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LES CONVENTIONS DE LA HAYE RELATIVES AUX ENFANTS : QUELQUES DEVELOPPEMENTS REGIONAUX

établi par le Bureau Permanent

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THE HAGUE CHILDREN'S CONVENTIONS: SOME REGIONAL DEVELOPMENTS

drawn up by the Permanent Bureau

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I. INTRODUCTION

The three modern Hague Children's Conventions continue their global expansion. In less than 10 years the number of Contracting States to *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* has more than doubled (from 29 to 75). *The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, after less than 10 years in operation, has 64 Contracting States. *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* has 10 Contracting States; a further 18 States, all Members of the European Union, have signed the 1996 Convention.

Within certain regions of the world the Conventions face particular challenges. There has, for example, been a reluctance among some States in the Middle East to embrace the 1980 Convention despite a growing awareness in the region of the problems of international child abduction and cross-frontier parent / child contact. Frequently these problems concern other States who are Parties to the 1980 Convention, and the absence of a coherent legal structure for resolving cases gives rise both to personal tragedies and sometimes to aggravation at the diplomatic level. This is the background against which the Permanent Bureau has been mandated to keep under review bilateral arrangements between "Hague" and "non-Hague" States, and it is also the background against which the Permanent Bureau organised the Malta Judicial Conference in March 2004, which is described in detail below.

The Permanent Bureau continues to take every opportunity to address those States which are known to have an interest in the Hague Children's Conventions, to point out their advantages and to provide or offer assistance and advice on implementation. Within Asia, for example, this was done during the last year in the course of official visits to India and Japan.

Different regions also confront special problems concerning implementation of the Hague Children's Conventions. The Permanent Bureau has found that it can be valuable to address these on a regional as well as a national basis. The regional approach is particularly useful where there is some commonality among the legal systems concerned, and even more so where there is a common language. These were some of the reasons for organising the Judges' Seminar in Mexico in December 2004 whose purpose was to improve the operation of the 1980 Convention in countries in Latin America.

The Permanent Bureau is convinced that more work at the regional level is needed. It is planning a follow-up meeting to the Malta Judicial Conference which will involve a slightly expanded group of States. A follow-up programme to the Latin American Judges' Seminar, which will embrace the three Hague Children's Conventions, is being drawn up. Some exploratory work is also underway in the Southern African Region to promote and improve the operation of the Children's Conventions in that region, and to examine ways in which implementation of Hague Conventions can be best adapted to the particular circumstances and needs of the countries in the Southern African Region.[1]

[1] The Conclusions and Recommendations from numerous judicial seminars, particularly in respect of the previous European programmes, are available on the Child Abduction Homepage of the Hague Conference; <http://hcch.e-vision.nl/index_en.php?act=text.display&tid=21> (under the heading *Judicial Seminars on the International Protection of Children*).

II. JUDICIAL CONFERENCE ON CROSS-FRONTIER FAMILY LAW ISSUES INVOLVING CERTAIN "HAGUE CONVENTION" AND "NON-HAGUE CONVENTION" STATES FROM THE ISLAMIC WORLD (ST. JULIAN'S, MALTA), 14-17 MARCH 2004

From 14-17 March 2004, Judges and experts from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, the European Commission, the Council of the European Union, the International Social Service and Reunite, as well as the Hague Conference on Private International Law, met in St. Julian's, Malta to discuss how to secure better protection for cross-frontier rights of contact of parents and their children and the problems posed by international abduction between the States concerned.

The Malta Judicial Conference was designed as a Conference of regional experts bringing together top ranking Judges and government officials as well as officials of regional organisations, non-governmental organisations representatives and academics. The number of participating States was limited in order to maintain a balance between "Hague Convention" and "non-Hague Convention" States and to keep the total number of experts present at a level suitable for a frank "brain-storming" session. The choice of participating States was based partly on demographic factors and partly on national experience in developing and applying bilateral arrangements.

