

## QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE 1980 AND 1996 CONVENTIONS

Wherever your replies to this Questionnaire make reference to domestic legislation, rules, guidance or case law relating to the practical operation of the 1980 and / or the 1996 Convention(s), **please provide a copy of the referenced documentation** in (a) the original language and, (b) wherever possible, accompanied by a translation into English and / or French.

**Name of State or territorial unit:<sup>3</sup> SPAIN**

*For follow-up purposes*

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### PART I: RECENT DEVELOPMENTS<sup>4</sup>

#### 1. Recent developments in your State

- 1.1 Since the 2006 Special Commission, have there been any significant developments in your State regarding the legislation or procedural rules applicable in cases of:
- a. International child abduction; and
  - b. International child protection?

Where possible, please state the reason for the development in the legislation / rules.

No. Since 2006 there had been no significant modifications in the Spanish civil procedure legislation concerning international abduction of minors, outside the novelties that are connected with that matter, which are mentioned in answer to question 1.3 as regards substantive law and those referred to, for example, shared custody, mediation, etc. which are detailed therein. In any case, we have to emphasize that as regards the review of Regulation (EC) No. 2201/2003 of the Council, of November 2003, known also as Brussels II bis, it is known that the Commission has to submit a report on 1 January 2012, at the very latest, and thereafter every five years to the European Parliament and the European Financial and Social Committee, based on the information provided by member States with regard to the application of the Regulation, accompanied, if appropriate, by proposals directed to its adaptation. At present, the European Commission is aware of where and when Regulation 2201/2003 has not been implemented and the need to carry out adaptations to promote some sort of cooperation that, based initially on the principle of mutual trust, has shown clear errors on its implementation. The extension of its scope of application is also on the table and so, for example, the future proposal about marriage economic system could raise the extension of the scope of application of Brussels II bis to such matters.

- 1.2 Please provide a brief summary of any significant decisions concerning the interpretation and application of the 1980 and / or 1996 Convention(s) given since the 2006 Special Commission by the relevant authorities<sup>5</sup> in your State.

<sup>3</sup> The term "State" in this Questionnaire includes a territorial unit, where relevant.

<sup>4</sup> This Part of the Questionnaire is intended to deal primarily with the developments in law and practice relating to international child abduction and international child protection which have occurred in your State since 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) (hereinafter "the 2006 Special Commission"). However, if there are important matters which you consider should be raised from *prior* to the 2006 Special Commission, please provide such information here.

<sup>5</sup> The term "relevant authorities" is used in this Questionnaire to refer to the judicial or administrative authorities with decision-making responsibility under the 1980 and 1996 Conventions. Whilst in the majority of States Parties such "authorities" will be courts (*i.e.*, judicial), in some States Parties administrative authorities remain responsible for decision-making in Convention cases.

In Spain and after the important judgment passed by the Supreme Court 4153/1998, of 22 June, that examined in a very accurate manner the implication of Article 16 of the Convention of 25 October 1980, there have been no further relevant decisions passed by the Supreme Court on this matter, other than Court orders of the Supreme Court 2774/2001, 5240/2002 and 7772/2004 dated 11 December 2001, 20 March 2002 and 15 June 2004, related to matters of international abduction of minors in issues regarding exequatur without direct relevancy to the effects on this question. In addition, it is relevant the content of the recent ad hoc jurisprudence emanated from the Court of Justice of the European Union, as it affects Spain directly and which have already motivated the following resolutions: Judgment of 27 November 2007, C-435/06; Judgment of 29 November 2007, C-68/07; Judgment of 11 July 2008, C-195/08 PPU; Judgment of 2 April 2009, C-523/07; Judgment of 16 July 2009, C-168/08; Judgment of 23 December of 2009, C-403/09 PPU; Judgment of 1 July 2010, C-211/10 PPU; Judgment of 15 July 2010, C-256/09, Judgment of 5 October 2010, C-400/10 PPU, Judgment of 9 November 2010, C-296/10 PPU, Judgment of 22 December 2010, C-491/10 and Judgment of 22 December 2010, C-497/10 PPU. Out of these twelve judgments, there can be considered as most important, for example, for the purpose of determining the concept of habitual residence, judgements dated 2 April 2009 C-523/07 and 22 December 2010, C-497/10 PPU and it is interesting to notice how out of twelve judgments, eight refer to circumstances that involve cases of international abduction of minors. It is also important to highlight for this purpose, the significance of being applied by the European Union Court of Justice the European Union Charter on Fundamental Rights since its entry into force on 1 December 2009 and the existing parallelism between the European Union Charter on Fundamental Rights and the European Convention on Human Rights, without forgetting the future accession of the European Union to the European Convention on Human Rights which will mean that the acts of the European Union institutions and the acts of the Member states in which the European Union's Rule of Law is applied, shall be subject of control before the European Court on Human Rights, which raises the problem of how to articulate the demand of exhausting the internal resources before bringing in the plea before the European Court of Human Rights.

1.3 Please provide a brief summary of any other significant developments in your State since the 2006 Special Commission relating to international child abduction and / or international child protection.

Since 2006 there have been a number of relevant questions in the area of international abduction of children. One of them is that concerning the formal appointment in January of 2009 of a judge for the International Network of Judges for The Hague Conference, which has allowed Spain to be formally represented in said organisation. Another relevant factor is the coming into force on 1 January 2011 of The Hague Convention of 19 October 1996. In the area of mediation and in relation to Directive of 21 May 2008 on certain aspects of mediation in civil and mercantile matters, it is fit to point out that such European rule on mediation –Directive 2008/52/CE- came into force in June 2008 and that governments must put it into effect before 21 May 2011 informing the Commission immediately. In Spain, the transposition is currently been debated in Parliament. In fact on 25 January 2011 the Justice Sectorial Conference analysed the Draft Bill on Mediation as regards civil and mercantile matters on 19 February 2010, regarding which on of 19 May 2010 the Report issued by the General Council of the Judiciary was published. Initially, it was expected to be approved by the council of ministers as a draft bill in January 2011. At international level and also in matters of mediation, a working group was constituted under the Belgium presidency in order to promote mediation in cases of abduction of minors where we hope Spain will be represented. At the meeting of contact persons of the European Judicial Network held on 21 January 2011 is was discussed the establishment of this working group on mediation in family matters and also the set up of a point of information on the mediation directive. A final point to indicate that the Stockholm programme also states, that with regard to interparental kidnapping, besides applying in an efficient manner the judicial instruments in force in this area, the possibility of resort to family mediation at international level should be studied, without leaving aside the good practices of the member states. In addition, it can also me mentioned as relevant some legal changes that have taken place in Spain as regards shared custody issues, in respect to the effect that it has on cases of

transfer and international abduction of minors. It has to be pointed out the modification on family law in Cataluña by Act 15/2010 of 29 July, and the modification in shared custody by Act 2/2010 of 26 May approved by the Assembly of Aragón (Cortes de Aragón), on equality on family relations in the face of the breaking-up of cohabitation of parents which came into force on 8 September 2010 whose main and more proclaimed potentiality has been to establish a new regulation on the so-called shared custody as a preferential system in cases of breaking-up of cohabitation of parents and, after which, in these situations, the Judge has to adopt in a preferential manner the shared custody in the interest of the minor children, unless individual custody is considered more convenient, taking into account the plan of family relation which must submit each of the parents and according also to a number of anticipated legal elements. In the case of Cataluña and in contrast to what initially could appeared to be, the recent Act 25/2010 of 29 July, Book Two of the Catalan Civil Code: Person and Family, published en el DOGC (Diario Oficial de la Generalitat de Cataluña) No. 5686 of 5 August, which came into force on 1 January 2011 does not follow this line of opting for shared custody as a preferential system. Instead, it has opted in preferably, but not discriminatory, for shared guardianship. The two more important novelties in the Catalan Act, regarding the effects here discussed, are the regulation of parenthood plan and the strong commitment for joint parentality, maintaining after the break-up, shared parental responsibilities. In the international field, it is fit to quote Regulation (EU) No. 1259/2010 of the Council dated 20 December, which establishes reinforced cooperation in the field of the applicable divorce act and that concerning judicial separation published in the DOUE (Diario Oficial de la Unión Europea) of 29 December 2010, which came into force on 30 December 2010 and shall be applicable from 21 June 2012.

