

The Hague Children's Conventions and the 1989 UN Convention on the Rights of the Child

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Let me first of all express my sincere thanks to the Convenors for the invitation to this very important event. It is a great honor for me to speak to you on behalf of the UN Committee on the Rights of the Child.

1. The Convention on the Rights of the Child (CRC) is usually justly referred to as the most comprehensive, holistic and inclusive text on the international protection of the rights of the child as it covers literally all aspects of children's life. Taking into account the theme of our Conference, I will briefly remind you about those articles of the CRC that specifically deal with family issues. Thus,

- The CRC protects the child's right to be cared for by his/her parents (art 7); not to be separated from his or her parents against their will, except when such separation is in the best interests of the child, and to maintain personal relations and direct contacts with both parents on a regular basis, except if it is contrary to the child's best interests (Art. 9 (1) (3));
- The CRC also deals specifically with the situations when the child's parents reside in different States, stating the child's right to maintain on a regular basis personal relations and direct contacts with both parents (Art. 10 (2));
- It fixes States' obligation to combat the illicit transfer and non-return (Art. 11 (1)), and to this end, specifically refers to the conclusion of bilateral or multilateral agreements or accession to existing agreements (Art. 11 (2));
- Provisions important for understanding of the legal framework of parents-child relations are contained in the CRC Art. 18 (1) that obliged the States to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child;
- Finally, Art. 27 (1) and (4) that speaks about the right of a child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development, and requires that the States take all appropriate measures to secure the recovery of maintenance for the child from the parents or other person having financial responsibility for the child, both within the State Party and from abroad. This article also requires that the State parties promote the accession to international agreements or the conclusion of such agreements as well as making other appropriate arrangements.

There are other articles in the CRC that may be relevant in the family context, but those just mentioned are, in my opinion, the most important for our current theme.

2. There is probably no need to speak about the importance of a family for the child’s upbringing. We, adults, we all came from our childhood. We all (or probably most of us) came from our families, and what we will become in the future to a significant extent depends on our childhood, on what the relations with our parents were and whether we had an opportunity to have meaningful contacts with each of them.

Globalization processes and particularly increased migration of the families or one of the parents with or without children is itself a serious challenge to the quality of parents-child relations, and, consequently, to the “quality of childhood”, if I may say so. It may become even more dramatic if it is aggravated by parental divorce or separation, parental conflicts, forceful separation of a child from one of his/her parents, abduction – as the worst scenario, which, in turn, may cause, and too often does cause, severe harm to the child involved, which may influence the whole child’s future life.

To the increased migration, I would add another reality of our today’s life – increase in the number of mixed marriages or mixed de facto unions where spouses or partners belong to different nationalities and/or different cultures.

These factors make international mechanisms aimed at solving cross-border family disputes and conflicts as topical as never before.

3. What is the connection between the CRC and three Hague Children’s Conventions we discuss today? I believe, the connection is very close and it becomes more and more important. Firstly, the CRC directly refers to international agreements and conventions that deal with different family issues. Secondly, it is obvious that each of the Hague Conventions, whether it deals with abduction, parental custody, visitation rights or child maintenance, supports, develops, and gives practical effect to the relevant provisions of the CRC. Thirdly, due to increase in cross-border family disputes, the Hague Children’s Conventions can be now more widely applied in the child’s rights contexts dealt with under the CRC than it was before.

4. Let’s have a look at the Concluding Observations (COBs) that the UN Committee on the Rights of the Child (Committee) adopted during approximately the last three years. COBs is a document which finalizes the Committee’s monitoring of the State party’ fulfillment of the provisions of the CRC and which is adopted as a result of a Dialogue with a State party. It can certainly be stated that there has been an increase in the Committee’s references to the Hague Conventions that we discuss today.

To give you examples:

5. In the COBs addressed to Kenya Government (2016) in the context of family environment the Committee was concerned about weak enforcement of court orders on child maintenance within the State party and abroad and recommended to consider ratifying or acceding to *the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the 2007 Hague Maintenance Convention) and its *Protocol on the Law Applicable to Maintenance Obligations* (the 2007 Maintenance Protocol).

Also, in 2016, in the COBs addressed to Haiti, Senegal, Oman, and Iran the Committee recommended to joint not only *the 2007 Hague Maintenance Convention* and *the 2007*

Maintenance Protocol but also *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* (the 1996 Child Protection Convention).

At the Dialogue with Algeria that took place earlier, in 2012, the Committee discussed, amongst other issues, the problems of illicit transfer and non-return of children from abroad and urged the State party to ratify *the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Abduction Convention).

6. When we speak about the Hague Children’s Conventions, we usually mean the cross-border disputes that arise between the parents. However, it should not be forgotten that the Hague Conventions equally concern other persons who have parental responsibility or custody rights. These may be, in particular, guardians and adoptive parent. This may be topical in case of *kafala*, the institution known to Islamic law, which is a kind of functional substitute of adoption. But, because it is not an adoption, it falls outside the scope of *the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. Therefore, for instance, the *1996 Child Protection Convention* will be extremely relevant when the Committee deals with *kafala* issues in a cross-border context, because the measures stipulated by that Convention are also applicable in case of *kafala* and analogous institutions.

