, United Kingdom (Isle of Man, Northern Ireland, Scotland), United States of America.**

⁵⁴ This was mentioned, e.g., by **Austria, Canada (Quebec, Manitoba, Saskatchewan), China (Hong Kong SAR), Czech Republic, Denmark, Finland, Germany, Luxembourg, Malta, New Zealand, Norway, Panama, Romania, Slovakia, Sweden, Switzerland, Turkey and United States of America** (information provided by Mr James Bischoff). In some jurisdictions, the use of physical force is limited in that it may be used against the abducting parent and sometimes against other named parties with whom the child might be, but not against the child (**Czech Republic, Denmark, Finland**). In **Germany**, physical force may be directed against anyone including the child for the enforcement of a *return* order; for the enforcement of a *contact* order, however, such force may not be directed against the child. See also *Ignaccolo-Zenide v. Romania*, *supra* note 49, at para. 106, where the use of force against the child was explicitly labelled as undesirable, though not completely excluded.

him or her, or the child could be placed in temporary institutional care before the return to the State of the habitual residence. In Norway, the enforcement officer would also be in a position to actually put the repatriation of the child in place once he or she has been removed from the abducting parent.⁵⁵

24. The three types of measures mentioned above come under different labels, such as “contempt of court”⁵⁶ or “coercive enforcement measures”. They are normally available in *civil* rather than criminal proceedings but not all of them exist in every legal system. Even where they exist they are often not used, not even in cases where the abducting parent refuses to comply with the return order, due to a consideration of the child’s best interests. Nevertheless it is recommended that all three types of coercive measures should be available in a legal system so that the courts can choose the measure which is most appropriate in the individual case.⁵⁷

25. In this context note may be taken of the European Court of Human Rights’ ruling that, for the enforcement of Hague return orders in States Parties to the European Convention on Human Rights,⁵⁸ it is not sufficient to provide for what the court called “indirect and exceptional” means of coercion, *e.g.*, a fine imposed upon the abducting parent, his or her imprisonment or the institution of criminal proceedings – in particular where these measures require steps to be taken by the applicant.⁵⁹ Instead, the law should also provide for the direct implementation of the return order (*i.e.*, the physical return of the child to the applicant or to the State of habitual residence) by State organs. The Court however stressed that the use of coercive measures *vis-à-vis* the child is undesirable, but the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the child lives. The emphasis here is on measures preparing the child for the return, in particular where contact with the left-behind parent has been cut off for a long time.⁶⁰

26. In addition to the coercive measures in civil proceedings just mentioned, sanctions / punishment under criminal law (either for child abduction or for non-compliance with a court order) exist in numerous legal systems. However, they are addressed to the abducting parent alone and their application will not normally lead to the return of the child. This is true for criminal proceedings against the abducting parent in both the requested and requesting State. Even the possible extradition of the abducting parent to the requesting State will not bring about the return of the child. Moreover, criminal proceedings against the abducting parent in the requesting State may, practically speaking, influence a decision-maker towards not returning the child.

27. However, in cases where there is a perceived or known risk that the abducting parent, after being ordered to return the child, will flee from that State with the child, there may be cases where the possibility of criminal proceedings in the requested State could be considered. This would be particularly so for jurisdictions where civil enforcement proceedings can be slow and cumbersome, giving the abducting parent ample time and opportunity to flee with the child to another country, possibly a State which is not a Contracting State to the Convention, thus making enforcement difficult, if not impossible. In such cases it may be more expeditious to issue a criminal warrant in order to prevent the abducting parent from removing the child from the country, thus minimising the harm caused to the child.

⁵⁵ In **Norway** the court can also decide that it is for the applicant or the abducting parent to organise the return. In the **United States of America** the enforcement officer is also able to put the repatriation of the child in place once he or she has been removed from the abducting parent.

⁵⁶ This was highlighted, *inter alia*, in the responses of the **Bahamas, Canada (Alberta, Nova Scotia, Quebec), China (Hong Kong SAR, Macao SAR), Cyprus, South Africa, United Kingdom (Isle of Man, Northern Ireland) and United States of America** to the 2004 Questionnaire.

⁵⁷ See also *infra* Principles 4.1 and 4.2.

⁵⁸ At the time of writing (June 2010), 47 States are Parties to the European Convention on Human Rights.

⁵⁹ *Ignaccolo-Zenide v. Romania*, *supra* note 49, at para. 111. For a more detailed discussion of the case law of the European Court of Human Rights and further references see Prel. Doc. No 6 of October 2006 (*op. cit.* note 3) at pp. 14 *et seq.*

⁶⁰ *Id.* at paras 106, 112 *et seq.*

- 1.6 Additional conditions or requirements for enforcing a return order through the use of coercive measures should be avoided or limited.**
- 1.7 Additional administrative burdens placed on the applicant with regard to the enforcement of a return order (such as the need for a formal application for enforcement or for any additional requirements and authorisations, the need for a renewal of an application for legal aid, etc.) should be avoided or limited.**

28. Once a return order has been made and is not complied with voluntarily, there should not be too many additional steps required (if any at all) before the enforcement organs may proceed to enforcing the order by coercive measures if necessary. Comparative research carried out by the Permanent Bureau has shown, however, that various additional steps are currently required in different combinations in some Contracting States:

- the requirement of an application or request for enforcement;
- the requirement of a separate formality certifying the enforceability of the return order;
- the requirement for specific enforcement measures to be ordered; and
- the requirement to re-apply for legal aid at the enforcement stage.

29. In a few jurisdictions, the applicant has to **request** that the enforcement officer **enforce** the return order.⁶¹ It is obvious that, in particular where the court has ordered that the child be handed over to the applicant, *co-ordination* with the applicant is essential before coercive enforcement can start. However, applicants may not be aware of the requirement of a formal request / application and may not know to whom it should be made. This is particularly relevant where the application is not made through the channel of Central Authorities. Contracting States are encouraged to consider whether the requirement of a formal request by the applicant could be abolished, *i.e.*, allowing for enforcement to be initiated by the court⁶² or by a public authority (such as the Central Authority, a public prosecutor or similar entity) who is well aware of the procedure.⁶³

30. Some legal systems require a **separate formality** which may come under different names, *e.g.*, authorisation to enforce, *formule exécutoire*, *certificado de ejecutoriada*, *auto que despacha ejecución*, executory engrossment (*exequatur*), enforcement order, *grosse*, execution document or registration for enforcement.⁶⁴ Its presence assures the enforcement officer that the return order may be enforced. This can be important, *inter alia*, if the return order may only be enforced once it has become final and is no longer subject to ordinary legal challenge.⁶⁵

31. Sometimes the applicant has to seek this attestation from a court (which might be a different court from that which made the return order) before he or she may request an enforcement officer to enforce the return order, and in some States the enforcement officer will again either have to turn to a court for authorisation or take further procedural steps *vis-à-vis* the respondent (*e.g.*, issue a warning and set a deadline for voluntary compliance) before the actual enforcement may start.

⁶¹ Austria, Bulgaria, Greece, Latvia, Lithuania, Romania, Turkey.

⁶² In Germany since 1 March 2005 the court *ex officio* requests the enforcement officer to begin enforcement.

⁶³ In Austria, in addition to the applicant, the court is entitled to make such a request; in Turkey it is the public prosecutor.

⁶⁴ Bulgaria, Chile, Greece, Latvia, Lithuania, Malta, Romania, Spain.

⁶⁵ See also *infra*, Principle 3.1.

32. In a large number of jurisdictions, however, no further separate authorisation or other decision of the kind mentioned above is required for the actual enforcement of a return order.⁶⁶ In legal systems where such additional steps are currently required, consideration should therefore be given to dispensing with these requirements in the future. If this is not possible, it may be worth considering whether some or all of them could be issued automatically (and not only at the request of the applicant), either together with the return order or at the earliest possible moment thereafter (in cases where additional conditions such as finality or service have to be fulfilled).⁶⁷

33. Similar comments can be made regarding the need to order **specific enforcement measures**. In most legal systems researched in the preparation of this Guide, only court-ordered coercive measures could be applied.⁶⁸

34. In some States *all* such measures have to be ordered *subsequent* to the return order itself in circumstances where it turns out that the respondent has not complied voluntarily with the order.⁶⁹ Even where the measures are included in the initial return order, sometimes they are only “threatened” as a penalty in case of non-compliance.⁷⁰ In these cases, an additional court order is normally necessary to “activate” the penalty and actually impose the sanction.

35. But there are also examples which show that it is possible to reduce the number of intermediary steps. In some jurisdictions a court order is required for *some* measures but not for others: in Finland, Latvia, New Zealand, Norway and the United Kingdom (England & Wales), some powers to use coercive measures (in all cases physical force) are vested in the enforcement officer.⁷¹ In other legal systems, the public prosecutor⁷² or the Central Authority⁷³ may at least request police assistance without having to go back to the court for an order.

36. Lastly, there are jurisdictions where specific enforcement measures are already included in the initial return order, either routinely or at least if there are indications that non-compliance might be expected.⁷⁴ Wherever possible, this practice should be followed to avoid

⁶⁶ **Argentina, Austria, Bahamas, Canada (Alberta, Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR, Macao SAR), Cyprus, Czech Republic, Denmark, Finland, Germany, Italy, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Slovakia, South Africa, Sweden, Switzerland (some cantons), Turkey, United Kingdom (England & Wales, Isle of Man, Montserrat, Northern Ireland, Scotland), United States of America.**

⁶⁷ *E.g.*, **France** and **Luxembourg** do require a formality, namely a *formule exécutoire*, but in **France**, the *formule exécutoire* is always included in the return order while in **Luxembourg**, it is applied at the moment that the judgment is issued. Thus, there is no *additional* and *subsequent* step after the return order is made. Where such requirements do exist, see also Principle 2.8 below.

⁶⁸ **Argentina, Austria, Bahamas, Canada (Alberta, Manitoba, Quebec, Saskatchewan), Chile, China (Hong Kong SAR, Macao SAR), Czech Republic, Denmark, Finland** (concerning a fine; concerning the use of physical force see *infra*, note 71), **France** (concerning a fine (*astreinte*)), **Germany, Greece, Latvia** (concerning a fine; concerning the use of police assistance see *infra*, note 71), **Lithuania, Luxembourg** (concerning a fine (*astreinte*)), **Mexico, Netherlands, New Zealand, Norway, Panama, Romania, Slovakia, South Africa, Spain, Sweden, United Kingdom (England & Wales, Isle of Man, Northern Ireland, Scotland), United States of America.**

⁶⁹ **China (Hong Kong SAR), Denmark, New Zealand** (if no specific measures have been included in the return order itself), **Romania** (additional fine per day of non-compliance if enforcement of first fine did not produce effect; removal of child from abducting parent by force and handover to applicant, criminal proceedings), **Slovakia, United Kingdom (Scotland).**

⁷⁰ *E.g.*, in **Germany** and **Greece**.

⁷¹ **Finland, New Zealand, Norway**: If the court has ordered that the child shall be collected, the enforcement officer is entitled to use appropriate physical force against a person hindering enforcement (but in **Finland** not against the child). **Latvia**: enforcement officer may request police assistance.

⁷² **Italy, Luxembourg, Monaco, United States of America** (some states, depending on implementation of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a model law for state courts developed by the National Conference of Commissioners on Uniform State Laws in 1997. The UCCJEA includes significant new enforcement provisions that had not been included in an earlier model law on child custody jurisdiction, *e.g.*, provisions directing state courts to enforce Hague return orders made by the courts of other states. The UCCJEA has now been adopted (with some modifications) by 48 states, the District of Columbia and the U.S. Virgin Islands, and its adoption is pending in two other states).

⁷³ **Cyprus, Netherlands**. Nevertheless, in **Cyprus** such an order *may* be sought.

⁷⁴ **Canada (Alberta, Manitoba, Nova Scotia, Quebec, Saskatchewan), China (Hong Kong SAR, Macao SAR), Cyprus** (order contains a standard clause setting out the consequences of non-compliance), **New Zealand** (whilst enforcement measures are not included in a return order, the procedure employed in the New Zealand courts ensures that the arrangements for the child’s return must be complied with before the injunctive order - which prevents the removal of the child from New Zealand - can be discharged. The arrangements regarding return therefore become ‘conditions’ of the order), **Norway** (in the return order the court specifies in what way the child is to be returned. In light of the fact that the child must be returned without delay, it is preferable to provide a prioritised list of alternatives for return. This will prevent the

loss of time, even if it is only as a default measure which may be applied if the abducting parent does not comply with the return order voluntarily.

37. Where costs are incurred for enforcement and the applicant has benefited from legal aid, the grant of legal aid should, if at all possible, automatically extend to the enforcement stage.

1.8 Where the return order needs to be served upon the respondent before coercive measures may be applied, consideration should be given to the possibility, in appropriate cases, of serving it at the moment that the enforcement officer proceeds to enforcement.

38. Some legal systems require a return order to be served upon the abducting parent *before* the order may be enforced.⁷⁵ This may give that parent additional time to abscond with the child. In other legal systems a return order may, in certain cases, be served at the moment that the enforcement officer actually proceeds to enforcement,⁷⁶ which avoids the risk just described.