## **2. Issues of compliance**

- 2.1 Are there any States Parties to the 1980 and / or 1996 Convention(s) with whom you are having particular difficulties in achieving successful co-operation? Please specify the difficulties you have encountered and, in particular, whether the problems appear to be systemic.  
Germany, Netherlands, Brazil, Mexico, Austria
- 2.2 Are you aware of situations / circumstances in which there has been avoidance / evasion of either Convention?  
Netherlands, Brasil

**PART II: THE PRACTICAL OPERATION OF THE 1980 CONVENTION**
**3. The role and functions of Central Authorities designated under the 1980 Convention<sup>6</sup>**
*In general*

- 3.1 Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities? If so, please specify.  
Germany, Netherlands, Brazil, Mexico
- 3.2 Have any of the duties of Central Authorities, as set out in Article 7 of the 1980 Convention, raised any particular problems in practice either in your State, or in States Parties with whom you have co-operated?  
Regarding the provision of legal aid and advice, including the participation of legal counsel and advisers, we have problems with Germany, Czech Republic, Poland, Belarus  
Regarding the location of children we have problems with Ecuador, Mexico
- 3.3 Has your Central Authority encountered any difficulties with the interpretation and / or application of any of the 1980 Convention provisions? If so, please specify.  
Yes, interpretation of article 5 about custody rights

*Legal aid and representation*

- 3.4 Do the measures your Central Authority takes to provide or facilitate the provision of legal aid, legal advice and representation in return proceedings under the 1980 Convention (Art. 7(2) g)) result in delays in proceedings either in your own State, or, where cases originate in your State, in any of the requested States you have dealt with? If so, please specify.  
In our own State there is not delay. In general we have problems of delay with the states that made a reservation according the article 26.
- 3.5 Are you aware of any other difficulties in your State, or, where cases originate in your State, in any of the requested States you have dealt with, regarding the obtaining of legal aid, advice and / or representation for either left-behind parents or taking parents?<sup>7</sup>  
In our own State there is not problem. The left-behind parent is defended by the State Lawyer. The taking parent can get legal aid according to international conventions about this matter if he/she has not enough incomes.

<sup>6</sup> See also question 6 below on "Ensuring the safe return of children" which involves the role and functions of Central Authorities.

<sup>7</sup> See paras 1.1.4 to 1.1.6 of the "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006) (hereinafter referred to as the "Conclusions and Recommendations of the 2006 Special Commission") (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings"):

"1.1.4 The importance for the applicant of having effective access to legal aid and representation in the requested country is emphasised. Effective access implies:

a) the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;  
b) the provision of appropriate assistance in instituting proceedings;  
c) that lack of adequate means should not be a barrier to receiving appropriate legal representation.

1.1.5 The Central Authority should, in accordance with Article 7[(2)] g), do everything possible to assist the applicant to obtain legal aid or representation.

1.1.6 The Special Commission recognises that the impossibility of, or delays in, obtaining legal aid both at first instance and at appeal, and / or in finding an experienced lawyer for the parties, can have adverse effects on the interests of the child as well as on the interests of the parties. In particular the important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find an experienced legal representative is recognised."

### *Locating the child*

- 3.6 Has your Central Authority encountered any difficulties with locating children in cases involving the 1980 Convention, either as a requesting or requested State? If so, please specify the difficulties encountered and what steps were taken to overcome these difficulties.

Yes, we have encountered difficulties so we have requested the assistance of Interpol Spain for locating the children in Spain as well as abroad.

- 3.7 Where a left-behind parent and / or a requesting Central Authority have no information or evidence regarding a child's current whereabouts, will your Central Authority still assist in determining whether the child is, or is not, in your State?

Yes, we provide assistance, we request Interpol the search of minor

- 3.8 In your State do any particular challenges arise in terms of locating children as a result of *regional* agreements or arrangements which reduce or eliminate border controls between States? If so, please specify the difficulties encountered and any steps your State has taken to overcome these difficulties. Are there any *regional* agreements or arrangements in place to assist with locating children because of the reduced / eliminated border controls?

No

- 3.9 Where a child is not located in your State, what information and / or feedback is provided to the requesting Central Authority and / or the left-behind parent as to the steps that have been taken to try to locate the child and the results of those enquiries?

We inform about the outcome of the search, sometimes about the different steps that our authorities has taken

- 3.10 Has your Central Authority worked with any external agencies to discover the whereabouts of a child wrongfully removed to or retained within your State (e.g., the police, Interpol, private location services)? Have you encountered any particular difficulties in working with these external agencies? Is there any good or bad practice you wish to share on this matter?

Yes, we work with Interpol

### *Information exchange, training and networking of Central Authorities*

- 3.11 Has your Central Authority shared its expertise with another Central Authority or benefited from another Central Authority sharing its expertise with your Central Authority, in accordance with the Guide to Good Practice – Part I on Central Authority Practice?<sup>8</sup>

No

- 3.12 Has your Central Authority organised or participated in any other networking initiatives between Central Authorities such as regional meetings via conference call, as proposed in Recommendations Nos 1.1.9 and 1.1.10<sup>9</sup> of the 2006 Special Commission?

No.

We organized 2 meetings: one with British and other with USA Central Authorities.

We participated in 2 meetings: with French and Portuguese Central Authorities

- 3.13 Would your Central Authority find it useful to have an opportunity to exchange information and network with other Central Authorities on a more regular basis than at Special Commission meetings?

Yes

<sup>8</sup> Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice". See, in particular, Chapter 6.5 on twinning arrangements.

<sup>9</sup> See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7):

"1.1.9 The Special Commission recognises the advantages and benefits to the operation of the Convention from information exchange, training and networking among Central Authorities. To this end, it encourages Contracting States to ensure that adequate levels of financial, human and material resources are, and continue to be, provided to Central Authorities.

1.1.10 The Special Commission supports efforts directed at improving networking among Central Authorities. The value of conference calls to hold regional meetings of Central Authorities is recognised."

### Statistics<sup>10</sup>

- 3.14 If your Central Authority does not submit statistics through the web-based INCASTAT database, please explain why.

*No due to technical problems*

### *Views on possible recommendations*

- 3.15 What recommendations would you wish to see made in respect of the role and particular functions that Central Authorities might, or do, carry out?

Every State should provide legal aid and advice, including the participation of legal counsel and advisers

## **4. Court proceedings**

- 4.1 If your State has not limited the number of judicial or administrative authorities who can hear return applications under the 1980 Convention (*i.e.*, it has not “concentrated jurisdiction”), are such arrangements being contemplated?<sup>11</sup> If the answer is no, please explain the reasons.

In Spain, there is no concentrated jurisdiction to hear cases concerning international child abduction. In accordance with article 1902 of the Spanish Rules on Civil Procedure, the competence to know these cases is held by first instance judges of the place where the minor is or has been found. In Spain there are about 900 first instance judges, of those only a few specialised in family issues which potentially might come to hear a case about international abduction of minors and, in many occasions are not properly trained to carry out this kind of tasks. The same happens when it comes to appeal level, where there are 52 Provincial Courts in charge of solving in second and last instance this type of cases. In view of this situation it seems clear that it is very difficult to maintain a proper level of experience and training for such a high number of judges. It is also true that despite the lack of concentration in jurisdiction, in many cases the lawsuits about abductions are located mainly in specific areas by reason of migrations, where judges are used to hear this kind of cases. They would be, for example, in Madrid, Barcelona, Murcia, Málaga, Balearic and Canary Islands. For the time being, the Spanish legislator does not consider the concentration of jurisdiction in these cases, and the lack of it is made good by the work carried out at the Central Authority, of the Spanish REJUE and REDUE, with the activity of the liaison judge for The Hague conference and with proper training and specialisation programmes on the subject, which are held every year in several judicial areas.