7. The Committee referred to the Hague Conventions not only under “Family environment” cluster but also in the context of children in situations of migration under the cluster “Special protection measures”. It was connected with Committee’s concern, among other issues, on the impact of migration on children, especially those left behind, as well as challenges in securing maintenance from parents who have migrated abroad. We may find examples in the COBs addressed to Jamaica and Saint Lucia in 2015 and 2014, respectively. In these cases, the Committee recommended entering into bilateral agreements with the major States of employment of Jamaican / Saint Lucian migrant workers, and ratify the Hague conventions and other conventions “relative to the subject”, to quote from the COBs.

At the same time, the recent migration crises, still unfortunately ongoing, makes also Art. 6 of the 1996 Child Protection Convention absolutely topical now. To remind, it aims at protection of refugee children and children who, due to disturbances occurring in their country, turned out to be internationally displaced. Under the 1996 Convention, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction to take measures directed to the protection of the child's person or property.

I will remind you that the Committee adopted the General Comment No. 6 “Treatment of unaccompanied and separated children outside their country of origin” in 2005, in which it encouraged the State parties to ratify international instruments that address issues relating to unaccompanied and separated children, and among them named the 1996 Child Protection Convention.

8. I can probably say that, generally speaking, effective and proper implementation of the Hague Children’s Conventions in many countries required not only some legislative

changes but, to a certain extent, change in mentality, change in a mindset of judges and all other professionals involved in cross-border child-related disputes, particularly because the concepts of child’s habitual residence and summary return of an abducted child were not familiar to their national laws. In those countries whose legal systems are influenced by or based upon Sharia’s law it has additional serious complications connected with cultural and religious specificities. They relate first of all to the position of a woman in the family, rules on child custody, and allocation of parental rights between a mother and a father. However, these specificities do not make the State parties to the CRC free from their obligations under this Convention and do not negate a general rule that a child needs both parents, and irrespective of the child’s age.

The Committee is constantly addressing these issues in all Dialogues with the State parties where the problem of parental inequality exists. Without going into details, the Committee’s concerns expressed during the Dialogues and reflected in the COBs can be summarized as follows:

Thus, in 2013, the Committee, when discussing family environment issues with one of such State parties expressed concerns that parental responsibilities were still not equally assigned, fathers being considered as the sole legal guardians of their children under the State party’s family laws. The Committee was also concerned that in cases of divorce between a Muslim man and a non-Muslim woman, custody of the children was automatically given to the father; women who remarry after a divorce lost custody of their children.

In 2015, with regard to another country, the Committee was concerned that the law still provided that mothers could keep custody of their daughters only until the age of 13 and their sons only until the age of 10.

In one of the recent Dialogues with a State party, in 2016, the Committee welcomed the recognition under the Constitution of the equal rights of children born within and out of wedlock. However, it expressed concerns that the new law legally recognized discriminatory practices which undermined equal parenting rights and responsibilities between women and men and had adverse effects on children.

9. As I have already mentioned, effective implementation of the Hague Conventions often required change in a mindset. The same is, to a certain extent true, regarding the CRC. Nevertheless, twenty seven years of implementation of the Child's Rights Convention indicated that, no matter how slow, States parties have been willing to change legislation and take other measures in order to comply with their international obligations. Therefore, we may expect that the more families are on the move and the more there will be children born in mixed marriages or mixed extra-marital unions, the more urgent will be the need for the countries to find solutions of cross-border child-related family disputes. I believe, this will also concern those countries whose legal systems are influenced by or based upon Sharia’s law.

10. Bilateral or multilateral agreements is an option that may help to solve cross-border family disputes. As I have mentioned, the CRC encourages the State to promote the conclusion of bilateral or multilateral agreement (or accession to existing agreements). Making agreements is also recommended by the Hague Conference on Private International

law. I would like to refer to the Declaration adopted at the Third Malta Judicial Conference, where it was noted that

“continuing efforts should... be made to develop the mutual trust and understanding between “Hague State Parties” and “non-Hague State Parties”...”.

The issues that are covered by three Hague Children’s Conventions directly concern children got involved in their parents’ conflicts. There are neither “sending” nor “receiving” countries. There are children torn between warring parents, children often left without any financial means. That is why I do believe that there is a solid ground for developing “the mutual trust and understanding between the “Hague” and “non-Hague” countries.

11. There is probably much more that could be said but I had to limit myself to the issues that I see as the most relevant to the theme of my talk.

Thus, to conclude,

As we often say in the Committee, the main rule for us is the best interests of the child (CRC, Art. 3), and I hope the same is true for all the countries that are the Parties to the CRC. I believe, it is obvious for everyone that, in cross-border context, for a child to be completely separated from one of the parents, to be deprived of regular meaningful contacts with a separately residing parent, to be deprived of child support or maintenance from a parent residing abroad is clearly not in the child’s best interests. And with the passage of time, these issues will only become more urgent, and the countries that are the Parties to the CRC, including those whose legal systems are influenced by or based upon Sharia’s law will inevitably have to react to this challenge. The Hague Children’s Conventions provide a very good solution, perhaps the best one that has been created at the international level so far.

Thank you so much for your attention.