39. It is not possible in all legal systems⁷⁷ and in all cases to provide for service to be effected at the moment that enforcement actually starts. Depending on the circumstances, however, there may be typical cases where not having an earlier service will not prejudice the position of the abducting parent, and fairness will therefore not require service to be effected *prior* to enforcement. These cases will most likely involve situations where the abducting parent already has notice of the return order, *e.g.*, where the order was based on an agreement previously worked out by the parties and / or their legal representatives or where the abducting parent was present at the court hearing and the return order was immediately pronounced at that hearing. Indeed, it could be considered whether it might be possible to impose a requirement that the abducting parent be present at the pronouncement of the decision in the return proceedings in order to ensure sufficient notice.⁷⁸ Another factor which might be relevant is whether the return order is final and cannot be challenged, *e.g.*, because it was given by a court of last instance. In this case it is normally clear that the abducting parent will have to comply with the return order.

1.9 No legalisation or similar formality may be required in the context of the Convention, including for a power of attorney or other document authorising a person designated by the applicant to take the child.

40. Where the court orders that the child shall be removed from the abducting parent and handed over to a person designated by the applicant (*e.g.*, in a case where the applicant is unable to come himself or herself), it needs to be ensured that the person claiming the child is actually authorised by the applicant. In this context it is recalled that Article 23 of the Convention states that: “No legalization or similar formality may be required in the context of this Convention.” This also applies to a certificate or any other document authorising the person designated by the applicant to take the child.

waste of time caused by the court having to decide on a coercive measure if it turns out that the first choice cannot be implemented), **Romania** (penalty of a fine between 5 and 25 million ROL to be fixed in return order; no further court order required to enforce it), **Spain, Sweden, United Kingdom (Northern Ireland)** (the return order will usually specify the exact details surrounding the return of the child including date, flight details, who is to accompany the child and time of arrival. If the applicant has serious doubts as to whether the return order will be carried out, the return order can have a penal notice attached. However, in making a return order, the Family Judge makes clear to both parties that the details of the return must be watertight and that any breach of the terms on the court order will have serious consequences) and **United States of America** (information provided by Mr James Bischoff).

⁷⁵ **Argentina, France, Luxembourg** (in cases of urgency, however, enforcement can take place immediately (*au vu de la minute*)), **Mexico, Norway, Slovakia, Turkey**.

⁷⁶ *E.g.*, in **Germany** and **United States of America**.

⁷⁷ *E.g.*, **Switzerland**.

⁷⁸ In certain legal systems this is not possible at the moment, *e.g.*, **France**.

2. LEGAL CHALLENGES AVAILABLE AGAINST RETURN ORDERS OR AGAINST THEIR ENFORCEMENT

41. Speed is a key operating principle of the Convention.⁷⁹ The following measures have been identified as speeding up return proceedings, including appeals, and the enforcement of the return order:

2.1 Concentration of jurisdiction

42. The concentration of jurisdiction on one or more specialised courts has been proven to speed up return proceedings and lead to a more coherent case law.⁸⁰ When it comes to enforcement, however, additional elements may have to be taken into consideration. Depending on the system concerned, concentration of jurisdiction at the enforcement level may not always be the best solution, and a conscious choice needs to be made.

2.1.1 In legal systems where certain orders concerning enforcement (either an authorisation to enforce, or the order of specific coercive measures) have to be made by a court other than the court that decided the application for return (a specialised enforcement court), the possible benefits of a concentration of jurisdiction at the enforcement court level should be carefully balanced against the advantages of proximity of the enforcement court to the place of enforcement.

43. Since enforcement normally does not take place in a courtroom but in the daily environment of the child, the benefit of increased specialisation and expertise in Hague matters needs to be balanced against the need for the enforcement court to be close to the scene of enforcement. A concentration of jurisdiction to order enforcement measures, with the ensuing specialisation, expertise and familiarity with the Convention may speed up the handling of the case. However, proximity to the location of the child and thus to the place of enforcement might assist the court in selecting the appropriate measures and, if necessary, co-operating with the local enforcement officers or supervising them.

44. Each State should therefore carefully choose the solution which is likely to produce the best results in the legal system concerned.⁸¹

2.1.2 Where the court plays a role in instructing enforcement officers who may also have districts of territorial competence, it should be kept in mind that a concentration of jurisdiction at the level of the courts, if it is not supplemented by a concentration of competence at the level of the enforcement officers, will often require co-operation between new partners. Communication between them should therefore be as clear and explicit as possible.

45. Depending on the legal system, the court instructing the enforcement officer may be either the court that made the return order or a specialised enforcement court. Where only a limited number of courts have jurisdiction over the matters mentioned above (with larger areas covered by their jurisdiction as a result), the question arises whether this concentration of

⁷⁹ See Guide to Good Practice on Central Authority Practice, *op. cit.* note 20, Chapter 1.5.

⁸⁰ This has been described in detail in Chapter 5 of the Guide to Good Practice on Implementing Measures, *op. cit.* note 33. Note that the **Netherlands** is amending its relevant legislation to provide for a concentration of jurisdiction in the Dutch courts in respect of Convention cases. When the amendment to the legislation comes into effect (expected to be early 2011), the District Court of The Hague will, in principle, be the only court to hear applications for a return order.

⁸¹ Training of the professionals concerned is particularly important in this context. On training, see Chapter 9 *infra*.

jurisdiction should be echoed by a concentration of competence at the level of the enforcement officers and their respective districts. Similar to the considerations concerning concentration of jurisdiction at the level of specialised enforcement courts, the benefit of increased specialisation and expertise in Hague matters needs to be balanced against the need for the enforcement officer to be close to the scene of enforcement in order to be in a better position to select the appropriate measures, the timing and other details of enforcement.

46. Where there is no concentration of competence at the level of enforcement officers, working routines which have developed between a court and the competent local enforcement officers may differ from one district to another. Both the court and the enforcement officers should therefore be as explicit and clear as possible in their mutual communications when preparing for enforcement. They should be encouraged to discuss the specifics of the case, the return and the envisaged enforcement, where appropriate, either by telephone or in person before enforcement begins.

2.1.3 Where the court plays a role in organising the actual enforcement, it should be kept in mind that a concentration of jurisdiction at the level of the courts, if it is not supplemented by a concentration of competence at the level of other professionals involved in enforcement (e.g., child protection authorities), will often require co-operation between new partners. Communication between them should therefore be as clear and explicit as possible.

47. Considerations similar to those discussed above regarding the territorial competence of enforcement officers and their communications with the court apply to the territorial competence of child protection authorities, youth welfare offices and other authorities and professionals who might be involved in the enforcement of return orders (see also Chapters 5 and 7 below).

48. These services often have a large number of local offices because in general it is essential for their work to be close to the child in question. Moreover it is well known that in many countries, due to budgetary constraints, these services are understaffed and overburdened with child protection cases. For the average child protection case worker who already has a huge case load, a Hague return case is unlikely to occur very often. Consequently, before the first one actually arises, both the interest of case workers in following some special training on the Convention, and the willingness of their superiors to make this possible, is often – and almost necessarily – rather limited. Therefore, concentration of competencies for the Convention might also be worth considering at the level of the child protection services. This applies in general to all stages of Hague return proceedings but, in particular, to the enforcement stage because here the role that a child protection officer has to play differs considerably from his or her ordinary day-to-day role. Very often, under domestic law, one of the aims of child protection measures is to provide the necessary assistance to enable the child to stay in the present family environment. Where the abducting parent has been the primary carer for a considerable time, removal of the child from this parent therefore appears as a disruption to the child's stability. Moreover, if the territorially competent social worker now requested to assist in enforcement has already been assisting the abducting parent and the child to settle into the new environment – maybe without any knowledge of the abduction and the situation of the left-behind parent – the conflict of loyalties and even of duties is unavoidable.

49. Depending on the possibilities available within a legal system, various options might therefore be envisaged:

- One possibility – which would be different from the structure found in most Contracting States – would be to establish the position of a special child protection officer attached to the court, who would be instructed by the court and would assist it in Hague return cases, including in the enforcement of return orders.

- Within the current structures in most jurisdictions, the most far-reaching solution would be a concentration of responsibilities for Hague return cases in only one child protection service for a certain district.
- Another option which has an even more limited impact on existing structures would be to appoint one social worker per district who receives special training on the Convention and can be contacted by other social workers if a Hague return case arises. Either the responsibility to assist in the return of the child could then be transferred to the specialised colleague, or the latter could provide advice and information about the Convention procedure to the otherwise competent social worker who would keep the case.
- A similar option would be to have a national welfare officer who would be very familiar with the Convention and who would provide instructions to the district welfare officers in Hague return cases. The national welfare officer would be in regular contact with the Central Authority and would co-ordinate any necessary action, including the involvement of other actors such as police officers.⁸²

2.2 There should be strict timeframes for courts to process appeals against return orders. Enforcement proceedings should also be conducted expeditiously.

50. Speed is important at all stages of Convention proceedings. In order to ensure that this requirement for speed is upheld, there should be timeframes in place for the various steps to be taken in the proceedings, such as for the trial court to fix a date for the hearing and then for that court to make a decision.

51. The Convention's obligation to process return applications expeditiously also extends to appeal procedures and extraordinary legal challenges. Some recent laws implementing the Convention consequently contain timeframes for a legal challenge to be filed against the decision of the trial court and / or for the appellate court to make a decision on that appeal.⁸³

52. In view of the requirement of promptness underlying the Convention, it is important to establish a timeframe for the courts. There are a few examples where this has been done by the national legislator.⁸⁴ For the Member States of the European Union, with the exception of Denmark, Article 11(3) of the Brussels Ila Regulation⁸⁵ tightens up the six-week period mentioned in Article 11 of the Convention. Moving beyond that, in its implementing legislation passed in 2003, Bulgaria has introduced a 30-day time limit for the court of first instance and the appellate court to decide a return application.⁸⁶ In Israel, the court of first instance has to decide within six weeks and the appellate court within 30 days from the day that the appeal was filed.⁸⁷

⁸² Israel (information provided by the Central Authority of Israel).

⁸³ Mexico (eight days for an interim order or a decree (*auto o sentencia interlocutoria*) to be pronounced, 15 days for a definite decision or judgment (*sentencia definitiva*); the period may be extended by eight days if the case is very complex), Spain (20 days), Bulgaria and Panama (30 days). In these three latter jurisdictions, the appeal is the only ordinary challenge possible. In Switzerland, the Federal Supreme Court has to decide within six weeks.

⁸⁴ In the Netherlands a pilot project is currently under way involving the Central Authority, the District Court of The Hague, the five Courts of Appeal and the International Child Abduction Centre. During the pilot project the return procedure is not supposed to take more than 18 weeks: six weeks of a "preparatory phase" at the Central Authority, six weeks for the court proceedings before the District Court of The Hague (exclusive jurisdiction) and six weeks for the appeal proceedings before a Court of Appeal. During the preparatory phase and during the court proceedings the parents will be offered mediation services. In April 2010 the new procedure was due to be evaluated.

⁸⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, "Brussels Ila Regulation"), OJ 2003 L 338, p. 1.

⁸⁶ First instance: 30 days following receipt of application.

⁸⁷ Chapter 22(1) of Israel's Civil Procedure Regulations, sections 295M and 295N.

53. While legislators may be hesitant to, or constrained in, imposing time limits on the independent judiciary, no such concerns exist with regard to parties as long as principles of due process and procedural fairness are respected. Consequently, in a considerable number of jurisdictions, a legal challenge against the first-instance decision has to be filed within two weeks.⁸⁸ Several States have set an even shorter deadline of five days only.⁸⁹ In all these legal systems a return order normally has to be final (*i.e.*, no longer subject to ordinary legal challenge) before coercive measures may be applied. A not-yet-final return order may, however, be declared provisionally (or immediately, as is the term in other legal systems) enforceable. This approach balances well the need for speedy implementation of the return with the risk of rendering a well-founded appeal meaningless because the return has already taken place while the appeal was still pending.

54. When fixing such timeframes, legislators should also give due consideration to the moment from which the time period should start running – from the date that the return order was made, from the date that it was made known (in whichever form) to the respondent, or from the date of service. The earliest possible moment should be chosen, bearing in mind considerations of procedural fairness and due process.

55. In a number of legal systems it is not so much for the legislator but for the courts themselves to set timetables for the determination of cases, and many of them prioritise or fast-track Hague return proceedings.⁹⁰ This is to be welcomed because court procedures should be expedited to prevent further harm to the child. Delay may affect the child, damage the child-parent relationship and frustrate the objectives of the Convention.

56. Where the order is enforceable before it becomes final,⁹¹ it may also be possible for the applicant parent to agree to a stay of the enforcement of the order on condition that the other side agrees to a shortened appeal timetable. The court would then make an order to this effect.

2.3 The number of legal challenges available against a court decision on a Hague return application should be limited. States should create conditions which enable their courts expeditiously to come to a final decision, *i.e.*, one which is no longer subject to ordinary legal challenge.⁹²

57. In almost all jurisdictions considered in the research carried out in the preparation of this Guide, it is possible to challenge Hague return orders.⁹³ Ordinary legal challenges will be discussed first, followed by a discussion of extraordinary legal challenges.