- 4.2 Are any procedural rules in place in your State in relation to return proceedings brought under the 1980 Convention? If so, do you consider that the procedural rules which are applied allow the relevant authorities to reach a decision within six weeks? To what extent do you consider that delays in return proceedings under the 1980 Convention are linked to a lack of appropriate procedures?

With regard to Spain, the specific regulation on the subject takes us to analyse Articles 1901 to 1909 of the Rules of Civil Procedure of 1881 as regards measures concerning the return of minors in cases of international abduction. Said rules were left devoid of any content in the previous Rules of Civil Procedure enacted by Royal Decree on 3 February 1881, as a result of the reform carried out by Law 31/1972, of 22 July and, in her current wording, there were introduced by Final Provision 19.2 of Organic Law 1/1996, of 15 January, on Judicial Protection of Minors, in order to regulate “Measures concerning the return of minors in cases of international abduction”. Later, said provisions

<sup>10</sup> See paras 1.1.16 to 1.1.21 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7).

<sup>11</sup> See, for example, the “Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)” (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission meetings”) at para. 3.1:

“The Special Commission calls upon Contracting States to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts.”

were declared effective, until the Law of Voluntary Jurisdiction came into effect by way of Derogatory Provision 1.1 of Law 1/2000 of 7 January, in which Final Provision number 18 points out that, within one year after said Law came into force, the Government would send to Parliament a draft bill about Voluntary Jurisdiction. In Law 13/2009 of 3 November, on the modification of the procedural law for implementation of the new Judicial Office, effective from 4 May 2010, no modifications had been done on this matter. Besides Articles 1901 to 1909 of the Rules on Civil Procedure already mentioned, which regulate measures regarding the return of minors in cases of international abduction, it is also appropriate as it is a valid regulation, of Organic Law 9/2002 of 10 December, on modification of Organic Law of 23 November 1995 of the Penal Code and of the Civil Code on abduction of minors, as it introduced the provision of precautionary measures in the civil area which would avoid abductions and illegal detention of minors, adding a new paragraph in measure 1 of Article 103 of the Civil Code (as regards the adoption of provisional measures due to lawsuit for nullity, separation or divorce), worded as follows: "When there is a risk of abduction of minors by any of the parents or third persons, it will be possible to adopt the necessary measures and, in particular, the following: a) To forbid leaving the national territory, except when a prior judicial authorisation exists. b) To forbid issuing passport to the minor or to withdraw such passport should this had already been issued. c) Compliance with preliminary judicial authorisation as regards any change of residence of the minor". Also, Organic Law 9/2002, gave a new wording to number 3 of Article 158 of the Civil Code that it reads as follows: "3. The necessary measures to avoid the abduction of minors by any of the parents or third parties and, in particular, the following: a) To forbid leaving the national territory, except prior judicial authorisation. b) To forbid issuing passport to the minor or to withdraw such passport should this had already been issued. c) Compliance with preliminary judicial authorisation as regards any change of residence of the minor". In addition, in Spain Regulation (EC) No. 2201/2003 of the Council of 27 November, is applied, and complements the Hague Convention of 25 October 1980. With such legislation, there is no doubt that it is possible to reach a decision within a period of six weeks in this kind of proceedings, and should a delay arise, this would not be connected with lack of appropriate ad hoc procedural rules.

## 5. Domestic violence allegations and Article 13(1) b) of the 1980 Convention<sup>12</sup>

5.1 Is the issue of domestic violence or abuse often raised as an exception to return in child abduction cases in your State? What is the general approach of the relevant authorities to such cases?

Domestic violence allegations are usually connected to exceptions to the minor return, but in Spain the approach to these situations are conditioned by Article 11 of Regulation Brussels II bis in force, in case of abduction within the European Community which reinforces the exceptional application to all kind of exceptions, including domestic violence allegations.

5.2 In particular:

a. What is the standard of proof applied when a taking parent relies on Article 13(1) b)?

In this kind of proceedings, following the thread of Article 13.1.b of The Hague Convention 1980, expert psychological evidence issued by social workers are required, as well as the exploration of the minors in those cases in which are legally appropriate, medical reports, police records, judicial decisions and the statement of victim and children

b. Bearing in mind the obligation in the 1980 Convention to act expeditiously in proceedings for the return of children,<sup>13</sup> how far do the relevant authorities in your State investigate the merits of a claim that domestic violence or abuse has occurred? How are resulting evidentiary issues dealt with (e.g., obtaining

<sup>12</sup> See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.1.12, 1.4.2 and 1.8.1 to 1.8.5. Please also refer to question 6 of this Questionnaire regarding the safe return of children.

<sup>13</sup> Art. 11 of the 1980 Convention: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children."

police or medical records)? How is it ensured that no undue delay results from any such investigations?

In this kind of proceedings each case is different, but it must be pointed out that judges are very much aware of the implications that domestic violence allegations have in this kind of situations. In fact, Spain has specific legislation that allows an integral treatment of such situations of domestic violence allegations. An evaluation of each case is almost always carried out by the judge, which should not involve an analysis on the essence of the allegations, but obviously should determine whether we are before a case of serious violence or not, whether this is reiterated or occasional, as very often a univocal term is used when referring to domestic or family violence, under which are sheltered very different cases and also it seems necessary to prove that it has effected the minor and that the return with the aggressor parent would place his/her in physical and psychological danger. All these kind of inquiries normally imply certain delay that should never exceed the effective period of six weeks and that the Spanish legislation is able to fulfil.



- c. Is expert evidence permitted in such cases and, if so, regarding which issues? How is it ensured that no undue delay results from the obtaining of such evidence?

This answer is considered as replied in the previous paragraph.

- 5.3 Where allegations of domestic violence / abuse are made by the taking parent, how will the relevant authority deal with any reports from children as to the existence of such domestic violence / abuse?

All provided reports are subject to judicial evaluation which goes through the exact issue without any previous prejudice.

- 5.4 Where allegations of domestic violence / abuse are made by the taking parent, what tools are used by judges (or decision-makers) in your State to ascertain the degree of protection which can be secured for the child (and, where appropriate, the accompanying parent) in the requesting State upon return (e.g., information is sought from the requesting Central Authority, direct judicial communications are used, expert evidence on foreign law and practice is obtained, direct notice can be taken of foreign law, etc.)?

In cases of abduction within the EC, the application of Brussels II bis allows the use of the European judicial network on civil and mercantile issues and the central authorities to establish direct judicial communications that may allow evaluating the protection measures that each state is going to implement in each case. Communications between judges of each country involved in the case are held in accordance with regulations. Outside the European Community, the matter is more complicated, but there are no limits to the use of any means that may allow obtaining the most precise information.

- 5.5 Do any regional agreements affect the operation of Article 13(1) b) in your State (e.g., for European Union Member States excluding Denmark, Art. 11(4) of the Brussels II a Regulation<sup>14</sup>)? If so, please comment upon how the relevant regional provision(s) have operated in practice.

It does not appear to exist in Spain any regional agreements affecting the application of Article 13.1.b outside the effectiveness of Article 11(4) of Brussels II bis, except for the bilateral agreement with Morocco of 30 May 1997 that includes specific provisions for return of minors.

- 5.6 From your practical experience, what do you see as the main (a) similarities, and (b) inconsistencies between States Parties regarding the application and interpretation of Article 13(1) b) in cases of alleged domestic violence? Can you suggest any good practice which should be promoted on this issue?

The main consequence of the allegation within proceedings involving international abductions of minors for domestic violence is the delay in the proceedings and the erroneous tendency to evaluate the merits of the case, obviating that we are always dealing with return proceedings. The use of the Hague International Network of Judges may be a very useful instrument to deal with this type of cases, by way of giving assistance directly to the judges involved in them.

- 5.7 Do you have any other comments relating to domestic violence or abuse in the context of either the 1980 or the 1996 Convention?

A good practice, when it comes to deal with this kind of situations, is that of promoting the exchange of information between the judges involved, with the help of Central Authorities and international cooperation networks available.

## **6. Ensuring the safe return of children**<sup>15</sup>

*The implementation of previous Special Commission recommendations*<sup>16</sup>

<sup>14</sup> Full title: 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.

