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ISS COMMENTS ON THE QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE HAGUE CONVENTIONS 1980 (ON CHILD ABUDCTION) AND 1996 (ON PARENTAL RESPONSIBILITY ACROSS BORDERS AND MEASURES ON THE PROTECTION OF CHILDREN)

To be submitted to the Permanent Bureau of The Hague Conference on Private International Law to the attention of the Special Commission of June 2011.

A. General Comments

❖ The introduction of mediation in Hague procedures

The place progressively given to alternative modes of conflict resolution, and especially mediation, in the operating framework of the conventions and the work of the Permanent Bureau is a big breakthrough, creating space for legal procedures and processes bringing forth negotiated settlements in the best interest of all actors involved in cross-border family conflicts: the families & children, administrative authorities, the judiciary and social workers.

The added value of introducing mediation in Hague procedures is clearly threefold: 1) it helps to deal with the reality of the family context (relational, social and financial) which needs to be considered if the sustainability of agreements is expected; 2) it helps families save a lot of money and enables administrative & legal bodies to more efficiently use human and financial resources over long periods of time; 3) it enhances the well-being of the family and the children.

Mediation should also be developed as a means of IPCA prevention; but a mediation process may accompany the whole legal procedure, with a careful look at some of its critical moments, to avoid abuse of process by one of the parties; last but not least, mediation and case-management can provide a very strong follow up and support to families involved in international parenting disputes, after court decisions have been made.

However, it is important to be aware that mediation is not always suitable for all families. Consistent and valid screening processes need to be used to ensure that the mediation process does not pose risk to the safety of a parent or child, that a parent's capacity to mediate with the other parent is not limited by their physical or mental health,

overwhelming emotions or other situational factors. It could be argued that the ISS network, as a social work agency, is well-placed to develop and administer appropriate mediation intake instruments and to support families throughout this process. In addition, due to the variability in understandings of the role and process of mediation across national and cultural contexts, it is important that any participants in mediation agree on the role of the mediator and the mediation framework used.

❖ **ISS & The Hague Permanent Bureau**

ISS has a longstanding working relationship with The Hague Conference, based on similar objectives and complementary areas of expertise. The promotion of child/family centred practices in matters of child abduction is an additional opportunity for a substantial collaboration between the two organisations.

❖ **ISS recommendations**

Towards improvements of the practical operation of the 1980 convention

ISS believes that there are two major concerns with the current practical operation of the 1980 convention:

1) The minor focus given to the child in legal proceedings under the convention, despite universal legal instruments upholding the rights of the child; therefore, there is an urgent need to facilitate processes for hearing the voice of the child, and to ensure that the child's needs are strongly represented in 1980 Hague cases.

2) The use of strictly legal and court-based proceedings has proved to pose substantial limitations when handling cases under the 1980 Convention. As the recourse to mediation and other ADR methods can be a useful complement or alternative to judicial procedures, the possibility of employing a mediation process as part of the whole legal procedure must be encouraged in a more systematic way.

However, we note that the practice of International Family Mediation is not yet coordinated in the countries where it is used; to implement effective mediation for cross-border family conflicts, and more specifically for child abduction cases, there is an urgent need to federate activities around the practice of international family mediation and strengthen transnational cooperation in this field.

Cooperation needs to occur among actors from the social work and judicial sectors, involved in the handling of international cases, at a national, regional, international or communitarian level.

In order to strengthen transnational cooperation, we suggest more practical and coordinated means to facilitate effective cross-border collaboration, as well as the identification and implementation of the most adequate mediation processes.

Strengthen links between the 1980 and 1996 Hague conventions

Practical tools, accessible to all across borders, will help limit problems arising from constraints of timely enforcement of the measures foreseen by the 1980 convention.

Furthermore, a better understanding of what is involved in mediation and in the mind of the families involved in cases of child abduction will:

1. Encourage referrals to mediation when appropriate
2. Improve the mechanisms of the 1980 convention
3. Link its practical operation to the application of the 1996 convention on parental responsibility and child protection.

B. Comments to specific parts of the questionnaire

❖ Part I: Recent developments

Issues of compliance

Timeframes are a recurring issue for cases under the 1980 convention. ISS notes that the time issue becomes problematic when States take a long time to expedite cases under the convention to another country, or when States become involved in matters beyond the scope of the convention (e.g. custody arrangements).

When the use of mediation is debated within legal circles, it is often argued that the process takes too much time and thus doesn't comply with the timeframes foreseen by the convention. But very often, the problem will re-emerge later on, when compliance with court decisions is hampered by non-respect of the agreement or lack of mirror-orders; then the case can turn into a judicial war which may last for years.