58. In a number of legal systems, only one level of *ordinary* legal challenge is available against a decision on a Hague return application.⁹⁴ Provided this legal challenge is dealt with

⁸⁸ **Austria, Bulgaria** (from hearing where decision was pronounced if party was present; from service if party was not present), **Cyprus, Czech Republic, Denmark** (from the day that the decision was given), **Finland** (from the day that the decision was given), **France** (against a decree (*ordonnance*)), **Germany** (from receipt of decision), **Luxembourg** (from service, for decisions other than default decisions), **Netherlands** (from date of the order), **Slovakia, South Africa** (from the day that the decision was given, or from the day that reasons were furnished if court gave decision without reasons first), **Turkey** (from service), **United Kingdom (England & Wales**, unless court fixed different time limit or Court of Appeal extended it). **China (Macao SAR)** and **Romania** have a deadline of 10 days.

⁸⁹ **Argentina, Chile** (from the day that the decision was given), **Greece** (from service, for party living abroad), **Panama** (from notification of decision), **Spain** (from service).

⁹⁰ *E.g.*, in **New Zealand**, the Family Court Caseflow Management Practice Note issued by the Principal Family Court Judge in September 1998 states that applications for return orders should be determined within six weeks, or 13 weeks where a specialist report or other evidence, material or information is required which cannot be obtained immediately. Also, as of 1 December 2008, all jurisdictions in **Canada**, with the exception of Quebec, have approved a procedural protocol in relation to the handling of return applications under the Convention. In the case of Quebec, although there is no written protocol the practice is that such matters are heard very quickly.

⁹¹ See *infra* Part 3.

⁹² See *infra* Principle 3.1.

⁹³ The only exception is the **United Kingdom (Montserrat)** where no legal challenge exists in Hague return cases.

⁹⁴ **Argentina, Bulgaria, Chile, China (Macao SAR), Cyprus, Czech Republic, Finland, Germany, Italy, Malta, Panama, Romania** (since December 2004), **Slovakia, Switzerland, Turkey, United Kingdom (Isle of Man)**. Among these legal

quickly – e.g., where strict timeframes are established for the challenge to be filed, and perhaps also for the court to decide – this will quickly lead to a final decision on the Hague return application. Where a return is ordered in such a system, it may be reasonable to postpone coercive enforcement until it is certain that the return order is final and can no longer be changed. This approach would benefit the child in two respects. First, the time that the child spends in the new environment will not be protracted by lengthy court proceedings, thus contributing to a settling-in of the child. Second, at the time coercive enforcement takes place it will be certain that the return order cannot be further changed.

59. Most jurisdictions provide for two,⁹⁵ and a few even more,⁹⁶ ordinary legal challenges against a return order. In this context it is worth mentioning that where timeframes exist for filing these legal challenges, or for the courts to decide upon them, the average time limit at the level of a second challenge appears to be longer than for the first level of challenge.

60. Therefore, the more levels of ordinary legal challenge available against a return order (or its refusal), the more often the question will arise whether the return order could (and should) be enforced by coercive means before it has become final. The difficult balance to be struck between the finality of the return order and the need for speedy enforcement will be further discussed below under Principle 3.1 which deals with the effect of legal challenges on the enforceability of return orders. In order to reduce the need for such difficult decisions, ordinary legal challenges against a return order should be limited, unless constitutionally impossible, to one level only.

61. In addition to ordinary legal challenges, in several jurisdictions there are *extraordinary* legal challenges of one or more levels. A large number of them are based on alleged violations of constitutional rights. Sometimes they require the exhaustion of all levels of ordinary challenge;⁹⁷ sometimes they may be brought in parallel, at any time.⁹⁸ Another type is not so much a challenge but a request to reconsider the issue, *i.e.*, an application for reopening the return proceedings because new circumstances become known which were not yet known at the time that return was ordered.⁹⁹

62. Such extraordinary legal challenges normally have to be brought to a higher court such as a Supreme Court or a Constitutional Court where the allegation is a violation of a constitutional right, or to the court of first instance or to the court which made the return order where the application is for the court to reconsider the matter. This involves a transmission of the case file from one court to another and adds another step which protracts the proceedings. Where such challenges are possible, legislators should consider amending court regulations in order to provide priority for proceedings under the Convention.¹⁰⁰ It would also be advisable to have internal mechanisms such as court directives for the rapid transfer of files.

systems, **Chile, Germany, Slovakia** and **Turkey** also allow extraordinary challenges which can be filed in exceptional cases.

⁹⁵ **Austria, Bahamas, Canada (Alberta, Manitoba, Nova Scotia, Quebec, Saskatchewan), China (Hong Kong SAR), Denmark, France, Greece, Luxembourg, Mexico, Monaco, Netherlands, Norway, South Africa, Sweden** (Swedish law was amended in 2009; in all civil cases parties now require leave to appeal a decision to the first appellate level), **United Kingdom (England & Wales, Northern Ireland, Scotland), United States of America** (where the case is heard by the federal courts, or by the courts of a state which has only one state appellate level; a further appeal would then go to the U.S. Supreme Court). In **South Africa**, there are also extraordinary challenges which can be filed in exceptional cases.

⁹⁶ *E.g.*, **New Zealand**.

⁹⁷ *E.g.*, in **Argentina, Germany, South Africa** and **Spain**, as well as for an application to the European Court of Human Rights under the European Convention on Human Rights.

⁹⁸ *E.g.*, in **Canada, Chile** and **Mexico**.

⁹⁹ *E.g.*, in **Sweden** a party may exceptionally petition for a retrial. This is a last resort in Swedish procedural law and the circumstances in which it is available are therefore limited. A party may seek to reopen the case only if the court has manifestly ruled in contradiction with the law or there were specific elements that have affected the outcome of the case such as procedural fraud, criminal behaviour of court officials or other persons involved or new evidence. In **China (Macao SAR), Slovakia** and **Turkey** decisions can also be reviewed in limited circumstances (see para. 74 of Prel. Doc. No 6 of October 2006, *op. cit.* note 3).

¹⁰⁰ An example is the Urgent Preliminary Procedure found in Article 104b of the Rules of Procedure of the Court of Justice of the European Communities. This is a derogation from the general rules of procedure to allow for greater speed in processing certain cases. It was first used in a child abduction case in *Inga Rinau* Case C-195/08 PPU 11 July 2008.

63. Admittedly, there may be little or no discretion for the national legislator with regard to constitutional challenges, and the constitution may require a stay of enforcement. However, this appears to be different for the second type of extraordinary challenge, *i.e.*, for requests to reopen the case. This can be an important procedure but, as long as such an application has not been decided upon, this has to be balanced against the fact that a final decision already exists – in most cases with the effect of *res judicata* – which is enforceable or can be declared enforceable.¹⁰¹

2.4 The grounds for appeal or other legal challenges should be limited.

64. In a number of States and territorial units, although several levels of appeal exist they are rarely ever used.¹⁰² One response to the Questionnaire circulated by the Permanent Bureau attributed the small number of appeals to the fact that, in the legal system concerned, the grounds for appeals were extremely limited, *e.g.*, limited to points of law, an insufficient consideration of the evidence, or a significant change in circumstances.¹⁰³ Wherever possible, Contracting States are encouraged to consider introducing such limitations.¹⁰⁴

2.5 A requirement of leave to appeal might be considered.

2.6 Where it is for the court deciding upon the return application to grant leave to appeal, the court should rule on the issue of leave at the same time as giving its decision on the return application.

2.7 Where it is for the appellate court or a third body to grant leave to appeal, it should receive the file from the lower court as soon as possible in order to enable it to make a decision.

65. The need for leave to be granted for an appeal may or may not speed up proceedings, depending on how the procedure is organised. Where the appeal procedure is quick, a set timeframe for the appeal courts exists and only one level of appeal is possible against a return order, the introduction of a leave procedure constitutes an additional stage and may slow down the proceedings. In contrast, where the appeal procedure is lengthy or there is no set timeframe for an appeal and several levels of legal challenge are possible, a leave requirement may speed up the proceedings. In this case, a final decision will be reached more quickly where (1) leave must be granted by the same court against whose order a legal challenge is requested, (2) such leave is refused by that court, and (3) the proceedings thereby come to an early end.

¹⁰¹ See *infra* Principle 3.1. Note also the decision of the European Court of Human Rights in *Sylvester v. Austria* (*op. cit.* note 21) where the Court held that, whilst a change in the facts of a case may “exceptionally” justify the non-enforcement of a return order, the relevant change must not be brought about by the State’s failure to take all measures that could be reasonably expected to facilitate execution of the return order. In this case the Court held that the Austrian Court had failed to take, without delay, all the measures which could reasonably be expected to enforce the return order and had thereby breached the applicant’s right to respect for his family life (Art. 8, European Convention on Human Rights). See also the decision of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland*, Application No 41615/07, 6 July 2010. The Court’s decision was given too late for it to be further taken into consideration in this Guide.

¹⁰² *E.g.*, **Canada (Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR), Monaco, United Kingdom (Scotland).**

¹⁰³ **United Kingdom (Scotland).**

¹⁰⁴ The **Netherlands** is to amend its law in Convention cases (amendment expected to take effect from early 2011) to limit the ability of an individual to bring an appeal in cassation before the Netherlands Supreme Court to cases where it is in the “interest of the law” only.

66. As previously mentioned, the need for leave to be granted can also carry the risk of causing delays. Such delays can occur not only where seeking leave creates an unnecessary additional step in the proceedings, but also where the leave procedure involves the transmission of the case file to another court, perhaps over considerable distances within the State, before that court can consider the application. Where leave to appeal has to be granted by the court that will eventually hear the appeal, or by a third body,¹⁰⁵ a request for leave has to be filed. Under some national laws it has to be filed with the court that made the original order, and that court has to transfer the case file (including the new request and perhaps accompanied by the court's comments) to the other court or body for decision. This can cause delays of days or even weeks given the fact that, due to budgetary constraints, files are often still kept in paper form and public administrations are frequently required to choose the cheapest way of transmission rather than the quickest.

67. With these considerations in mind it is recommended that a coherent package should be adopted. The "travelling" of the file should be reduced to a minimum and, wherever possible, competencies and decisions should be concentrated. One approach would be to have the court which makes the initial order decide on leave to appeal and include that decision in the initial order. Another approach would be to have the appellate court decide on the question of leave to appeal if feasible (e.g., if case files are kept and transmitted electronically and can thus be transmitted without causing delays, or if both courts are located in the same building, or if appropriate and efficient courier services are available). These practical requirements would be of even greater importance if a third body were designated to grant leave to appeal, thus requiring an additional transmission of the file to the appellate court.

2.8 Separate challenges allowed against specific enforcement measures and / or decisions on additional formality requirements for enforcement should be avoided or limited.

68. Under Principles 1.6 and 1.7 it was recommended that the number of steps required before coercive enforcement of a return order can take place should be reduced. Examples are a *formule exécutoire* or another authorisation required for enforcement or an additional court decision ordering a specific coercive measure or steps to be taken by a bailiff or another enforcement officer.

69. However, where additional formal steps such as an executory engrossment, an authorisation to enforce or similar steps are required, the possibility of challenging these steps independently should be excluded or limited.¹⁰⁶ In any event, the number and levels of legal challenges available against such measures should be limited and it should not be possible to use them as a delaying tactic. In addition, the abducting parent should not be able to raise the same defences that were previously rejected in the return proceedings themselves when challenging these additional formal steps.

70. Likewise, in Principles 4.2 and 4.3 below, it is recommended that provision for the application of specific coercive measures such as police assistance, the application of force or other measures should be made in the original return order, even if it is only as a default measure which may need to be applied later if the abducting parent does not comply with the return order voluntarily. Any challenge would then have to be brought against the return order itself. If, however, the return order and the specific enforcement measures are challenged separately, consolidation of these challenges is recommended.

¹⁰⁵ In **Denmark**, leave has to be granted by the Appeals Permission Board, an independent body consisting of five members: a Supreme Court judge as President, one high court judge, one county court judge, one practising lawyer and one lawyer / jurist with an academic background.

¹⁰⁶ E.g., in **Chile, Latvia, Lithuania** and **Luxembourg**, this formality may not be challenged separately.

71. In some legal systems, certain steps on the way to enforcement (such as an authorisation to enforce) may only be ordered once the return order has become final and is no longer subject to ordinary challenge. A legal challenge against the additional formality certifying that the return order is final and enforceable, or against any enforcement measure, cannot therefore be brought as long as the return order itself is still subject to challenge. In these legal systems, consolidation of the challenges against the return order itself and the specific enforcement orders is impossible. Instead, tight timeframes, limited levels of challenge (preferably one level only) and limited grounds for such challenges are recommended if a challenge against the separate enforcement step cannot be excluded altogether.