<sup>15</sup> See Art. 7(2) h) of the 1980 Convention and the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.1.12 and 1.8.1 to 1.8.5. Please also refer to the "Domestic violence allegations and Article 13(1) b) of the 1980 Convention" section of this Questionnaire (question 5).

- 6.1 What measures has your Central Authority taken to ensure that the recommendations of the 2001 and 2006 Special Commission meetings<sup>17</sup> regarding the safe return of children are implemented?

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<sup>16</sup> See the Conclusions and Recommendations of the Special Commission of 2006 (*op. cit.* note 7) at paras 1.1.12 and 1.8.1 to 1.8.5 and the Appendix to the Conclusions and Recommendations.

<sup>17</sup> *Id.*

- 6.2 In particular, in a case where the safety of a child is in issue and where a return order has been made in your State, how does your Central Authority ensure that the appropriate child protection bodies in the *requesting* State are alerted so that they may act to protect the welfare of a child upon return (until the appropriate court in the requesting State has been effectively seised)?

We inform to requesting State's Central Authority about the arrangements of the travel and the person who the minor is going to travel with.

*Methods for ensuring the safe return of children*<sup>18</sup>

- 6.3 Where there are concerns in the requested State regarding possible risks for a child following a return, what conditions or requirements can the relevant authority in your State put in place to minimise or eliminate those concerns? How does the relevant authority in your State ensure that the conditions or requirements put in place are implemented and adhered to?

We inform to requesting State's Central Authority about the concerns in order the competent authorities of the requesting State take the appropriate measures.

*Direct judicial communications*

- 6.4 Please comment upon any cases (whether your State was the requesting or requested State), in which the judge (or decision-maker) has, before determining an application for return, communicated with a judge or other authority in the requesting State regarding the issue of the child's safe return. What was the specific purpose of the communication? What was the outcome? What procedural safeguards surround such communications in your State?<sup>19</sup>

In Spain, the use of direct judicial communications is fully accepted and has the legal protection of Conventions dated 25-10-1980 and 19-10-1996 as well as the Brussels II bis Regulation. There are many opportunities for the use of communications aimed at favouring a safe return of minors. At present, there is a pending case between Spain and Germany, in which it has been offered through the Hague Liaison Judges Network the use of such communications, in which central authorities of both countries have taken part in order to ease the safe return of the minor to Spain, although, so far no positive results have been achieved from the German judicial authorities that are dealing with the case and that in accordance with Brussels II bis Regulation must proceed to return the minor to Spain. It is about the case Aguirre Zarraga versus Simone Pelz, H28 (2047) that concerns the minor Andrea Aguirre Pelz born on 31 January 2000 upon which it has been resolved prejudicial C-491/10 PPU by judgment passed by the Court of Justice of the European Union on 22 December 2010.

*Use of the 1996 Convention to ensure a safe return*

- 6.5 If your State is not Party to the 1996 Convention, is consideration being given to the possible advantages of the 1996 Convention in providing a jurisdictional basis for urgent protective measures associated with return orders (Arts 7 and 11), in providing for their recognition by operation of law (Art. 23), and in communicating information relevant to the protection of the child (Art. 34)?
- Our State is Party to the 1996 Convention from January 1<sup>st</sup>, 2011

*Other important matters*

- 6.6 Are you aware of cases in your State where a primary carer taking parent has refused or has not been in a position to return with the child to the requesting State? How are such cases dealt with in your State? Please provide case examples

<sup>18</sup> Where relevant, please make reference to the use of undertakings, mirror orders and safe harbour orders and other such measures in your State.

<sup>19</sup> See the draft General Principles on Judicial Communications which will be circulated prior to the 2011 Special Commission meeting.

where possible.

There are a lot of cases with these features and we have sent them to the State Lawyer in order to lodge an abduction's lawsuit.

6.7 What steps has your State taken to ensure that all obstacles to participation by parents in custody proceedings after a child's return have been removed (in accordance with Recommendation No 1.8.5 of the 2006 Special Commission)? In particular, where a custody order has been granted in the jurisdiction of, and in favour of, the left-behind parent, is the order subject to review if the child is returned, upon application of the taking parent?

We do not have information about it

- 6.8 In cases where measures are put in place in your State to ensure the safety of a child upon return, does your State (through the Central Authority, or otherwise) attempt to monitor the effectiveness of those measures upon the child's return? Would you support a recommendation that States Parties should co-operate to provide each other with follow-up information on such matters, insofar as is possible?  
We do not have information about it

## **7. The interpretation and application of the exceptions to return**

### *In general*

- 7.1 Where the taking parent raises any exceptions under Article 13 or Article 20 of the 1980 Convention, what are the procedural consequences? What burden and standard of proof rest on the taking parent in respect of such exceptions?<sup>20</sup>

The allegation of exceptions is legally envisaged and should not mean any kind of negative consequence for the procedure of the case. Normally, the burden of proof concerning exceptions relies on the party that invokes them, but when minors are involved, the discretion of the judge allows him to ask for evidence considered appropriate, even when not requested by the parties.

- 7.2 Does the raising of exceptions under Article 13 or Article 20 in practice cause a delay to return proceedings? What measures, if any, exist to keep such delay to a minimum?

The allegation of exceptions of Articles 13 and 20 in practice should not cause any delay.

### *Article 13(2) and hearing the child*

- 7.3 In relation to Article 13(2) of the 1980 Convention:  
a. By whom, and how, will any enquiry be made as to whether a child objects to a return?

In order to know the opinion of minors in Spain, there are ad hoc regulations that guarantee their right to be heard in a suitable manner. In Spain it has been decisive the recent law reform of 2005 affecting marriage, separation and divorce, and which has become effective mainly through Law 15/2005 of 8 July, by which the Civil Code and the Rules of Civil Procedure were modified as regards separation and divorce, and by Law 13/2005 of 1 July, by which the Civil Code was changed in matters regarding the right to get married. This subject, already mentioned in Article 9 of Organic Law 1/1996 of 15 January on Judicial Protection of minors, and following Law 15/2005, has undergone important changes. In the previous Article 92 of the Civil Code the judge had the obligation to hear minors who had sufficient good sense and always those over 12 years old, indicating that the judge, ex officio or at the requested of the parties involved, could ask for an experts report. Now, in the new Article 92 of the Civil Code, it is not compulsory such examination and includes original provisions in paragraphs 2, 6 and 9. In addition, it has to be emphasised that in a very novel manner said Law 15/2005 of 8 July, has regulated for the first time in Spain the way to carry out the examination of minors by adding a new final paragraph to rule 4 of Article 770 of the Rules of Civil Procedure. Such rule did establish that when minors or disable children existed, these would be heard should they have good sense and, in any case, if they were over 12 years old. Now the new paragraph adds: "...When examining minors in civil proceedings the judge shall guarantee that the minor are heard in suitable conditions in order to safeguard their interests, without interference from other persons and asking for help from specialists when considered necessary". The same modification as regards consensual separation and divorce revokes the

<sup>20</sup> In relation to Art. 13(1) b), see also question 5.2 above.

previous Article 777.5 which said: "...Should there be underage or disable children, the court will ask for a report from the Public Prosecutor about the conditions in the settlement agreement regarding the children and shall hear them, if they had sufficient good sense and always those over 12 years...". Now, the new Article 777.5 says: "...5. Should there be underage or disable children, the Court will ask for a report from the Public Prosecutor about the conditions in the settlement agreement regarding the children and will hear the minors if they have sufficient good sense when is considered necessary ex-officio or at the request of the Public Prosecutor, interested parties or members of the Judicial Technical Team or the minor himself. These actions shall be carried out during the period referred to in the previous paragraph or, if this had not been established, within a period of five days...". A clear achievement of this reform has been that of not imposing compulsory hearings of minors from certain age. Also, Community Regulation No. 2201/2003 of 27 November, known as Brussels II bis, establishes the general principle that in Europe minors must be heard in issues that affect them. As an exception, a minor will not have to declare if that is considered improper, taking into account his age or degree of maturity. These circumstances have to be the subject of a clear restrictive interpretation.