ISS believes that a survey and further analysis on the time that mediation processes require would be useful to deal with the question of timeframes in the framework of the 1980 convention.

❖ Part II: The practical operation of the 1980 Convention

Recommendations on the role and functions of Central Authorities

ISS experiences valuable working relationships with Central Authorities and upholds the importance of their liaising with agencies that can offer comprehensive services and support for families affected by IPCA.

ISS believes that all Central Authorities should be encouraged to involve various actors dealing with cross-border family conflicts and IPCA cases in their regular meetings.

Domestic violence allegations

Reports of the work of ISS branches presents evidence that the problem of domestic/family violence often emerges when handling IPCA cases (e.g. in: *Living in Limbo, The experience of IPCA*, ISS Australia Report, 2005, 50 pages). Whether allegations are occasioned by fear or pre-existing family violence (physical, emotional, financial), objective criteria for the assessment of the existence of family violence are difficult to determine, and should not be the role of a social work organisation. Of greater importance are the findings of current research clearly indicating that the exposure of children to violence has considerable impact on the emotional, psychological, neurological and social development of the child.

ISS is concerned that the issue of domestic violence in IPCA cases is marginalised under the assumption that the person alleging family violence is seeking to abuse the process of the 1980 Hague Convention.

Domestic violence allegations and the voice of the child: Along with the provision of the 1980 convention (article 13b), giving a greater place to the view of the child may help to read between the lines in case of allegations. Yet, to prevent misuse of such an instrument, as well as mental pressure on the child, the approach may need to involve extra-judicial skills.

Domestic violence allegations and return orders: guaranteeing a safe return by means of social and legal assistance (for example, exploration of the existence of residence permits, accommodation, psychological support if needed...) would be of great help to the parent who is obliged to go back in spite of fear of violence.

ISS recommends timely referral to social services in the place of residence during the return procedure.

Ensuring the safe return of children

The safe return of a child includes all issues arising after its return to the habitual residence. To prevent problems, courts should, in the first instance and during the procedure, be well informed that the child is not being returned to a situation that contains significant risk (see Article 13b). The ISS network is able to obtain information from abroad and could collaborate on these issues. This type of service would help to seek documentary proof as a complement to parental testimony (which is weighing one parents' word against the other).

After the return of the child: ISS experience shows that issues which led to the abduction are rarely resolved in the return process. To take just one example, the child has the right to be in contact with both parents after the return, regardless of risks incurred. The principle of ongoing contact with the abducting parent after the child is returned needs to be addressed and is often difficult and emotive; parents should be supported in this endeavour by qualified professionals.

ISS is well placed to work on cases after the return application is heard.

Particular difficulties arise when the abducting parent has no citizenship rights within the country to which they have returned, which means that he or she is no longer eligible for housing and financial services. Measures to ensure the safety of the child (its mental and physical stability and the fulfilment of basic needs) upon return should be put in place by States (with child protection authorities and/or relevant social services).

ISS can collaborate on these issues where ever present throughout the world.

ISS also strongly supports the use of mediation to support the parents after the return of the child. Perhaps all return orders should be accompanied by a mediation order to prevent future abductions and promote contact with both parents.

Equally important are prevention measures including mediation (with appropriate screening for suitability), to avoid an increase of IPCA cases; once the court procedure is underway there is not much space for an intervention in the best interest of the child.

ISS recommends a mandatory mediation (or information session on mediation) to accompany a return order.

Finally, ISS supports the expeditious resolution of cases under the convention, but notes with concern that avoidance of delays should not be at the expense of obtaining the child's views via appropriately trained professionals.

Interpretation and application of exceptions to return: the hearing of the child

ISS notes that EU regulations in this regard have brought some success: the child has a chance to be heard directly in regard to objections of return. ISS agents highlight that it makes sense when hearing from the child is not seen as a formal requirement.

ISS strongly believes that the child's voice and legal status in return proceedings should be reinforced and processes ensuring safe and adequate hearings be further implemented.

Relationship with other instruments

It appears that the compatibility between international conventions like the Convention on the rights of the child and The Hague 1980 convention decreases; e.g. both the UNCRC and the EU Council Regulation clearly give a place to the child, either through its voice or additional protection measures. ISS believes that the automatic return-order, which makes the child a hostage of his parents' conflict, as well as the interpretation of the best interest of the child, will turn out to be a point of conflict with the principle of the basic rights of the child.

ISS fears that the acceptance of The Hague will erode if the rights of the child will not be given a more explicit place.