3. THE EFFECT OF LEGAL CHALLENGES ON THE ENFORCEABILITY OF RETURN ORDERS

- 3.1 States should create conditions which enable their courts expeditiously to reach final decisions which are no longer subject to ordinary legal challenge.¹⁰⁷ Preferably, coercive measures should then only be used to enforce a return order that is final.**
- 3.2 The possibility of immediate or provisional enforceability of a return order which is not yet final should nevertheless exist in order to respond appropriately to the circumstances of each case.**
- 3.3 An application to reopen the case should not, as a rule, have any impact on the enforceability of the return order.**

72. The child's best interests will be most effectively served if coercive measures are only applied once it is clear that the return order will not be changed or annulled. This is only true, however, if the proceedings are quick enough that they do not contribute to the settling-in of the child in the new environment, with the ensuing risk of harm in case of a subsequent return.¹⁰⁸

73. Therefore it is suggested that the best solution would be to take legislative or other measures to enable a final decision to be reached within the shortest possible time and, as a *rule*, only enforced once it can no longer be changed by ordinary legal challenge. The following measures, when used in combination, enable an appropriate balance to be struck between the need for a speedy implementation of the return and the risk that a well-founded appeal will be rendered meaningless: (a) the limitation of available legal challenges, (b) the establishment of tight timeframes for the court of first instance to decide an application, for parties to file an appeal, and for the appellate court(s) to decide an appeal, and (c) the requirement that the return order be final (*i.e.*, no longer subject to ordinary legal challenge) before coercive measures can be applied.

74. At the same time, however, it is important that in certain situations (*e.g.*, where it is known that the appellate procedure will be lengthy or where the protection of the child so requires) the possibility of enforcing the return order before all ordinary legal challenges have been exhausted exists.¹⁰⁹ This can be ensured in different ways: the first instance return order could be made immediately enforceable by law,¹¹⁰ allowing for the possibility of a stay of enforcement either by operation of law once an appeal is lodged, or to be granted by the (first instance or appellate) court *ex officio* or upon application by a party.¹¹¹ Another

¹⁰⁷ See *supra*, Principle 2.3.

¹⁰⁸ *Id.*

¹⁰⁹ There are cases in which the return order has been enforced notwithstanding the fact that an appeal is pending: Case 11.676, *X et Z v. Argentina*, 3 October 2000, Inter-American Commission on Human Rights Report No 11/00 [INCADAT cite: HC/E/ 772] where the Commission held that the immediate enforcement of a return order whilst a final legal challenge was still pending did not breach Arts 8, 17, 19 or 25 of the *American Convention on Human Rights*, *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. Va., 2003) [INCADAT cite: HC/E/USf 494] (although in *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001) [INCADAT cite: HC/E/USf 909] an appeal was not allowed to proceed once the child was returned to the State of habitual residence). However, it should be noted that some States take the view that enforcement prior to appeal should never occur because it renders the appeal meaningless.

¹¹⁰ **Bahamas, Canada (Alberta, Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR), Cyprus, Denmark, Finland, Italy, Luxembourg, Malta, Mexico, New Zealand, Norway, Panama, Sweden, United Kingdom (Northern Ireland, Scotland), United States of America.** In **Luxembourg**, the return order is by law provisionally enforceable and the judge can, in cases of necessity, order actual enforcement to begin immediately. In **Belgium** decisions under the Convention are given by a tribunal of summary procedure and, as such, the decisions are immediately enforceable, notwithstanding an appeal.

¹¹¹ **Bahamas** (enforcement will be stayed pending appeal); **Canada (Alberta, Manitoba, Nova Scotia)**: stay can be ordered because of the appeal or for other reasons; **Quebec**: often return orders are enforceable notwithstanding any appeal. If so, a parent who wishes to appeal the order must ask the Court of Appeal to stay execution of the return order until the appeal

possibility would be to require finality of the return order by law before it can be enforced but to enable the courts to declare the return order provisionally enforceable if the circumstances so require. In some systems, this is possible during the period in which an appeal can still be lodged and / or after the appeal has been filed but not yet decided.¹¹² In other systems, it is not possible to declare the return order (provisionally) enforceable where no appeal has been filed and the time for doing so has not yet expired. If an appeal is then actually filed the court of first instance¹¹³ or the appellate court¹¹⁴ can declare the return order enforceable despite the pending appeal. It is worth noting that where this latter model operates there are usually very short deadlines for filing an appeal.¹¹⁵

75. With regard to extraordinary legal challenges (in most legal systems these take the form of constitutional challenges and applications for a reopening of the proceedings due to a change of circumstances¹¹⁶), it is suggested that the distinction between these and ordinary legal challenges should be echoed at the level of declaring the return order enforceable or staying enforcement. Here States are encouraged to distinguish as clearly as possible between “ordinary challenges” – which in most cases may “ordinarily” justify delaying enforcement until the return order is final – and “extraordinary challenges” which will only very extraordinarily justify a further delay in enforcing a decision which is often already final and has gone through several instances.

is heard and a decision is rendered; **Saskatchewan**: enforcement can be stayed upon application of the appealing party); **China (Hong Kong SAR)** (an appeal does not automatically suspend the enforceability / enforcement of the return order. If the return order establishes a time limit within which the return must be effected, the appellant should apply for a stay of execution pending appeal. The application for a stay must first be made to the court of first instance, and then to the Court of Appeal if the court of first instance refused the application); **Cyprus**; **Denmark** (court of first instance or appellate court can order a stay pending appeal); **Malta** (an appeal will suspend enforcement); **Mexico** (enforcement of interim orders or decrees (*sentencias interlocutorias o autos*) will be stayed where it could cause irreparable harm or would be difficult to reverse if the applicant so requests with reasons; the enforcement of judgments and freezing orders will also be stayed); **New Zealand** (court of first instance or appellate court can order a stay upon application by a party); **Norway** (court of first instance can order a stay); **Panama** (the appeal suspends the return order and its enforcement); **Sweden** (whilst first instance orders for return are immediately enforceable, a party bringing an appeal can prevent enforcement after the appeal has been filed by seeking an ‘inhibition’ or stay of the order pending the decision of the appeal court); **United Kingdom (England & Wales)**: enforcement will be stayed pending appeal; **Northern Ireland**: the return order is stayed pending the appeal; **Scotland**: in case of an appeal, a stay is likely); **United States of America** (some states; court rules vary with regard to whether stays are mandatory or discretionary).

¹¹² **Austria** (in exceptional cases the court of first instance may order immediate enforceability irrespective of an appeal), **Belarus** (where it might adversely affect the physical or mental health of the child or result in the impossibility of the enforcement of the decision to leave the child with the abducting parent), **Czech Republic**, **France** (court of first instance may order provisional enforceability), **Greece**, **Lithuania** (in cases of urgency and upon a written request of the applicant; provisional enforceability can be ordered by the court of first instance as well as by the appellate court or the court of cassation). In **Spain**, if the return order was declared provisionally enforceable and is appealed, the appeal stays enforcement and an application for a new order for provisional enforcement is required for enforcement pending the appeal. **United States of America**.

¹¹³ In **Argentina**, the decision has to be final in order to be enforced but when granting leave to appeal, the court of first instance can order that an appeal shall not stay the enforcement. In **Switzerland**, the initial return order can state that an appeal shall not suspend enforcement. If no such statement is included and an appeal is filed, a separate order is required for the order to be (provisionally) enforceable pending the appeal.

¹¹⁴ In **Germany**, a first instance return order has to be final in order to be enforceable, *i.e.*, the two-week deadline for filing an appeal must have expired, or the appellate court must have given a final decision. The court of first instance cannot order an earlier enforcement. If an appeal is filed, however, the appellate court has to examine *ex officio* whether to order immediate enforceability. According to the relevant provisions, this *should* be ordered where the legal challenge is obviously ill-founded or where the return of the child before a decision on appeal is in line with the child’s best interests, taking into account the justified interests of the parties.

¹¹⁵ **Argentina**: different in each province, average five days; **Germany**: two weeks.

¹¹⁶ See *supra*, Principle 2.3 and the accompanying text.

4. THE ENFORCEMENT PROCEDURE (INCLUDING THE RETURN ORDER TO BE ENFORCED AND THE AIMS OF ENFORCEMENT) AND THE ACTORS INVOLVED

- 4.1** A court, when making a return order, should carefully choose the appropriate option for returning the child. In all but exceptional circumstances¹¹⁷ the order should require the immediate return of the child as delays can further harm and cause confusion for the child and can provide an opportunity for the abducting parent to re-abduct the child.
- 4.2** A court, when making a return order, should make it as detailed and specific as possible, including practical details of the return and the coercive measures to be applied if necessary.
- 4.3** The practical arrangements which are necessary for the implementation of the return order should preferably be decided after the judge has heard the submissions of the parties and considered their respective proposals. Courts are encouraged to invite the parties to make such proposals and, if possible, to agree on the practical arrangements to be incorporated in the return order.
- 4.4** Where appropriate, the court might consider including a hierarchical scale of different options in the return order.
- 4.5** Questions concerning the child's travel documents should be clarified well before the enforcement stage, preferably before, or at the time of, making the return order.
- 4.6** There should be a possibility for the authorities of the State(s) concerned to issue a provisional "*laissez-passer*" for one-time use to enable the child to leave the country and be returned to the State of habitual residence.

76. Article 12 of the Convention provides for ordering "the return of the child". The Preamble of the Convention specifies that this is normally to the State where the child habitually resided prior to his or her wrongful removal or retention. There is no explicit reference in the Convention regarding ordering a surrender / delivery of the child to a person, or a change of the primary carer. This leaves a range of possibilities for a return order under the Convention of which courts should be aware when making a return order. In most legal systems, courts can (1) order the abducting parent to return the child to the State of habitual residence, (2) order the child to be handed over to the applicant parent or a person designated by him / her for the purpose of returning the child to that State, or – in some legal systems – (3) order the child to be collected by an enforcement officer who (normally in co-operation with child protection authorities) will make practical arrangements for returning the child. Courts should bear in mind the options that are available in their legal system when choosing the solution which is most appropriate in the individual case, depending in particular on the willingness of the abducting parent to co-operate.

¹¹⁷ For example, where the child needs to be prepared for the return, see *supra*, Principle 1.4.

77. It is important for courts to make the return order as specific as possible. The country of destination is normally mentioned, and some return orders contain clear details of the mode of return,¹¹⁸ *i.e.*, when, how and by whom the child is to be returned. Often such details indicate that the applicant or the respondent will return with the child to the State of habitual residence.¹¹⁹ Where surrender of the child to the applicant is ordered, it is equally important to specify details in the return order. Useful details are, *e.g.*, the time and place of the handover and whether the presence of other professionals such as consular officers, social workers, psychologists or others is required.¹²⁰ However, the power of the court to order the participation of such other professionals will depend on international and domestic law. To give an example: it is beyond the power of a court of one State to order the participation of consular officers of another State in the enforcement of the return order. Likewise, a national court may, under its domestic law, lack the power to oblige a certain agency or authority of that State (who may or may not have been a party to the return proceedings) to participate in the handover and / or return of the child, *e.g.*, because the powers and obligations of that agency or authority are regulated by law and that law does not provide for such participation. With regard to the parties themselves, and also to authorities, agencies and other bodies potentially affected by a return order, courts are encouraged to communicate with them, preferably before making the order, and reach agreement on how to best proceed.

78. In a number of legal systems return orders are rarely appealed and are normally complied with voluntarily. It is noteworthy that in many of these jurisdictions (where there is a high degree of compliance), the court will closely involve the parties and / or their lawyers in working out the practical details of the child's return and, where necessary, facilitate agreement on the practical arrangements and then incorporate those practical details into the return order. Such details may include the precise dates for travel, who has to take the child on board which flight, who is to buy the plane ticket, etc. An order made on this basis is more likely to gain acceptance and compliance than a court order that is imposed upon an abducting parent who is mentally and psychologically unprepared.

79. Consideration should be given to including a provision requiring the presence of the parties, or in the case of the applicant parent, the presence of his / her legal counsel, at the pronouncing of the judgment on the application for return. Thus, if return is ordered, any conditions of return can be finalised in the presence of the parties and / or their counsel, which should lead to a more expeditious enforcement process. Where a party's physical presence is not possible, the court should consider using other forms of participation such as video conference, including through the internet, telephone conference or other modern methods of communication.

80. Another issue the court should consider before making the return order is the possible need for travel documents for the child. Where appropriate, provisions relating to these questions could then be included in the return order. The following should be clarified: whether the child has his or her own passport, the nationality of the child, whether an exit or entry visa is required for travelling to the State of habitual residence and which parent has the authority to apply for the child's passport.

81. If the child does have his or her own passport and the court intends to order the surrender of the child to the applicant, the court could order the surrender of the passport as well. In some jurisdictions this may not be necessary because the enforcement officer is entitled by law to collect personal belongings when removing the child.

¹¹⁸ Bahamas, Canada (Manitoba, Nova Scotia, Quebec), China (Hong Kong SAR), Latvia, Lithuania, Malta, Norway, Spain, Switzerland, United Kingdom (Northern Ireland), United States of America.

¹¹⁹ See the responses from Spain and the United Kingdom (Northern Ireland) to the 2004 Questionnaire.

¹²⁰ Spain, Switzerland and United States of America (information provided by Mr James Bischoff).