- b. Who will assess the child's maturity for the purposes of Article 13(2)?  
The judge that deals with the case.
- c. In what circumstances, in practice, might the relevant authority in your State refuse to return a child based on his or her objections? Please provide case examples where possible.

When the Judge considers the minor is mature and there are circumstances that advise so.

- 7.4 How, if at all, have other international and / or regional instruments affected the manner in which the child's voice is heard in return proceedings in your State?<sup>21</sup>

In Spain the minor is always heard when he/she is 12 years old. When he/she is under this age the Judge will decide if the minor is heard or not

- 7.5 How does your State ensure that hearing a child does not result in any undue delay to the return proceedings?

In practice there is not delay

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<sup>21</sup> For EU Member States, excluding Denmark, reference should be made to Art. 11(2) of the Brussels II a Regulation:

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

## Article 20

- 7.6 How has Article 20 of the 1980 Convention been applied in your State? Are you aware of an increase in the use of this Article (please note that Art. 20 was not relied upon at all according to the 1999 Statistical Survey, nor was it a sole reason for refusal in 2003<sup>22</sup>)?

This article has not been applied except in an exceptional cases. This rule has been used in an isolated and wrongly manner by some court in cases of allegation of infringement of the right to move freely within the European Union. That is the case of judgment dated 17 January 2006 passed by Section 10 of the Provincial Court of Valencia. It seems that said tendency has already been corrected and in fact Article 20 is applied very rarely and exceptionally.

### Any other comments

- 7.7 Do you have any other comment(s) you would like to make regarding any of the exceptions to return within the 1980 Convention?

Yes, we think that there is an abuse of the implementation of article 13b (risk or danger for the minor) without any merit. The only evidence is the statement of the taking parent

## 8. Article 15 of the 1980 Convention

- 8.1 Have you encountered any difficulties with the use of Article 15? If so, please specify the difficulties encountered and what steps, if any, have been taken to overcome such difficulties.

The biggest difficulties in using Article 15 are derived from the delay in the process that means the obtaining of certificates. When issuing such certificate it has to be determined the efficiency of the process by which it has been requested, that is to say, if the petitioning judge is under the obligation or not as regards the content of the issued certificate. Another problem arises from the difficulty of identifying the authorities in each country in charge of issuing such certificates.

- 8.2 Has the use of Article 15 caused undue delay in return proceedings in your State? Are there particular States Parties with whom you have had difficulties in this regard? Please provide case examples where possible.

In Spain it is difficult to obtain the certificate because there is not a proceedings to request it. There is no provision in the internal legislation on implementation about which authority is in charge of issuing such certificates.

- 8.3 Are you aware of any cases in your State where direct judicial communications have been used in relation to Article 15? If so, please provide details of how, if at all, direct judicial communications assisted in the particular case.<sup>23</sup>

No, we do not have this information

## 9. Immigration, asylum and refugee matters under the 1980 Convention

- 9.1 Have you any experience of cases in which immigration / visa questions have arisen as to the right of the child and / or the taking parent to re-enter the State from which the child was wrongfully removed or retained? If so, how have such issues been resolved?

<sup>22</sup> It was, however, partially relied upon in eight cases (9%), all of which were in Chile. See N. Lowe, "A Statistical Analysis of Applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I – Overall Report", Prel. Doc. No 3, Part I, 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 of October – November 2006 (2007 update, published in September 2008). Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings" and "Preliminary Documents".

<sup>23</sup> See *supra*, note 19.

yes, we have some cases (United States, Argentina, Colombia, United Kingdom, Brasil)

9.2 Have you any experience of cases involving links between asylum or refugee applications and the 1980 Convention? In particular, please comment on any cases in which the respondent in proceedings for the return of a child has applied for asylum or refugee status (including for the child) in the State in which the application for return is to be considered. How have such cases been resolved?  
No, we have not



- 9.3 Have you any experience of cases in which immigration / visa questions have affected a finding of habitual residence in the State from which the child was removed or retained?  
No
- 9.4 Have you any experience of cases in which immigration / visa questions have inhibited the exercise of rights of access?  
Yes

#### **10. Newly acceding States to the 1980 Convention**

- 10.1 If your State has recently *acceded* to the 1980 Convention, what steps have been taken to inform other States Parties of the measures taken to implement the Convention in your State?<sup>24</sup> Did you find the Standard Questionnaire for newly acceding States<sup>25</sup> useful for this purpose?
- 10.2 How regularly does your State consider declaring its acceptance of the accessions of new States Parties to the 1980 Convention (Art. 38)?
- 10.3 What measures, if any, do your authorities take to satisfy themselves that a newly acceding State is in a position to comply with 1980 Convention obligations, such that a declaration of acceptance of the accession can be made (Art. 38)? How does your State ensure that this process does not result in undue delay?

#### **11. The Guide to Good Practice under the 1980 Convention**

- 11.1 In what ways have you used the Guide to Good Practice – Part I on Central Authority Practice, Part II on Implementing Measures, Part III on Preventive Measures and Part IV on Enforcement<sup>26</sup> – to assist in implementing for the first time, or improving the practical operation of, the 1980 Convention in your State?  
Looking for advise
- 11.2 How have you ensured that the relevant authorities in your State have been made aware of, and have had access to, the Guide to Good Practice?  
In all training courses in which we have participated we recommend the lecture of the web page of Hague Conference and specially the Guides to Good Practice. We also refer to it in all applications that we send to the State Lawyer, when we are the requested state.
- 11.3 Do you have any comments regarding how best to publicise the recently published Guide to Good Practice – Part IV on Enforcement (published October 2010)?  
No
- 11.4 Are there any other topics that you would like to see form the basis of future parts of the Guide to Good Practice in addition to those which are already published or are under consideration (these are: Part I on Central Authority Practice; Part II on Implementing Measures; Part III on Preventive Measures; Part IV on Enforcement; and the draft of Part V on Mediation)?  
No
- 11.5 Do you have any other comments about any Part of the Guide to Good Practice?  
The biggest problem regarding Guides of Good Practice derives from the non obligation of its content that turn them into mere recommendations which are not taken into account by the officers in charge of implementing the conventions.

<sup>24</sup> See Art. 38 of the 1980 Convention.

<sup>25</sup> The Standard Questionnaire for newly acceding States is available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Questionnaires and responses".

<sup>26</sup> All Parts of the Guide to Good Practice under the 1980 Convention are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Guides to Good Practice".

## **12. Relationship with other instruments**

12.1 Do you have any comments or observations on the impact of international instruments on the operation of the 1980 Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

No

12.2 Do you have any comments or observations on the impact of regional instruments on the operation of the 1980 Convention, for example, the Brussels II a Regulation<sup>27</sup> and the *1989 Inter-American Convention on the International Return of Children*?

Brussels II bis has meant a clear step forward as regards the Convention dated 25-10-1980 in its own area within the European Union but its implementation is not free from problems. It will have to be seeing in which direction the next revision moves in 2012.

## **13. Publicity and debate concerning the 1980 Convention**

13.1 Has the 1980 Convention given rise to (a) any publicity (positive or negative) in your State, or (b) any debate or discussion in your national Parliament or its equivalent? What was the outcome of this debate or discussion, if any?

Yes, Parliament has taken interest in some cases that have made a great impact

13.2 By what methods does your State disseminate information to the public about the 1980 Convention?

We have done a booklet and we have sent it to all competent authorities about children, associations of women, men, divorce parents, Woman's Institute, Ombudsman and children-rights organizations in all Autonomous Community and other organizations

## **PART III: THE PRACTICAL OPERATION OF THE 1996 CONVENTION<sup>28</sup>**

## **14. Implementation of the 1996 Convention**

14.1 If your State is Party to the 1996 Convention, do you have any comments regarding:

a. How it has been implemented?