❖ Part III: The practical operation of the 1996 convention:

ISS undertakes this work in many countries; therefore, ISS recommends Central Authorities to use existing expertise, and that States signatory to the 1996 convention should involve their ISS branch or representative in the mandate.

Newly acceding States to the convention

In the European countries, that have now ratified the 1996 convention, ISS is ready to discuss with the Central Authorities designed to deal with these matters, about which services ISS can offer, and, most importantly, in which direction ISS can develop its services in order to offer a long standing expertise in dealing with family relations across borders.

ISS is willing to help the authorities to implement the convention and cooperate with them in a complementary way.

Publicity

ISS handles many cases covered by the 1996 convention, which is closely related to the international convention on the Right of the Child, bringing forth protection measures in the best interest of the child. Accordingly, ISS branches and correspondents disseminate information on the 1996 convention via websites and publications, advocate for the convention through awareness-raising seminars and national conferences and offer counselling via telephone hotlines.

In non-Hague countries, ISS continues to offer its services in support of families across borders

❖ **Part IV: Transfrontier access/contact and international family relocation**

In the ISS experience, these issues are closely related to the right to access in cases of return and non-return orders. Problems arise from huge divergences between national family laws and cultural interpretation on what is care in the best interest of the child (e.g. the importance given to access to the remaining parent and rights of movement of the caring parent).

In addition, family court decisions on access do not force foreign administrative authorities to provide a foreign parent with the necessary permit to see their child.

Upstream, ISS branches noticed that in a number of cases, the separation of a bi-national couple exposes the parent who doesn't have citizenship to the risk of losing a proper residence status, which may force them to leave the country leaving the child behind or abducting it.

State policies on permission to relocate vary hugely from one country to another. ISS strongly supports the principles of the Washington Declaration 2010 which place an emphasis on the child's best interests, the child's right to contact with both parents except if contrary to best interests, the legal relocation as a means of improving the cooperation between parents, as well as the use of mediation to develop and maintain contact agreements in the context of relocation.

As ISS deals with such cases on a daily basis, the network could join The Hague Conference and the ICMEC in their effort to develop and promote common principles.

❖ **Part V: Non-convention cases and non-convention States**

The ISS network includes a significant number of members and working partners in non-convention States. In many countries and cases it is necessary to support the parents in negotiating amicable solutions. Hence, knowledge and experience of ways to handle cases of child abduction cases do exist, as well as reliable working partners and access to the social systems.

However, cooperation with non-convention States in matters of child abduction can be difficult. In the absence of bilateral agreements, or in cases of deficient application of those agreements, ISS strongly supports the development of mediation facilities. According to the results of pilot projects conducted since early 2000, resolution of conflict was attained in a high proportion, when parents agree to participate in such a project. Generally, these mediations function when the abducting parent has something important to lose when legal action is engaged against him for child abduction (a job, a residence or working permit, a social status).

ISS has longstanding experience of work in non-Hague States, and is very well acquainted with the functioning of administrative and legal authorities in many countries, as ISS correspondents work in close collaboration with these entities to handle their cases.

ISS offers to foster possibilities of collaboration on these issues with the Permanent Bureau of The Hague.

Costs of mediation with non-Hague States: the access to mediation is sometimes hampered although parents wish to engage in the process; the reason is that the process, including heavy travel and lodging costs for the encounters, must be paid by the parties (because generally there is no financial help for this available). Telephone and/or on-line facilities are more and more explored to combat this impeding problem.

The Malta Process

ISS is closely following the developments on the Malta process engaged by the Permanent Bureau. Introducing its expertise in cross-border family conflicts and outreach to countries not signatory to the 1980 and 1996 Conventions, ISS would be happy to further participate in the process.

❖ Part VI: Training and education, tools, services and supports provided by the Permanent Bureau

In 2005 and 2006, The Hague Permanent Bureau collaborated with ISS for the organisation of a series of training seminars addressed to the social workers of the ISS network. The idea was to raise awareness on international conventions for a more efficient handling of cross-border family conflicts and cases of international child abduction.

In the light of recent developments in the mediation area, ISS conversely proposes to organise, together with The Hague Conference, a series of awareness-raising seminars and practical workshops on issues at stake when involving mediation, addressed to Central Authorities and legal bodies, both in Hague and non-Hague States; such workshops will give a chance to discuss very practical questions of transnational cooperation in this field.

Since 2006, ISS (ISS Bulgaria, Germany and Romania, Switzerland, Australia, UK, USA) has organised international training seminars and regional encounters for judges, Central authorities and social work professionals focusing on the child in cross-border family conflicts and the ISS mediation based approach in the handling of these cases.

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