82. If the child does not have his or her own passport but appears on the passport of the abducting parent who refuses to return with the child, it would be useful to clarify which authority would be competent to issue a passport or other identity document (including a provisional *laissez-passer* or emergency passport for one-time use) for the child, and what the requirements are. If the child is a national of the requesting State or of a third State, it should be checked whether the application would have to be made to the authorities *in* that State, or to that State's consular offices in the requested State. Similarly, if the child is a national of the requested State it might still be that State's consular authorities in the requesting State (where the child is habitually resident) which would be competent to issue an identity document for cross-border travel.

83. If both parents have joint custody and the child requires an identity document, both parents often have to sign the application.¹²¹ The same may apply with a visa application. Where the abducting parent refuses to co-operate in this respect, it will be necessary to resolve this problem quickly. Often it is possible for a court to consent instead of the parent, and it is therefore important to know which courts of which State will have to intervene in such a process. While jurisdiction for child protection measures is mostly based on the habitual residence of the child, the issuance of identity documents is a sovereign act of the State of nationality, and therefore it is not obvious which State's courts will have jurisdiction to replace or dispense with a parent's consent to the issuance of an identity document for the child. Courts are therefore encouraged to ensure they have the proper information before them as early as possible, if necessary with the assistance of the Central Authorities, and in any event before making a return order.

84. If the child is a national of the requesting State and it is for the authorities in that State to issue *permanent* identity documents such as a passport, and if it appears impossible to complete such a procedure before the envisaged return of the child, it would be desirable for the authorities (including the consular authorities) of the State concerned to issue a provisional *laissez-passer* or emergency passport for one-time use to enable the child to leave the country and be returned to the State of habitual residence. This would avoid the purposes of the Convention being frustrated by an abducting parent who refuses to co-operate in obtaining travel documents for the child. Where assistance in this respect is required from the courts and authorities of the State where the return proceedings are pending, such assistance should be provided as far as possible. For example, a court could consider procuring or ordering the abducting parent to submit photographs of the child under Article 7(2) *b*) and *l* or *h*) of the Convention if they are required for the new identity document or visa.

85. Lastly, the court might need to lift border alerts ordered earlier to prevent the child from being taken out of the jurisdiction. The lifting of these border alerts should be done in such a way as to ensure that the abducting parent does not have time to abscond with the child. The court order could specify that the border alert is not to be lifted until the time of the departure, or could ensure that the passports for the abducting parent and the child are being held by another person, such as an enforcement officer, until the border alerts are lifted.

86. The ultimate goal is to implement the court order and achieve the return of the child while at the same time causing as little stress for the child as possible. If the extent of co-operation of the abducting parent in returning the child appears unpredictable at the time that the court makes the return order, a possibility would be to include "cascading options" into the order, starting with an option that interferes less drastically with the situation of the child and, in case this should later fail, providing for another, more drastic option. The following are examples¹²² to choose from: "The respondent mother is ordered to return the child into the applicant father's custody by (date) at the latest with a view to returning to State X; the

¹²¹ In the **United States of America**, for example, both parents' consent is required for the issuance of a passport to a person under the age of 16; 22 CFR § 51.28(a)(2). However, a passport for direct return to the United States of America may be issued with the consent of one parent only in circumstances where the return of the minor to the USA is necessary to permit a court of competent jurisdiction to adjudicate or enforce a custody determination; 22 CFR § 51.28(a)(5)(ii).

¹²² These examples have been taken from the responses of **Canada (Quebec)** and **Germany** to the 2004 Questionnaire.

mother can avoid the handover of the child to the applicant by notifying the Court before that date that she has returned to State X with the child.” Another option would be: “The Court orders the immediate return of the child to State X and permits the respondent mother to accompany the child. Should the mother fail to return the child before (date), the Court orders the child to be returned to the father’s custody with a view to returning to State X.”

87. This “cascade” of options offers some advantages. First and foremost, it keeps stress for the child to a minimum, and only where one option has failed, another, probably more stressful but also more efficient option will be implemented. Secondly, by incorporating this scale in the initial return order, loss of time is avoided if one option is not complied with. This requires, however, close monitoring by the court or another authority vested with responsibility for overseeing enforcement.

88. In the event that a child’s location is not known or changes, the police play a crucial role in locating the child so that the order for return can be executed. Given that, in many cases, the police may be involved from the beginning stage of the proceedings right through to the enforcement, States should consider, where possible, setting up a special police unit to handle cases of abduction so that this unit develops an expertise and a more consistent approach to the handling of such cases. This unit could co-ordinate with and act as a contact point for the Central Authority and maintain direct contact with local units around the country and with officers directly involved in the enforcement.¹²³

¹²³ For example, in **Israel**, the Crime Victims Department of the Israeli Police is responsible for co-ordinating the carrying out of any necessary action required by the Israeli Police under the Convention. It has determined internal guidelines as to how such cases are to be handled so that there will be uniformity amongst the different police units throughout the country.

5. PROMOTING VOLUNTARY COMPLIANCE¹²⁴

- 5.1** Having regard to the benefits to the child of an amicable settlement, the Central Authority and the court should, from the outset and throughout the proceedings including the appeal stage, work as appropriate with the parties or their legal advisers and give consideration to the possibility of a mediated or other form of voluntary settlement, without prejudice to the overriding obligation to avoid undue delay in the litigation.
- 5.2** At the enforcement stage, efforts to reach an amicable outcome, in particular agreement on the modalities of return and on voluntary compliance, should continue. To that effect, the court, the Central Authority and the enforcement officers should work as appropriate with the parties or their legal advisers and give consideration to the possibility of a mediated or other agreement. However, this should be without prejudice to the overriding obligation to avoid undue delay in implementing the return order.
- 5.3** Where appropriate, courts should request the assistance of professionals from psycho-social professions as well as professional mediators with a view to achieving an amicable settlement and / or preparing the parties involved, in particular the child, for the return. Such assistance should be available at every stage of the proceedings if necessary, including the enforcement stage. It should, however, be sought as early as possible during the proceedings.
- 5.4** Effective mechanisms should be available to ensure the enforceability in the relevant States of agreements reached by the parties so as to be able to proceed to enforcement without delay if the agreement is not complied with.

89. It is obvious that the interests of the child are likely to be best served if an amicable solution can be reached.¹²⁵ Attempts to achieve an amicable solution should start as early as possible. Depending on the legal system, this could be before or during court proceedings. At the same time, it is important that they do not affect the rapid procedure required by the Convention. In Sweden, for example, the court may request a representative of social services, or another person deemed suitable, to act as a mediator to try to reach a voluntary solution, provided that there is a reasonable prospect that such a measure will result in the voluntary return of the child, and will not unduly delay the proceedings in court. The maximum timeframe allowed for mediation is a period of two weeks, which can only be prolonged under exceptional circumstances.¹²⁶ Similarly, in some pilot projects for bi-national co-mediation between Germany and a number of other jurisdictions,¹²⁷ mediators included in the projects have agreed to be available for three 3-hour mediation sessions (normally over a single weekend) within two weeks if necessary. It has to be recalled, however, that the attempt to achieve an amicable solution requires careful evaluation of the parties' conduct by those in charge of the proceedings, in particular Central Authorities and the courts, as willingness to negotiate can also be a tactic to protract the return proceedings.

¹²⁴ See "Feasibility study on cross-border mediation in family matters – Responses to the Questionnaire", Prel. Doc. No 10 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference, drawn up by the Permanent Bureau, available at < www.hcch.net > under "Work in Progress" then "General Affairs".

¹²⁵ See, *inter alia*, the responses of **France**, **Luxembourg** and **Monaco** to the 2004 Questionnaire.

¹²⁶ See **Sweden's** response to the 2004 Questionnaire.

¹²⁷ See *infra* note 130.

90. Amicable solutions reached during the course of the return proceedings can take many forms, e.g., a return to which the abducting parent agrees, or agreement of the left-behind parent to the child and the other parent remaining in the new State provided that satisfactory arrangements for contact between the child and the left-behind parent are found.

91. Even where no amicable settlement can be reached during the course of the return proceedings, and, as a consequence, a return order is made, efforts by all those involved, including enforcement officers and in particular the parties, to achieve voluntary compliance should continue after the order is made. The least that can be gained at this stage is to avoid coercive enforcement, but sometimes it might even be possible to come to an overall amicable solution. However, efforts to reach an amicable outcome must always be subject to the principle that the return order should be implemented without undue delay. As mentioned above, efforts at reaching amicable solutions should not affect the rapid procedure required by the Convention and this principle applies *a fortiori* at the enforcement stage of proceedings.

92. Mechanisms that can be used to create an environment in which the abducting parent is willing to return without coercive measures can include: undertakings given by the applicant parent, the making of mirror orders in the courts of the requesting and requested States which provide for the protection of the child and the parent, and co-operation with the authorities of the requesting State to seek the withdrawal of any criminal warrant for the abducting parent or to ensure that a custody hearing will be held expeditiously upon the return of the child to that State. Requiring the presence of the parties, particularly the abducting parent, at the pronouncement of the judgment ordering return allows discussions on this issue to begin immediately.¹²⁸

93. However, in attempting to ensure that the abducting parent is willing to return voluntarily, care must be taken not to set unduly onerous conditions for the return, for example, those requiring the authorities of the requesting State to take actions that they are unable to take or requiring the applicant parent to give undertakings which are particularly burdensome, e.g., to make payments which are beyond the applicant's means.

94. Any undertakings that are required from the applicant parent must be proportionate and clearly related to the need to protect the child and / or the accompanying parent. The duration of the undertaking must be only for as long as is necessary, bearing in mind that it will be for the authorities of the State of the habitual residence of the child to make long-term orders in this situation.

95. The involvement of professional mediators and / or experts from the psycho-social professions may contribute to reaching an amicable solution, provided that they are involved at a sufficiently early stage *and* are familiar with the aims of the Convention. To ensure the latter, and also to avoid loss of time caused by the search for mediators, it is recommended that the necessary infrastructure be created in advance.¹²⁹ This could involve, e.g., the establishment of a pool of interested mediators who agree to make themselves available for mediation in Hague return proceedings at short notice, and who receive some training on the legal framework.¹³⁰ The competent authorities, e.g., the Central Authorities and / or the courts, should have ready access to this pool of mediators if the need arises.

¹²⁸ Or in the case of the applicant parent, his / her legal counsel. Where a party's physical presence is not possible, the court should consider using other forms of participation such as video conference, including through the internet, telephone conference or other modern methods of communication.

¹²⁹ In the **Netherlands** the pilot project currently under way (*op. cit.* note 84) involves the use of mediation during the 'preparatory phase' (pre-proceedings) and whilst court proceedings are ongoing. The mediation is to be conducted by professional mediators (who are lawyers and psychologists). In **Belgium** a working group has been established to explore the possibility of putting in place a model for international family mediation.

¹³⁰ In the **United Kingdom**, the non-governmental organisation Reunite has carried out a pilot project on mediation in international parental child abduction and published a report on it in October 2006 which is available at < www.reunite.org >. Another pilot project for bi-national co-mediation in Hague return cases was conducted between **Germany** and **France** between 2003 and 2006. In 2008 / 2009 a comparable project was in the course of being established between **Germany** and **Poland**.

96. Parties are strongly advised to submit any agreement, whether achieved in or out of court, to the courts so as to make it enforceable if necessary. Contracting States are encouraged to facilitate this in their respective legal systems. Depending on the choices available, the agreement could, for example, be turned into a court-approved settlement which in many civil law States can be enforced like a judgment, or result in what is known in common law legal systems as a “consent order”. If the agreement is not complied with enforcement can then start without further delay.

6. THE CHILD

- 6.1** Where appropriate, having regard to the abducted child's age and maturity, the wishes and feelings of the child should be explored at an early stage of the return proceedings and, where a return is ordered, should duly be taken into account when considering how best to implement the return.
- 6.2** In accordance with his / her age and maturity, the child should, as far as possible, be kept fully informed about enforcement proceedings and what will happen once he / she returns to the State of habitual residence.

97. Even in jurisdictions where there is a high degree of voluntary compliance with Hague return orders and, as a rule, coercive enforcement issues do not therefore arise, there have been cases where a return order could not be implemented because the child objected to being returned.¹³¹ In Finland, domestic legislation on the enforcement of Hague return orders explicitly provides for this situation.¹³²

98. In 1980, when the Convention was adopted, it was not common in many jurisdictions to hear children in court proceedings. Consequently, the Convention does not contain an explicit obligation to hear the child. Return may, however, be refused under Article 13, paragraph 2, if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his / her views. In proceedings under the Convention it will therefore often be the abducting parent, when raising an Article 13, paragraph 2 defence, who brings in the child's perspective.

99. However, since 1980, several new international instruments at the global and regional levels, including the *United Nations Convention on the Rights of the Child* (UNCRC),¹³³ the *European Convention on the Exercise of Children's Rights*,¹³⁴ the Brussels IIa Regulation¹³⁵ and others, have established an obligation to explore the wishes and feelings of a child and take due account of them in certain court proceedings concerning the child, bearing in mind the child's age and maturity. Most of the provisions of an international nature leave it to national law or to the judge's discretion to determine whether the child is to be heard by the judge in person, or whether the child's views, wishes and feelings are explored by a different professional – normally from the psycho-social professions – and then reported to the court.¹³⁶ Domestic legislation on this issue has also evolved – perhaps even more than international law which reflects the lowest common denominator. For many States, the obligation to explore the child's wishes and feelings, as well as his or her views, and to take due account of them, is now mandatory. However, for other States the decision as to whether the child should be heard is left to the discretion of the judge.