Referring to implementation of the 1996 Convention, we integrate the report that Spain presented in the recent Conference of Morocco of December 2010 within the Malta process and that is literally wording as follows:

According to the current status table provided by The Hague Conference over Hague Convention 19.10.1996, in the case of Spain the signature was on 1st April 2003 and the ratification is dated on 6th September 2010. The entry into force will be on 1st January 2011. With the ratification of this Hague Convention Spain is contributing more efficiently to the protection of children at international level. This Convention lays down rules on jurisdiction, applicable law, recognition and enforcement of measures on parental responsibility and child protection that are in conformity with the main provisions in these fields under Spanish law, especially when jurisdiction lays in principle within the Contracting State of the habitual residence of the children.

The declarations and reservations concerning Spain are as follows:

Declarations Reservations

Articles: 23,26,34,52,55,60

1 April 2003

Articles 23, 26 and 52 of the Convention allow Contracting Parties a degree of

<sup>27</sup> *Op. cit.* note 14.

<sup>28</sup> This part of the Questionnaire is directed both to States Parties and non-States Parties to the 1996 Convention save where indicated otherwise, and should be completed by all States insofar as is appropriate.

flexibility in order to apply a simple and rapid regime for the recognition and enforcement of judgments. The Community rules provide for a system of recognition and enforcement which is at least as favourable as the rules laid down in the Convention. Accordingly, a judgment given in a Court of a Member State of the European Union, in respect of a matter relating to the Convention, shall be recognised and enforced in Spain by application of the relevant internal rules of Community law.

6 September 2010

(Translation)

If the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children were to be extended by the United Kingdom to the territory of Gibraltar, the Kingdom of Spain would like to make the following declaration:

1. Gibraltar is a non-autonomous territory whose international relations come under the responsibility of the United Kingdom and which is subject to a decolonisation process in accordance with the relevant decisions and resolutions of the General Assembly of the United Nations.

2. The authorities of Gibraltar have a local character and exercise exclusively internal competences which have their origin and their foundation in a distribution and attribution of competences performed by the United Kingdom in compliance with its internal legislation, in its capacity as sovereign State on which the said non-autonomous territory depends.

3. As a result, any participation of the Gibraltar authorities in the application of this Convention will be understood as carried out exclusively within the framework of the internal competences of Gibraltar and cannot be considered to modify in any way the provisions of the two previous paragraphs.

4. The process provided for by the Arrangements relating to Gibraltar authorities in the context of certain international treaties (2007), agreed by Spain and the United Kingdom on 19 December 2007, applies to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.

Pursuant to the provisions of article 34, paragraph 2 of the Convention, Spain declares that the requests referred to in article 34, paragraph 1 shall be communicated to its authorities solely through its Central Authority.

In accordance with the provisions of Article 55:

Pursuant to the provisions of article 60 and article 55, paragraph I(a) and (b) of the Convention, Spain reserves the jurisdiction of its authorities to take measures directed to the protection of the property of a child which is situated on its territory, and the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.

Signature and ratification: a brief explanation.

The declaration dated on 1 April 2003 and concerning Art. 23, 26 and 52 Hague Convention 19.10.1996 has a very simple explanation. Spain is member of the European Union and the 1996 Hague Convention has to be located within this scope. There was a Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention due to the fact that according to the judgment on external powers, delivered by the Court of Justice of the European Communities in the "European Agreement on Road Transport" – Case 22/70, Member States were no longer free to approve the 1996 Convention on their own, given the adoption of Regulation N° 1347/2000 and the resulting sharing of power between the Community and the Member States. In this framework, Spain signed the Convention on 1 April 2003, making a declaration aimed at ensuring that the European Union rules on recognition and enforcement of judgements will continue to apply in the Community. Linked with the situation

described, the Council Decision n° 2008/431/EC, 5th June 2008, authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law, authorised Member States that had not yet ratified or acceded to the Convention to do so. This situation concerned Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden and the United Kingdom. As a consequence of this previous explanation Spain ratified Hague Convention 19.10.1996 on 6-IX-2010.

Reasons concerning declarations and reservations made by Spain.

In order to explain reasons concerning declarations and reservations made by Spain it is clear that one relevant issue concerning Spain in order to ratify this Hague Convention is connected with the territory of Gibraltar, due to the competences that the Hague Convention provides to certain territories that may have forced a direct relation between Spain and the local authorities in Gibraltar. Nonetheless and once in force The Treaty 19.12.1997 between Spain and the United Kingdom over nature of authorities in Gibraltar, Spain was able to ratify this Convention according to the proper declaration that was made.

Concerning declaration under art 34, it is clear that in order not to burden the functioning of the desired co-operation when a requested authority cannot identify properly the requesting authority and cannot assess its authority to send such a request, Spain has made this declaration to achieve that requests made under 34.1 may only be routed through its Central authority.

Concerning the reservations under Arts 55 and 60, their sense is based on a clear aim to preserve the jurisdiction of Spanish Authorities in order to take the measures of protection for property or for certain property. In this field, as the explanatory report focuses on, we are at the interface between property law and the law of protection of minors and the requirements of the law of the situs or place where the property is located are particularly strong like in other countries.

Spanish Central Authority.

Spain has appointed only one Central Authority under Art. 29: Direction Générale de Coopération juridique internationale, Ministère de la Justice, C/ San Bernardo, 62, 28071 Madrid, in order to ensure a proper coordination with other international Conventions related to the 1996 Convention, where the Ministry of Justice is also designated as Central Authority. Spanish Central Authority is able to carry over direct obligations under art 30(1) and 30(2) Hague Convention 19.10.1996 and has previous experience under Hague Convention 25.10.1980 and Council Regulation 2201/2003 in the fields of requests to transfer jurisdiction, requests to assume jurisdiction and requests regarding cross-border placement and can coordinate other functions to be performed within Spain by other competent authorities or other public authorities.

Link between Hague Convention and Brussels II bis Regulation

About the question of how to handle parental responsibility issues under Hague Convention 19.10.1996 and Brussels II bis Regulation, we have a specific legal provision. As concerns the relation of Council Regulation 2201/2003 with the Hague Convention of 19 October 1996, The Regulation shall apply: (a) where the child concerned has his or her habitual residence on the territory of a Member State; (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Spain and The Hague Convention 19.10.1996

Concerning the prospective entry into force in Spain of Hague Convention 19.10.1996, Spain does not have to make changes to domestic legislation even though future appropriate implementing measures could be put in place if necessary. The Hague Convention 19.10.1996 and its provisions will be automatically incorporated into the Spanish legal system according Art 96 Spanish Constitution, when in force. Right now, Spain can take advantage of current domestic Spanish law implementing Hague Convention 25.10.1980 and Brussels II bis Regulation, already existing. Naturally, Spanish social services involved in the practical operation of The Hague Convention 19-10-1996, including Child Welfare Agencies, Courts, Stakeholders, etc., will be informed of real implications in order to obtain a good coordination with Spanish Central Authority, whose functions coincide with Hague Convention provisions.

It is important to focus on the fact that Spain has a wide experience implementing under Brussels II bis Regulation cases transferring provisions to a court better placed to hear the case and developing direct judicial communications under art 11.6, 11.7, 15 and 55 Brussels II bis Regulation with the cooperation of the International Hague Network of Judges, the Spanish Central Authority, the Spanish Network of judges for international judicial cooperation or REJUE, and the European Judicial Network in civil matters. This experience will be very useful to develop provisions under art 8, 9 and 31 of Hague Convention 19.10.1996. Concerning access rights and cross-border placement of children according Art 35 and 33 Hague Convention 19.10.1996, previous experience of Spanish authorities under similar provisions in Brussels II bis Regulation will be very useful.

Mediation in Spain can be used properly to reach agreed solutions for measures of protection. Currently, Directive 21st May 2008 is in implementing legal process in Spain and there are internal mediation laws in almost every Autonomous Entities forming Spain. At the same time, Spanish domestic laws are sufficient to protect the confidentiality of information that is gathered or transmitted under the Convention and relationship between this Hague Convention and other instruments in which Spain is part concerning protection of children is guaranteed.

- b. How it is operating?
  - c. Further, when implementing the 1996 Convention, did your State use the implementation checklist drawn up by the Permanent Bureau in consultation with States Parties?<sup>29</sup> If so, do you have any comments regarding the implementation checklist and how it might be improved in future?
- 14.2 If your State is not Party to the 1996 Convention, is your State considering implementing the 1996 Convention? What are viewed as the main difficulties, if any, in implementing this Convention?

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<sup>29</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Conventions" then "Convention No 34" and "Practical operation documents".

**15. The role and functions of Central Authorities designated under the 1996 Convention**

- 15.1 If your State is Party to the 1996 Convention:
- a. Did you encounter any difficulties designating a Central Authority?  
Yes, we did
  - b. Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities? If so, please specify.  
We have no experience
  - c. Have any of the duties of Central Authorities within the 1996 Convention raised any particular problems in practice either in your State, or in States Parties with whom you have co-operated?  
We have no experience
  - d. Has your Central Authority encountered any particular difficulties with the interpretation or application of the 1996 Convention provisions? If so, please specify.  
We have no experience
  - e. Would you consider the development of any model forms under the 1996 Convention useful (*e.g.*, in relation to the provisions regarding transfer of jurisdiction (Arts 8 and 9), or in relation to the certificate which may be given by the relevant authorities under Art. 40)?  
Yes, it would be very useful

**16. Publicity concerning the 1996 Convention**

- 16.1 If your State is Party to the 1996 Convention, by what methods does your State disseminate information to the public about the 1996 Convention?
- 16.2 Could you provide a list (including contact details and website addresses) of non-governmental organisations in your State which are involved in matters covered by the 1996 Convention?

**17. Relationship with other instruments**

- 17.1 Do you have any comments or observations on the impact of regional<sup>30</sup> or international instruments on the operation of the 1996 Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

**PART IV: TRANSFRONTIER ACCESS / CONTACT AND  
INTERNATIONAL FAMILY RELOCATION**

**18. Transfrontier access / contact<sup>31</sup>**

- 18.1 Since the 2006 Special Commission, have there been any significant developments in your State regarding Central Authority practices, legislation, procedural rules or case law applicable in cases of transfrontier contact / access.  
Apart from Brussels II, the most significant novelty is the coming into force of the Convention of 16 October 1996.

<sup>30</sup> *E.g.*, the Brussels II a Regulation (*op. cit.* note 14).

<sup>31</sup> See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.7.1 to 1.7.3.

18.2 Please indicate any important developments in your State, since the 2006 Special Commission, in the interpretation of Article 21 of the 1980 Convention.

The question debated in Spain is whether the visits of Article 21 are always linked to a process of abduction or are they autonomous. If the visits are autonomous a problem arises from the lack of implementation of a had hoc national process and its very succinct wording prompt many doubts that only Brussels II bis and Convention of 19 October 1996 have developed.

18.3 What problems have you experienced, if any, as regards co-operation with other States in respect of:

- a. the granting or maintaining of access rights;
- b. the effective exercise of rights of access; and
- c. the restriction or termination of access rights.

Please provide case examples where possible.

18.4 In what ways have you used the "General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children"<sup>32</sup> to assist in transfrontier contact / access cases in your State? Can you suggest any further principles of good practice?

## **19. International family relocation**<sup>33</sup>

19.1 When does a parent require the permission of (a) the other parent, and (b) the relevant State authorities, to relocate internationally with a child (*i.e.*, to move with a child from your State to another State, on a long-term basis)?

In Spain, and more clearly during the breakup process, there is a clear social belief or conscience, that the parent who has got the custody of the minor children assumes such power regarding them, many times sanctioned by the law in the cases of attribution of the use of the family house according to Article 96 of the Civil Code that annuls in fact the capacity to decide of the other parent, who remains only as the visiting parent regarding his minor children. The custodian parent seems to be the only one that can take decisions regarding the questions that affect his minor children, annulling in such a way the parent no-custodian that seems to be relegated to have simple visits more or less sporadic and duly programmed in advance, without any power of decision on the matters that concern them. Naturally, we are considering the usual situation in which parental authority is jointly exerted by both parents, and where the breakup of the living together affects the physical parents-children relationship and the way parents feed their children; but it seems that breakup does not affect to rights and duties inherent in parental authority that is generally granted in a joint way. The basic, legal frame-work is provided by Article 39 of Spanish Constitution and Articles 154 and 156 of Civil Code, those have been widely developed by the case law of our Supreme Court. Law 15/2005 did not change, in essence, the current situation, but it reveals the preference for the joint exercise of the parental authority. Article 92.4 of our civil law implies a clear necessity of future prevision for the people involved, and article 156, last paragraph seems to make general what it is a mere exception, when it is a patent reality the granting of the joint exercise of parental authority in almost all sentences and ad hoc agreements in processes

<sup>32</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Guides to Good Practice".

<sup>33</sup> See the Conclusions and Recommendations of the 2006 Special Commission meeting at paras 1.7.4 to 1.7.5: "1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move. 1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation."

of breakup. We must clearly state that a social belief, that is general but wrong, is different from a social custom (Article 156.1 of Civil Code) that does not exist in Spain and does not legitimize unilateral decisions. In Spain, the parent who has the custody, according to our Civil Code, can not take his minor child out to other residence and in no way to another country, without the authorization of the other parent that probably will have only a right of visitation. The other parent consent is required because, even though this one has got only the right of access to children, he has also the custody during the time of the visit. If there is no agreement between both parents, it is necessary a judicial authorization.

It is true that, in Spain, the question about what rights are included in the custody and which ones in the parental authority is not pacific. However, it is clear that a change of residence has serious and significant consequences for the minor; consequently this change is a matter of parental authority more than mere custody. Moreover, there is a clear law making tendency for the future that wants to configure joint custody as the general rule, in opposition to individual custody. This is the preferential rule if there is a breakup and there is no agreement.

A good example is the law of Aragón about "Equality in the familiar relations in case of breakup", Law 2/2010 (into effect since 8 September 2010). This law tries to favour children best interest and to promote equality between parents because the joint custody is based on the combination of two other basic rights: On one hand, the children right of having a balanced and continued relation with both parents; on the other hand, the right and duty of parents of upbringing and educating their children in the exercise of the family authority.

This legislative tendency supports the idea above mentioned in this epigraph. For example, law 25/2010 of 29 July, Book Two of the Code Civil of Cataluña "Person and Family", published in the official gazette of Cataluña DOGC No. 5686 of 5 August (into effect since January 1st 2011). Article 236.11 of this law is about how to exercise the parental rights in case of breakup. In its number 6, it states that, except that the judicial authority establishes other criteria, it is necessary that one parent gives his express or tacit consent to the other one about: deciding the kind of children education, changing their residence if there is a change in their usual environment and taking important decisions on their patrimony. According to Article 236.13 the consent is supposed tacitly given when the deadline of thirty days since the notification of its petition has already expired with no disagreement from the parent who has not the parental authority.

19.2 Do you have a specific procedure in your State which applies when a parent wishes to seek the relevant authority's permission to relocate internationally? When permission of the relevant authority is required to relocate internationally, what criteria are applied to determine whether such permission should be granted, or not?

In Spain there is an ad hoc process to solve transfer petitions of minors and to resolve discrepancies among parents, which is quick and effective and allows contradictions among the parties involved and makes possible the examination of evidence.

19.3 Are you aware of any recent decisions in your State concerning international family relocation which may be of interest to the Special Commission meeting? In particular, are you aware of any cases where the international relocation of a child was permitted by the relevant authorities in your State following the return of the child to your State under 1980 Convention procedures?



- 19.4 Do you have any comment on the Washington Declaration on International Family Relocation<sup>34</sup> reached at the conclusion of the International Judicial Conference on Cross-Border Family Relocation<sup>35</sup> in March 2010? In particular, do you have any comment on paragraph 13 of the Washington Declaration, which states:
- “The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.”