¹³¹ E.g., Finland, United Kingdom (Scotland).

¹³² Finnish Child Custody and Right of Access Act, Section 46 — Enforcement of a decision on the return of a child (186/1994) (...)

(2) If the order to return a child is based on an application that had been filed before one year had passed from the abduction of the child or the failure to return the child, the enforcement of the order to return the child may be declined only if the child objects to being returned and has attained such an age and level of maturity that it is appropriate to take his or her opinion into account. (620/1996)

In Belgium the judicial authorities can contact the Youth Support Department or a Youth Court if they encounter difficulties in enforcing the decision to return. The Youth Support Department is in charge of ensuring the safe return of children.

¹³³ Art. 12.

¹³⁴ Art. 3, Art. 6 b), second indent.

¹³⁵ Art. 11(2).

¹³⁶ Art. 12(2) of the UNCRC, Art. 6 b) of the *European Convention on the Exercise of Children's Rights*, second indent, Recital 19 of the Brussels IIa Regulation.

100. In order to avoid a failure of coercive enforcement due to the objection of the child at the last minute, *i.e.*, when enforcement is taking place, it is important to take into account the child's perspective as early as possible during the return proceedings and also when making efforts towards achieving an amicable solution.¹³⁷ Where a return order is made but cannot then be enforced because the child strongly refuses to travel,¹³⁸ even where the abducting parent has agreed, this equally frustrates the purposes of the Convention and the return order. An early exploration of the child's wishes and feelings in the course of the return proceedings will allow time to prepare the child for return, where necessary, with the help of experts from the psycho-social professions.¹³⁹ However, care should be taken to ensure that in the course of exploring the wishes and feelings of the child, he / she is not encouraged to make an objection to being returned that would not otherwise exist.

¹³⁷ See **Sweden's** response to the 2004 Questionnaire. For the **EU Member States** (except Denmark), see also Article 11(2) of the Brussels IIa Regulation which now makes it mandatory for courts in the States bound by the Regulation to give the child an opportunity to be heard unless this appears inappropriate having regard to his or her age or degree of maturity.

¹³⁸ See as an example *T.B. v. J.B. (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 [INCADAT cite: HC/E/UK 419] where the Court of Appeal's decision to order the return of the children to New Zealand was subsequently not enforced due to the children physically resisting attempts by the enforcement officer (the tipstaff) to escort them to the airport.

¹³⁹ See *supra*, Principle 1.4.

7. CO-OPERATION AMONG COURTS, AUTHORITIES AND OTHER ACTORS WITHIN THE REQUESTED STATE

101. During the course of Hague return proceedings, including at the enforcement stage, co-operation among different domestic actors is important:

7.1 Where the system permits, the court responsible for making a return order should exercise supervision over the process of implementation. Where the court does not have this responsibility, another court (e.g., a specialised enforcement court) or public authority (e.g., the Central Authority) should assume it. The authority responsible for effecting a return should endeavour to achieve it in accordance with the terms of the return order and at the earliest practicable date consistent with the order.

102. Article 12 of the Convention obliges the judicial or administrative authority concerned (normally a court) to order the return of the child. Paragraphs *c*) and *h*) of Article 7 oblige the Central Authorities to secure the voluntary return of the child or to bring about an amicable resolution of the issues, and to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child. Beyond these obligations, to achieve the purposes of the Convention, it is important that mechanisms are in place to ensure the actual return of the child where an amicable resolution cannot be reached and a return is ordered. The clear attribution of overall responsibility for overseeing the implementation of the order, combined with a routine follow-up after the return is ordered, will contribute to swift implementation and make it possible to take additional steps as soon as the need arises.

103. A number of different institutions might be considered by Contracting States when deciding which one of them shall assume the obligation of monitoring the implementation of a return order, if necessary by coercive enforcement. In several jurisdictions, it is either the court that ordered the return which supervises or monitors the enforcement procedure,¹⁴⁰ or a specialised enforcement court¹⁴¹ to which this responsibility is attributed. In other jurisdictions, the Public Prosecutor's Office has an important role in initiating and / or monitoring enforcement.¹⁴² It might also be the Central Authority who is responsible for supervising or monitoring the enforcement of the return, either alone¹⁴³ or together with a court.¹⁴⁴ In doing so, the Central Authority should liaise with other actors involved such as legal counsel, courts, the requesting Central Authority, the police and other competent authorities.¹⁴⁵

¹⁴⁰ **Argentina, Austria, Czech Republic** (first instance), **Germany** (the court which ultimately orders return or confirms a return order; could be first instance or appellate court), **Panama** (first instance), **Romania, Slovakia** (first instance), **Spain, Switzerland** (in some cantons), **United Kingdom (Isle of Man, Northern Ireland), United States of America.**

¹⁴¹ **Switzerland** (in some cantons), **Turkey.**

¹⁴² **France, Italy, Luxembourg.** In **Belgium** it is the Office of the Public Prosecutor (the *Ministère Public*) who, pursuant to Article 139 of the Judicial Code, is in charge of enforcing judicial decisions. However, Article 1322 of the Judicial Code states that, when ordering the return of a child, the President of the court can determine the appropriate methods of enforcement, taking into account the interests of the child and can appoint, if necessary, the individuals who are allowed to accompany the bailiff when executing the order. Where it is anticipated that difficulties with enforcement may arise, the court can appoint professionals, such as psychologists and social workers, to assist the bailiff.

¹⁴³ **Canada (Manitoba, Nova Scotia, Quebec, Saskatchewan), China (Macao SAR), Cyprus, Georgia, Malta, Monaco, Netherlands, New Zealand, South Africa, Sweden** (but here in practice the police also has an important role), **United Kingdom (Montserrat).** In the **Bahamas**, the Attorney General's office, to which the Central Authority refers, supervises enforcement.

¹⁴⁴ **Chile, Mexico** (court of first instance and Central Authority), **Portugal** (the court requests the involvement of the Central Authority and the Central Authority then executes the order with the assistance of the police, the applicant and the lawyers involved in the case), **Romania.** In **Mexico**, moreover, the Presidency of the *Tribunal Superior de Justicia* of each state supervises the work of the courts of first instance.

¹⁴⁵ **New Zealand.**

7.2 Where the application of coercive measures is envisaged, enforcement officers should have at their disposal comprehensive information concerning the facts of the particular case and the court order to be enforced. They should also be familiar with the aims of the Convention.¹⁴⁶

104. Ordering (either in the return order itself or as an enforcement measure) that the child be removed from the abducting parent and handed over to the applicant or another person who will take care of the actual repatriation is a measure which will directly affect the child. Therefore, every precaution should be taken in order to make sure that the child will not be traumatised, and to ensure that enforcement is successfully completed – preferably at the first attempt.

105. Even where there is an institution *overseeing* enforcement, such as a court, public prosecutor or Central Authority, it will, practically speaking, be someone else who is charged with the actual taking of the child. This will often be a law enforcement officer, a bailiff, receiver, officer of the court (e.g., the tipstaff) or other official as designations vary.¹⁴⁷ In a number of jurisdictions it is the police who are charged with this duty, either by law or as ordered by the court in a particular case.¹⁴⁸ Often the police might also intervene to assist the bailiff or other enforcement officer if there are problems.¹⁴⁹ As the enforcement of return orders under the Convention is not likely to occur very frequently in the daily practice of these professionals, it is important for them to be provided with the relevant information before they proceed to enforcement.

106. In an often multinational (and multicultural, as well as multilingual) situation of family crisis, enforcement by coercive measures, in particular the removal of a child by an enforcement officer, requires careful preparation. The place and time of enforcement will have to be carefully chosen (e.g., at the home of the abducting parent or in a neutral place such as at the school the child is attending; during the day or an early-morning surprise visit, etc.). Depending on the circumstances of the case, and in the States which permit such a measure, it will have to be considered whether enforcement in a neutral place such as school or kindergarten, avoiding the presence of the abducting parent, is desirable or not. While this will avoid a battle between the two parents and thereby contribute to de-escalation, it also has to be borne in mind that the child may not have been in contact with the left-behind parent for a long time and that the abducting parent during this period has been the primary carer. Therefore it can be important to give the child an opportunity to say good-bye to the abducting parent. In order to put the enforcement officer (or whoever else is in charge of making these decisions) in a position to take a decision which meets the child's best interests, it is important to provide that person or body with as complete a picture of the legal and, in particular, the factual background of the case where possible, e.g., preferably with a copy of the full court order and a description of the factual background which led to the return decision.

107. Depending on whether the applicant parent or another person who knows the child is scheduled to be present at the scene of enforcement (see below under Principle 7.6), it can be useful to provide the enforcement officer with a photograph of the child to enable him to identify the child among other children if necessary. The more information given to enforcement officers, the better they can prepare enforcement and also ensure, where necessary, the assistance of other professionals (see below under Principle 7.3). It was also reported that the presence of both a male and a female enforcement officer has sometimes proved helpful to de-escalate the situation.

¹⁴⁶ On training, see Chapter 9 *infra*.

¹⁴⁷ Austria, Belarus, Bulgaria, Czech Republic, Finland, Germany, Greece, Latvia, Lithuania, Norway, United Kingdom (England & Wales), United States of America.

¹⁴⁸ Canada (Manitoba, Nova Scotia, Quebec, Saskatchewan), Chile (mentioning the police (*Carabineros de Chile*) or Interpol as mandatory participants), Netherlands, New Zealand, Panama, Sweden, Switzerland (together with child protection authorities).

¹⁴⁹ Argentina, Austria, China (Macao SAR), Cyprus, Finland, France, Germany, Italy, Latvia, Norway, Romania.

- 7.3** Before proceeding to enforcement, it should be considered whether other professionals (e.g., the psycho-social professions, mediators, interpreters, a judge where appropriate, etc.) need to be involved in either the preparation of enforcement and/or at the actual scene of enforcement. The professional actually carrying out the enforcement should be able to call upon the assistance of such other professionals if required. However, the need for the involvement of additional professionals should always be weighed against any delay which might be occasioned by their involvement.
- 7.4** It should also be possible to involve other professionals where the need for the involvement of such other professionals only materialises *once enforcement has already started*.
- 7.5** All professionals involved in the enforcement of a return order should be aware of each other's role and responsibilities. They should closely co-operate throughout the proceedings.

108. Depending on the circumstances of the case, the involvement of other professionals in addition to the enforcement officer might facilitate enforcement. Possible participants are, *inter alia*, interpreters (where the child and/or the abducting parent does not speak the language of the State of enforcement), professionals from the psycho-social professions (child psychologists, social workers, child protection officers, etc.), mediators, the police, a locksmith, the applicant or another person to whom the child is to be handed over, the lawyers of the parties / parents, a *guardian ad litem* of the child or other legal representative, medical doctors, a judge, a representative of the Central Authority or others. Some of these professionals might be needed for practical purposes, others to ensure the physical or psychological well-being of the child. Sometimes their presence *at the immediate scene of enforcement* might be useful, while in other cases their services might be required *before*, namely with a view to mentally preparing the child for return.¹⁵⁰ However, it should always be borne in mind that the involvement of additional parties can cause delays in enforcement. The need for the involvement of such professionals should therefore always be weighed against any delay which might be occasioned by their involvement.

109. However, where such professionals are not routinely involved in Hague cases and/or come into the Hague return proceedings at a very late stage, e.g., when coercive enforcement is already imminent, it is extremely important to provide them with full information about the Convention, the nature of a Hague return order and the specifics of the return order that they are being asked to enforce and to make clear their respective roles and obligations in the enforcement process. This is particularly the case where the court has ordered the surrender of the child to the applicant for the purpose of returning the child to the State of habitual residence. A social worker, a child psychologist or another expert from the psycho-social professions who is not familiar with the Convention might already have assisted the abducting parent and the child with their settling-in following their arrival in that State and some confidence may have been established between them. For this professional it can be difficult to assist the enforcement officer in removing the child from the parent who had requested and received his or her assistance before, and any such conflict among different professionals should be identified and settled before enforcement actually starts.

110. Methods for involving these additional professionals may vary. In some jurisdictions, the participation of certain professionals, in particular social workers or child protection officers, in coercive enforcement situations is prescribed by law.¹⁵¹ More often, however, this decision

¹⁵⁰ See *supra*, Principle 1.4.

¹⁵¹ **Belarus** (representative of the organ of guardianship), **Finland** (social worker), **Lithuania** (representative of the public institution for the protection of children's rights), **Sweden** (in cases where the police take the child into care because of an emergency, either following a court order or on their own initiative).

is left to the discretion of the court.¹⁵² Sometimes the person who will actually be taking the child from the abducting parent (e.g., the bailiff or law enforcement officer) is also responsible for calling in other professionals, if appropriate.¹⁵³

111. Regardless of whose responsibility it is to involve such other professionals, it is recommended that some person or body familiar with the circumstances of the case and the aims of the Convention routinely consider the need for involving other professionals in the preparations for enforcing the return order before enforcement actually takes place. Where this is not to be decided by the enforcement officer but by the court or by another body and will thus normally be done in advance, it should nevertheless be possible for the enforcement officer to request the assistance of additional professionals, should this become necessary once enforcement has started. This could be ensured, e.g., by the presence of a judge at the scene of enforcement or by prior arrangements being made so that the competent persons or bodies are put on alert and can intervene at short notice if necessary.