<b>PART V: NON-CONVENTION CASES AND NON-CONVENTION STATES</b>
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**20. Non-Convention cases and non-Convention States**

- 20.1 Are you aware of any troubling cases of international child abduction which fall outside the scope of the 1980 Convention? Are you aware of any troubling cases of international child protection which fall outside the scope of the 1996 Convention?  
Yes
- 20.2 Has your State had a significant number of cases of international child abduction or protection with any particular non-Contracting States?  
Rusia
- 20.3 Are there any States that you would particularly like to see become a State Party to (a) the 1980 Convention and / or (b) the 1996 Convention? If so, what steps would you suggest could be taken to promote the Convention(s) and encourage ratification of, or accession to, the relevant Convention(s) in those States?  
Rusia, Argelia, Japan
- 20.4 Since the 2006 Special Commission, has your State concluded:
- a. Any bilateral, or other, agreements on international child abduction with States not Party to the 1980 Convention?  
No
  - b. Any bilateral, or other, agreements on international child protection with States not Party to the 1996 Convention?  
No
- Please provide brief details of any such agreements, including which non-Contracting States are party to the agreement(s).
- 20.5 Are there any States which are not Parties to the 1980 or 1996 Conventions or not Members of the Hague Conference that you would like to see invited to the Special Commission meeting in 2011 and 2012?<sup>36</sup>  
Rusia, Argelia, Japan

<sup>34</sup> Available in full on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “News & Events” then “2010”.

<sup>35</sup> The International Judicial Conference on Cross-Border Family Relocation was held in Washington, D.C., United States of America, from 23 to 25 March 2010 and was co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (< [www.icmec.org](http://www.icmec.org) >), with the support of the United States Department of State.

<sup>36</sup> See the “Request for funding” made in Info. Doc. No 1 (circulated at the same time as this Prel. Doc. No 1).

*The "Malta Process"*<sup>37</sup>

## 20.6 In relation to the "Malta Process":

- a. Do you have any comment to make on the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the accompanying Explanatory Memorandum?<sup>38</sup> Have any steps been taken towards implementation of the Principles in your State?

We have already spoken before about the implementation of mediation in Spain, and we support any claim to extend its applicability to the scope of the countries involved in the Malta Process.

- b. Do you have any comment to make on the "Malta Process" generally?  
 b) This process will allow to extend the regulations of The Hague Conference to countries with a very different social and cultural scene, entailing huge benefits for the citizens involved
- c. What is your view as to the future of the "Malta Process"?  
 c) The efforts already made should be carried on.

**PART VI: TRAINING AND EDUCATION AND  
 THE TOOLS, SERVICES AND SUPPORTS PROVIDED  
 BY THE PERMANENT BUREAU**<sup>39</sup>

**21. Training and education**

- 21.1 Do you have any comments regarding how judicial (or other) seminars or conferences at the national, regional and international levels have supported the effective functioning of the 1980 and 1996 Convention(s)? In particular, how have the conclusions and recommendations of these seminars or conferences (some of which are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section"), had an impact on the functioning of the 1980 and 1996 Convention(s)?

It is essential to maintain a monitoring system of conventions and continuous training of judicial operators involved in their practical application. The conclusions that are obtained at each seminar and conference are enormously useful.

- 21.2 Can you give details of any training sessions / conferences organised in your State, and the influence that such sessions have had?

For example, it can be mentioned the financial seminar given by the European Network of Judicial Training that dealt with International Abduction of minors and the new challenges (REFJ0910) held in Barcelona on 10, 11 and 12 June 2009, directed by the Spanish judge at the Hague Network of Judges and with the outstanding participation of the Spanish Central Authority. This was designed for European family judges. All papers and working materials of the different workshops are now available to Spanish judges, in Spanish and English, in a prominent place at the intranet for judges within the Spanish Judiciary website. The multiplying effect of the congress results obtained in this way is really great and allows a continuous specialisation of a considerable number of judges in this field.

<sup>37</sup> The "Malta Process" is a dialogue between certain States Parties to the 1980 and 1996 Conventions and certain States which are not Parties to either Convention, with a view to securing better protection for cross-border rights of contact of parents and their children and the problems posed by international abduction between the States concerned. For further information see the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

<sup>38</sup> The Principles and Explanatory Memorandum were circulated to all Hague Conference Member States and all States participating in the Malta Process in November 2010. They are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

<sup>39</sup> Further information regarding the tools, services and supports provided by the Permanent Bureau will be set out in the report to the 2011 Special Commission meeting on this subject (see the "Documentation" section of Info. Doc. No 1).



## **22. The tools, services and supports provided by the Permanent Bureau (including through the International Centre for Judicial Studies and Technical Assistance)**

*In general*

- 22.1 Please comment or state your reflections on the specific tools, services and supports provided by the Permanent Bureau to assist with the practical operation of the 1980 and 1996 Conventions, including:
- a. INCADAT (the international child abduction database, available at < [www.incadat.com](http://www.incadat.com) >). INCADAT underwent a complete revision and an improved, re-designed version was launched on 30 April 2010;<sup>40</sup>  
Excellent
  - b. *The Judges' Newsletter* on International Child Protection - the bi-annual publication of the Hague Conference on Private International Law which is available in hard copy and online for free;<sup>41</sup>  
Excellent
  - c. The specialised "Child Abduction Section" of the Hague Conference website (< [www.hcch.net](http://www.hcch.net) >);  
Excellent
  - d. INCASTAT (the database for the electronic collection and analysis of statistics on the 1980 Convention);<sup>42</sup>
  - e. iChild (the electronic case management system designed by the Canadian software company WorldReach);<sup>43</sup>
  - f. Providing technical assistance and training to States Parties regarding the practical operation of the 1980 and 1996 Conventions.<sup>44</sup> Such technical assistance and training may involve persons visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau (often through the International Centre for Judicial Studies and Technical Assistance) organising, or providing assistance with organising, national and international judicial and other seminars and conferences concerning the Convention(s) and participating in such conferences;
  - g. Where individuals contact the Permanent Bureau seeking help in cases involving international child protection issues (which occurs on an almost daily basis), providing referrals (primarily to Central Authorities) and offering advice of a general nature on the operation of the Convention(s);

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<sup>40</sup> Further information regarding the INCADAT re-launch can be found on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "News & Events" then "30 April 2010". Further information regarding the improvements to INCADAT and the continuing work being undertaken will be provided in the report to the 2011 Special Commission meeting on the services provided by the Permanent Bureau (see Info. Doc. No 1).

<sup>41</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" and "Judges' Newsletter on International Child Protection". For some volumes of *The Judges' Newsletter*, it is now possible to download individual articles as required. Further, an index of relevant topics is being created to enable more user-friendly searches of the publication. The publication is also in the process of being re-designed. Further information regarding this publication will be provided in the report to the 2011 Special Commission meeting (see Info. Doc. No 1).

<sup>42</sup> Further information is available via the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "INCASTAT".

<sup>43</sup> Further information is available via the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "iChild".

<sup>44</sup> Such technical assistance may be provided to judges, Central Authority personnel and / or other professionals involved with the practical operation of the Convention(s).

- h. Encouraging wider ratification of, or accession to, the Convention(s), including educating those unfamiliar with the Convention(s);<sup>45</sup>
- i. Supporting communications between Central Authorities, including maintaining an online database of updated contact details.

*Other*

- 22.2 What other measures or mechanisms would you recommend:
- a. To improve the monitoring of the operation of the Conventions;
  - b. To assist States in meeting their Convention obligations; and
  - c. To evaluate whether serious violations of Convention obligations have occurred?

**PART VII: PRIORITIES AND RECOMMENDATIONS FOR THE SPECIAL COMMISSION AND ANY OTHER MATTERS**

**23. Views on priorities and recommendations for the Special Commission**

- 23.1 Which matters does your State think ought to be accorded particular priority on the agenda for the Special Commission? Please provide a brief explanation supporting your response.  
Provision of legal aid in all cases.
- 23.2 States are invited to make proposals concerning any particular recommendations they think ought to be made by the Special Commission.

**24. Any other matters**

- 24.1 States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 and / or the 1996 Convention(s).

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<sup>45</sup> Which again may involve State delegates and others visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau organising, or providing assistance with organising, national and international judicial and other seminars and conferences concerning the Convention(s) and participating in such conferences.