112. Even in cases where the Central Authority is not directly responsible for supervising the implementation of a return order, it can play an important and active role in monitoring the enforcement, co-ordinating the different actors to the extent necessary, serving as a channel for the exchange of information between the different actors and maintaining ongoing contact with the Central Authority in the requesting State in order to update it and co-ordinate any matters necessary. The Central Authority may wish to consider providing emergency contact numbers in the event that problems arise during the execution of an enforcement after regular office hours.

7.6 Whoever is responsible for deciding who shall be present at the actual scene of enforcement (e.g., the court, the Central Authority, the enforcement officer) should carefully consider whether the presence of the applicant is likely to be helpful or whether there is a risk that it might instead complicate matters in the particular case.

113. Where the court orders that the *abducting parent* shall return the child to the State of habitual residence, or where the child is old enough and ready to travel alone, the question of whether the *applicant* should be present at the scene of enforcement does not necessarily arise. Frequently, however, courts order the *surrender of the child to the applicant* for the purpose of returning the child to the State of habitual residence. If it becomes necessary to remove the child by coercive measures, e.g., by using an enforcement officer, that officer will then normally deliver the child to the applicant or to a person designated by the latter. Often enforcement officers will not proceed to enforcement unless it is clear that the child can be handed over to a designated person once he or she has been removed from the abducting parent.¹⁵⁴ In many legal systems, the presence of the applicant or a person designated by him or her is mandatory,¹⁵⁵ can be ordered by the court¹⁵⁶ or requested by the enforcement organ.¹⁵⁷

¹⁵² Argentina, Austria, Canada (Manitoba, Nova Scotia, Quebec), Chile, China (Macao SAR), Mexico, Portugal, Spain, Switzerland, United Kingdom (Northern Ireland), United States of America.

¹⁵³ E.g., in Canada (Manitoba, Saskatchewan), the police, where authorised by the court to enforce the return order, will request participation of a child protection worker in order to meet child protection concerns. In Finland and Romania, the enforcement officer may request police assistance and, in Finland, the presence of a witness and of social or psychological experts can also be requested. In France, Italy and Luxembourg, the Public Prosecutor (who is the organ responsible for enforcement) may order the assistance of the police or of any other institution considered necessary, such as the Central Authority or social workers. In Germany, the bailiff may request assistance by the police, if required, and should, under the internal guidelines for bailiffs, ensure the participation of the youth welfare office in appropriate cases.

¹⁵⁴ In some States travel assistance programmes are available to help reunite a child with an applicant but such programmes tend to have very specific criteria which have to be met. For example, under the Travel/Reunification Programme in Canada, arrangements can only be initiated once confirmation has been received that the child can be removed legally and is in the custody of local authorities. The parent or legal guardian must be able to obtain legal physical custody of the child upon arrival (information provided by Ms Sandra Zed Finless).

¹⁵⁵ Argentina, Bahamas, Bulgaria, Chile, Czech Republic, Lithuania.

114. If there is a discretion as to whether to order or request the presence of the applicant at the scene of enforcement, courts, Central Authorities, enforcement officers and others who may be responsible for deciding this issue should carefully consider the circumstances of the case. Such circumstances could include, *e.g.*, whether the child has been with the abducting parent and without contact with the left-behind parent for a long time already, who has been the primary carer in the recent past, and other relevant factors. In some cases, the presence of the applicant might comfort the child – in particular where contact has not been interrupted for too long. In other cases, the presence of the applicant at the scene of enforcement, and the possible encounter with the abducting parent, might contribute to an escalation of the conflict. A possible way to avoid this would be to have a person other than the applicant who has a close relationship with the child present at the scene of enforcement in order to comfort the child. In addition, or instead, the applicant could be kept waiting nearby, but out of sight.¹⁵⁸

115. Lastly, it is worth mentioning that where, exceptionally, there are reasons to proceed to enforcement although the applicant has not yet arrived nor designated another person to take the child, it should be possible for the enforcement officer to place the child in protective care until the applicant arrives. This could be appropriate where the child is in danger in the abducting parent's care, or where there is a risk that the abducting parent will abscond with the child.

¹⁵⁶ **Luxembourg.** In **Canada (Manitoba, Nova Scotia, Quebec), China (Hong Kong SAR)** (information provided by Miss Sau Kong Lee) and **New Zealand**, the presence of the applicant at the scene of enforcement is required where the return order specifies that the child has to be handed over to the applicant.

¹⁵⁷ **Finland.**

¹⁵⁸ For the presence of the abducting parent, see *supra*, Principle 6.2.

8. CROSS-BORDER CO-OPERATION TO ENSURE SAFE RETURN

116. During the course of Hague return proceedings including at the enforcement stage, co-operation between the authorities of the States concerned is important.

- 8.1** A court considering the return of a child should be provided, through the Central Authorities or other appropriate channels, with information concerning the protective measures and services available in the requesting State, where this is needed to assist in securing the safe return of the child.
- 8.2** To this end, courts are encouraged to make use of national, regional and international judicial networks¹⁵⁹ and liaison judges and to seek the assistance of Central Authorities where appropriate.
- 8.3** The requesting State should do what it can to create conditions for a return order to be made, for example:
- by ensuring that the impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which is capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges;
 - by making it possible to grant mirror orders or other orders ensuring the protection of the child following return; and
 - by encouraging its courts and administrative authorities to apply these rules with a view to favouring the return of the child – where appropriate accompanied by the abducting parent.
- 8.4** Authorities of the requesting and requested State (*i.e.*, the court before which the application for return is pending, both Central Authorities and, where appropriate, the courts of the requesting State) should communicate with each other as early as possible during the return proceedings with a view to making the practical and legal arrangements which are necessary for the safe return of the child. These arrangements should preferably be in place before the return order is made.

117. During the course of return proceedings, it may become necessary to obtain a safe harbour order (or a mirror order in respect of protective measures taken on a provisional basis in the requested State) to ensure that the child returns to a safe environment.¹⁶⁰ The first precondition for this to happen is that the legal system of the requesting State allows for this. Secondly, where the authorities of the requesting State are vested with some discretion, they should be encouraged to exercise such discretion with a view to favouring the return of the child.

¹⁵⁹ See also the Conclusions and Recommendations of the Joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, held in Brussels on 15 and 16 January 2009, available at < www.hcch.net > under “Child Abduction Section” then “Judicial Communications”.

¹⁶⁰ Common law judges have a long-standing practice of requesting undertakings from the applicant and mirror orders or safe harbour orders from the requesting State if this is necessary to avoid a refusal to return the child. It is worth mentioning that for the Member States of the European Union, a majority of which have a civil law tradition, the Brussels IIa Regulation, at Art. 11(4), states that: “A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”. This should encourage courts in both States concerned to co-operate in creating a safe environment for the child after return.

118. The courts and authorities concerned need to co-operate with each other to put in place the legal framework and practical arrangements for return – preferably before the return order is made, but certainly well before enforcement takes place.¹⁶¹ Such co-operation could take place by way of direct judicial communication and / or direct contacts between courts and authorities involved, or with the assistance of the Central Authorities, national, regional or international judges' networks and liaison judges.¹⁶²

119. When the return of a child involves long-haul flights, special international co-operation should be considered. In these situations there can be concerns that the opportunity exists for the abduction of the child during transit stops. There are a number of measures that can be taken to prevent this. The passports of the child and accompanying person could be retained by the airline on each leg of the return journey, the movements of the child and accompanying person could be restricted to the transit area and border officials could meet and escort the child and accompanying person to and from flights in the transit areas.

120. Central Authorities and the courts should also assist the parties as much as possible to make the appropriate arrangements.

¹⁶¹ See also Principle 4.3 *supra* regarding the encouragement which should be given to the parties themselves to make proposals and, if possible, to agree the practical arrangements for return.

¹⁶² Where direct judicial communications do occur, this must obviously be done in accordance with domestic law. However, where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure or under relevant international instruments, the necessary steps should be taken to ensure that such a legal basis exists: see Recommendation No 15 from the Joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (Brussels, 15–16 January 2009), *op. cit.* note 159. Work is still ongoing in relation to the Draft General Principles on Direct Judicial Communications, which are being developed to provide guidance and safeguards for engaging in direct cross-border judicial communications.

9. TRAINING AND EDUCATION

- 9.1 The professionals responsible for enforcing a return order should receive appropriate training.**
- 9.2 The professionals responsible for enforcing a return order should be aware of the role of other relevant professionals in their jurisdiction (for example, social workers, psychologists, interpreters) who could assist in the enforcement and its preparation. Interdisciplinary training which brings together representatives of these different professions is recommended.**
- 9.3 All professionals involved in Hague return proceedings and the enforcement of return orders should be made aware of the objects of the Convention.**
- 9.4 All professionals involved in Hague return proceedings and the enforcement of return orders should be made aware of the possible pressure of the media and / or parent initiatives and support groups in such cases, and should be prepared to deal with this pressure.¹⁶³**
- 9.5 Problems can occur when judges, lawyers and other professionals are unfamiliar with the Hague return process. There is merit in a properly trained and educated specialist group of judges and lawyers undertaking this work so as to reduce delays and add integrity to the process.**

121. As has been pointed out in earlier Parts of this Guide,¹⁶⁴ the training of professionals involved in the application of the Convention is essential for its smooth operation in the child's best interests. Undue delays can occur in return proceedings because insufficient training or specialisation amongst the professionals involved leads to a lack of appreciation for the operation of the process and the importance of speed throughout.

122. Training regarding the application of the Convention is provided in many Contracting States and it can take various forms. Awareness among legal professionals, such as judges and lawyers, of the aims and purposes of the Convention can be increased through the initial education required for the exercise of their professions, subsequent ongoing training and additional regular or *ad hoc* conferences and seminars which provide a forum for the exchange of experience. It is also useful to include enforcement issues amongst the issues to be discussed at such training events for the legal professions.

123. For judges, depending on the way the judiciary is organised, Ministries of Justice and Magistrates' Associations, separately or jointly, offer training for judges and officers of the court¹⁶⁵ – sometimes through so-called Judges' Academies or Judicial Training Centres which are operated by them. Often training is offered by the institutions related to the respective professions, such as Bar Associations or Law Societies offering training for lawyers.¹⁶⁶ In many jurisdictions, the Central Authority plays an active role in providing

¹⁶³ In this context, see also *supra*, Principle 6.4, stating that all professionals involved in Hague return proceedings and the enforcement of Hague return orders should be aware of each other and their respective roles.

¹⁶⁴ See the Guide to Good Practice on Central Authority Practice, *op. cit.* note 20, Chapter 6, the Guide to Good Practice on Implementing Measures, *op. cit.* note 33, in particular Chapter 10, the Guide to Good Practice on Preventive Measures, *op. cit.* note 29, Chapter 5, and the Guide to Good Practice on Transfrontier Contact, *op. cit.* note 12, Principle 7.5.

¹⁶⁵ **Argentina, Austria, Bulgaria, Chile, China (Macao SAR), Czech Republic, France, Latvia, Lithuania, Mexico, Monaco, Netherlands, Panama, Slovakia, South Africa, Spain, Sweden, United Kingdom (Scotland), United States of America.**

¹⁶⁶ **Argentina, Austria, Canada (Manitoba, Quebec), Chile, New Zealand, Spain, United Kingdom (Scotland), United States of America.** The **United Kingdom (Isle of Man)** responded that some of the training is undertaken as part of the professional qualification required for the person to undertake such work; other specialist training is provided by the employer as required. In **Scotland**, training for judges is also provided by bar associations.

specific training on the Convention or participating in training sessions organised by the other bodies mentioned earlier.¹⁶⁷

124. However, as the description of practice in applying the Convention and in enforcing return orders, above, has shown, enforcement will often involve more professionals than just the legal professions. Professionals facilitating voluntary agreement include mediators, social workers and child protection officers. Enforcement officers and police officers might also be involved in the proceedings leading to a return order and in its enforcement. In a number of jurisdictions, the police and other law enforcement officers or bailiffs receive training on enforcement in family law, including Convention matters, from their respective authorities.¹⁶⁸ Social workers, educators and child psychologists often receive training on Hague matters or custody matters in general through their respective authorities such as the competent Ministry, often in co-operation with the Central Authority.¹⁶⁹

125. In some countries, the Central Authority provides training to officers working, or shortly to be posted, at diplomatic and consular missions abroad.¹⁷⁰

126. An interdisciplinary training might be a useful option in this context, and it does provide some added value.¹⁷¹ “Interdisciplinary training” does not necessarily mean that all the professions involved in the application of the Convention and the enforcement of a return order have to *receive* training together. The training can also bring together the different professions in different capacities, *e.g.*, at a training seminar for bailiffs (enforcement officers), a judge could explain the purposes of the Convention; a social worker could discuss the possibilities for amicable solutions and the assistance that the social welfare institutions could provide; a psychologist might explain the likely effect on the child and possible strategies for de-escalation, etc. At a seminar for judges, a bailiff might illustrate difficulties he encountered when enforcing a Hague return order and explain to the judges how they can facilitate his work by phrasing the order in a particular way. A widening of the professional perspective and the networking effect – in particular in combination with a concentration of jurisdiction – are important results achieved at these kinds of training events. To this effect, participation of Central Authority staff is also highly recommended.¹⁷²

127. While this Guide has insufficient information to report on domestic funding programmes, it is worth mentioning that where training events are raised to the international level, bringing together practitioners from at least two Contracting States, funding can sometimes be obtained from regional or international funding programmes, and by entering into a partnership with some domestic governmental or non-governmental body or person, the organisational workload for the governmental partner might also be alleviated. Some of these funding programmes provide for the possibility of including a programme co-ordinator into the budget of the seminar. As soon as funding is approved and the person hired, this person can then take charge of organising the event.

¹⁶⁷ **Canada (Alberta, Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR), France, Germany, Norway, Slovakia, South Africa, Sweden, Switzerland, United Kingdom (Scotland), United States of America.**

¹⁶⁸ **Austria, Canada (Alberta, Manitoba, Quebec, Saskatchewan), Germany, Monaco, New Zealand, Spain, United Kingdom (Scotland), United States of America.** In **Austria**, training is provided for those bailiffs who are part of the special task forces that exist at the appellate courts (*Oberlandesgerichte*) and deal with difficult enforcement issues in family matters. In **Germany**, where the training of the judiciary, including judges and officers of the court, falls within the responsibility of the states, the Federal Ministry of Justice, in co-operation with the German Bailiff’s Association and the German states, organised two seminars for bailiffs on the enforcement of orders relating to domestic violence, Hague return orders and contact orders in 2005 and 2006.

¹⁶⁹ **Canada (Manitoba, Quebec), China (Hong Kong SAR), Monaco, Slovakia, Spain.** In **Hong Kong SAR**, refresher training for social workers of the Family and Child Protective Services Units on “Handling International Child Abduction Cases” is also conducted on a need basis.

¹⁷⁰ *E.g.*, **Canada** (information provided by Ms Sandra Zed Finless), **Norway, Sweden** and the **United States of America.**

¹⁷¹ Such training has occurred, *i.e.*, in **Bulgaria, Finland, Germany, Panama, South Africa** and **Sweden.**

¹⁷² In many jurisdictions, the Central Authority plays an active role in providing specific training on the Convention or participating in training sessions organised by the other bodies mentioned earlier, *e.g.*, in **Canada (Alberta, Manitoba, Quebec, Saskatchewan), China (Hong Kong SAR), France, Germany, Norway, Slovakia, South Africa, Sweden, Switzerland, United Kingdom (Scotland), United States of America.**

128. Training measures can also provide an opportunity to raise awareness among those professionals who are not frequently involved with Hague return proceedings regarding the fact that they might unexpectedly be faced with media campaigns against the return of the child, or with events and happenings organised by support groups aimed at obstructing the return of the child to another country. Such events are more likely to happen where return proceedings do not occur frequently in a Contracting State and consequently tend to be lengthy. This gives the abducting parent time to seek public support, which then makes it more difficult to implement the child's return smoothly.

129. Where the professionals involved in the proceedings and in the enforcement are aware of this risk, they might consider alternative scenarios for enforcing the return order, possibly choosing a solution that avoids public pressure and stress for the child.

9.6 It is recommended that practice guidelines, manuals, checklists and / or other documents should be developed which can be of assistance to the different professionals involved in the enforcement of Hague return orders.

130. Provision of a generally applicable "Enforcement Document", compiling relevant concise information on law and procedure, categories of professionals that have to be involved or whose involvement is recommended, supplemented by contact details of agencies and authorities able to provide more detailed or more specific information relevant to a particular situation, will be of great assistance to professionals involved in the coercive enforcement of a Hague return order.

131. In some jurisdictions the Central Authority has produced such documentation or has assisted other bodies, e.g., the police, in producing it. Sometimes such material is targeted at the general public, sometimes at certain groups of professionals involved. The dissemination of the Explanatory Report on the Convention by Eliza Pérez-Vera, Reports and Conclusions and Recommendations resulting from meetings of the Special Commission on the operation of the Convention and from judges' seminars, earlier Parts of the Guide to Good Practice¹⁷³ and other documentation have been mentioned as important contributions to knowledge-building among the professionals concerned.

132. Sometimes training seminars for specific groups of professionals (e.g., judges or enforcement officers) have been used to develop checklists for the application of the Convention.¹⁷⁴ Development of documentation by the professionals themselves and / or under the auspices of their professional organisations may enhance acceptance of the resulting document.

¹⁷³ See the Guide to Good Practice on Central Authority Practice, *op. cit.* note 20, the Guide to Good Practice on Implementing Measures, *op. cit.* note 33, the Guide to Good Practice on Preventive Measures, *op. cit.* note 29, and the Guide to Good Practice on Transfrontier Contact, *op. cit.* note 12.

¹⁷⁴ For an example (a checklist for bailiffs developed in **Germany**) see Annex V to Prel. Doc. No 6 of October 2006, *op. cit.* note 3.

ANNEX

Chapter 7 of General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children

Annex

7. ENFORCEMENT OF CONTACT ORDERS UNDER NATIONAL LAW

7.1 *Effective enforcement procedure*

- 7.1.1 **Effective mechanisms should be available for enforcing a contact order, including effective coercive measures.**
- 7.1.2 **Additional requirements, which are to be fulfilled in order to commence and pursue the enforcement process, should be limited.**
- 7.1.3 **Separate challenges allowed against the order of specific enforcement measures and / or decisions on additional formality requirements for enforcement should be limited or avoided altogether.¹⁵⁹**

The legal framework should allow for expeditious enforcement of (foreign) contact orders. It has to be kept in mind that the longer contact between parent and child is disrupted the more difficult it will be to re-establish it and make it work. Considering the importance of the child's contact with both parents for his or her development, the enforcement of contact orders should be swift.

In many cases, the mere knowledge that a contact order is enforceable and will be enforced in a case of non-compliance and that non-compliance will have consequences will make the parties respect the terms of the order.

In autumn 2006, a comparative legal study¹⁶⁰ on the matter of enforcement of orders made under the 1980 Convention was carried out by the Permanent Bureau. The study has shown that coercive measures used to enforce contact orders differ immensely from country to country. In some countries non-compliance may lead to a reduction or complete refusal of spousal maintenance.¹⁶¹ It may also result in a modification or withdrawal of custody rights. In many jurisdictions sanctions for non-compliance can even be imposed where a specific time-period referred to by the contact order has already expired.¹⁶²

Threat of consequences for non-compliance strengthens the position of the non-primary carer, who in the exercise of his or her contact rights necessarily relies on the co-operation of the primary carer of the child.

¹⁵⁹ See, concerning the parallel problems in connection with enforcement of return orders, A. Schulz, "Enforcement of Orders made under the 1980 Convention – Towards Principles of Good Practice", Prel. Doc. No 7 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006), para. 2.8 (available on the Hague Conference website, see *infra*, pp. 53–56). A review of the different experiences of enforcement can also be found in N. Lowe and K. Horosova, *op. cit.*, note 25, para. 7.3.

¹⁶⁰ See A. Schulz, "Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study", Prel. Doc. No 6 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available on the Hague Conference website, see *infra*, pp. 53–56).

¹⁶¹ For example the Netherlands, *ibid.*, para. 311.

¹⁶² For example Austria, Chile, Cyprus, Germany, Italy and the Netherlands, *ibid.*, paras 315 *et seq.*

In the interest of a swift enforcement procedure, additional conditions required for enforcing a contact order by use of coercive measures should be limited or avoided altogether – this concerns administrative requirements as well as other necessities like the requirement of an additional court decision or a *formule exécutoire* or another authorisation required for enforcement or additional steps to be taken by a bailiff or other enforcement officer. “Where additional formal steps such as an executory engrossment, an authorisation to enforce or similar steps are required it is suggested to limit or exclude the possibility to challenge these steps independently, [...] and to limit the number and levels of legal challenges available against such measures.”¹⁶³

7.2 Practical arrangements

- **Practical arrangements, which are necessary for an effective exercise of contact, should be as precise as possible.**

The contact order should fix the practical details of the contact precisely. The terms should be clear and unambiguous. Dates and time of day should be precise. Where travelling is involved, the order should also clarify who has to bear the travel costs. Courts should invite the parties to jointly elaborate the practical arrangements to be incorporated into the contact order or at least consider submissions of the parties.

The more precise the terms of the order are the easier the enforcement will be. Keeping in mind the possible necessity of a translation of the contact order into another language the wording should be distinct and non-ambiguous.

7.3 Promoting voluntary compliance

- **Central Authorities and courts should encourage the parties at any stage, including the enforcement stage, to consider the possibility of mediation or other ways to find an amicable resolution.**
- **The wishes and feelings of the child should be taken into account according to his or her age and maturity.**

Due to the recurring and ongoing nature of contact, voluntary agreement and amicable settlement – if necessary facilitated by the appropriate means such as mediation – are very important. Courts and authorities involved should provide all assistance possible with a view to achieving such amicable settlement.

¹⁶³ A. Schulz, *op. cit.*, note 159, para. 2.8. For a discussion of parallel problems concerning enforcement of return orders, see also paras 1.5–1.6 of the same document.

In cases where an order for contact on several successive occasions has been issued, every possibility for a voluntary continuation of the contacts should be thoroughly examined once a first contact has been enforced, since the repeated enforcement of a contact order becomes ever more stressful for the child as well as for the parents.

It is important to bear in mind that within the mediation process there is a need for safeguards to ensure that the weaker party is not consenting to an order because of fear of the other party, because of intimidation by the other party or even because of exhaustion from lengthy highly conflictual proceedings. Highly experienced mediators are a safeguard against these risks.

In the process of establishing the terms of the contact order, co-operation of the parents as to the practical arrangements of the contact should be encouraged and the parents' submissions should be considered as well as the wishes and feelings of the child concerned, according to his or her age and maturity.

Also, at the stage of enforcement of the contact order, the court and any authority involved should encourage amicable settlement of disputes arising in connection with the exercise of contact.

Children should be represented in mediation proceedings. This ensures that having the decision made outside a court does not detract from the importance of considering the best interests of the child.¹⁶⁴

In addition, both children and their parents can be assisted in their decision-making by proper access to counselling. Sometimes a parent has abducted a child or refused to allow contact because they are desperate and access to counselling or a child representative may encourage them to reconsider their position.

The comparative legal study on the matter of enforcement of orders made under the 1980 Convention has shown that some countries regularly include a mediation phase in the enforcement process of contact orders.¹⁶⁵

7.4 Co-operation of bodies and professionals involved

- **Bodies and professionals involved in the enforcement of a contact order should closely co-operate.**
- **Great emphasis should be placed on the facilitation of cross-border co-operation in this matter.**

The enforcement of contact rights in a cross-border family situation may involve many actors, such as the Central Authority, judges, bailiffs, social workers or other professionals – depending on the jurisdictions concerned and the enforcement measures chosen.¹⁶⁶ In the interest of an adequate solution to problems with the execution of contact, the exchange of relevant information between the professionals / bodies involved should be swift and effective.

¹⁶⁴ See also section 2.4.5 for further discussion of the involvement of children in mediation.

¹⁶⁵ For example Finland, see A. Schulz, *op. cit.*, note 160, para. 310.

¹⁶⁶ *Ibid.*

Detailed information concerning the special circumstances of the case should be available easily to allow a sensitive dealing with the case, where necessary. Especially in cases where an abduction of the child has occurred before, was threatened or feared by one of the parents, the actors involved in the enforcement of a contact order should have access to background information in addition to the plain facts included in the actual contact order itself.

Safeguards, such as the surrender of passport or travel documents (mentioned above in section 5.3) should be taken into consideration to avoid the risk of abduction.

In cross-border contact cases the multinational, multicultural and multilingual backgrounds have to be taken into account and relevant information concerning sensitive matters should be made available to the bodies / professionals involved.

7.5 Training and education

- **The professionals involved in enforcement of contact orders in cross-border contact cases should receive appropriate training, especially in regard to the aims and mechanisms of the applicable Hague Conventions and other international instruments.**
- **It is recommended that practice guidelines, manuals, checklists and / or other documents which can be of assistance to the different professionals involved in the enforcement of contact orders in cross-border cases be developed.**

Appropriate training for professionals involved in the enforcement of contact orders in cross-border contact cases should impart knowledge of the aims and mechanisms of the applicable Hague Conventions and other international instruments as well as call attention to the sensitivity of post-abduction situations and situations where an imminent abduction is feared. Such training should also provide information about the particular difficulties of cross-border contacts which, for example, have to do with the mistrust and anxieties of parents in both countries and the dangers of misunderstandings arising from cultural differences for parents and for professionals. It is also important that training for professionals includes familiarising them with the relevant domestic law.¹⁶⁷

Practice guidelines, manuals, checklists and / or other documents would be very helpful to assist the different professionals involved in the enforcement of contact orders in cross-border cases.

¹⁶⁷ See also section 2.4.5 relating to training for mediators.