The background to the Hague Conference's involvement in this area is the continuing mandate given to the Permanent Bureau to keep under review the development of bilateral arrangements between "Hague" and "non-Hague" States which provide remedies on parental disputes over contact with children. A research paper[2] on this subject was presented at the Special Commission Meeting of October / November 2002, called to review a number of aspects of the operation of the 1980 Convention. An initial review of 11 bilateral arrangements involving Algeria, Australia, Belgium, Canada, Egypt, France, Lebanon, Morocco and Tunisia suggested that the bilateral arrangements which at the moment are having most success are those which offer procedures for promoting and facilitating agreed solutions between the family members concerned. What is lacking is an effective legal structure to provide a framework within which agreements can be negotiated safely and fairly, which is capable of giving effect to such agreements and which will provide remedies where agreement is not possible.

An international legal framework is of course already partly available in the form of the Hague Convention of 1980, but most of the "non-Hague" States concerned are not ready at this point to accede to the 1980 Convention.[3] Another important ingredient in that legal framework is the 1996 Hague Convention with its recognition, enforcement, co-operation and applicable law provisions. It is significant that Morocco is already a Contracting State. However, many other States in the region are not yet ready to accede.

The Malta Judicial Conference was therefore an important stepping-stone and an opportunity to continue the search for common legal principles to complement mediating structures, and to begin to identify the basic building blocks for better co-operation and for the development of a "rule of law" between the countries concerned. In the best traditions of the Hague Conference this search for common legal principles involved (1) a full appreciation of how the legal systems concerned currently address cross-frontier family law problems; (2) a process in which principles develop on the basis of consensus – principles in which all the countries concerned feel a sense of "ownership"; (3) respect for

[2] See Preliminary Document No 7 of August 2002 for the attention of the Special Commission of September/October 2002, Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States, drawn up by Caroline Gosselain for the Permanent Bureau.

[3] One exception is Morocco which has announced its intention to acceded to the 1980 Convention.

the diversity of the different legal systems and their basic values; and (4) a willingness to compromise in the pursuit of shared objectives which, in the case of international child protection, include those embodied in the *United Nations Convention of 1989 on the Rights of the Child*.

The Conference consisted primarily of discussion among the participants both in plenary and in small discussion groups with simultaneous Arabic, English and French interpretation. The experts were confronted with some practical and rather typical case scenarios dealing with issues such as the procedural aspects in deciding access / contact, return, and relocation applications, how to give appropriate respect / recognition to agreements between the parties and existing court orders, safeguards and guaranties, and practical forms of assistance. The experts considered how these cases would be handled under existing rules and procedures, and what common approaches might be possible in developing improved systems.

After three days of discussion, the Malta Conference moved towards approval of the common set of principles. These principles are more than statements of aspiration. They contain possible building blocks for the development of a legal framework - "a rule of law". Particularly important is the recognition of the need to develop common jurisdictional standards and to give mutual respect to decisions made on those bases. There is acknowledgement too of the fact that speed is of the essence in cases where parent and child have been separated and a reaffirmation of principles set out in the *United Nations Convention of 1989 on the Rights of the Child* including the child's right, where parents reside in different States to maintain on a regular basis personal relations and direct contacts with both parties.

The Malta principles, embodied in a Declaration made by those present, and set out at Annex A of this Preliminary Document, are part of a continuing dialogue. The involvement of the judiciaries of the countries concerned in that dialogue has been an important element in the success so far achieved.

As a result of the Judicial Conference, Sweden and Malta have designated Liaison Judges who have joined the existing Hague International Network of Liaison Judges.

Further work is now being planned to build upon the broad principles and shared conclusions within the Malta Declaration. The States involved in and the experts participating in the Malta Conference have manifested a strong wish to bring forward the Malta process. The Malta Conference was made possible by generous support, financial or in-kind, from Germany, Malta, the Netherlands, Sweden and the United Kingdom.

III. THE LATIN AMERICAN JUDGES' SEMINAR ON THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (MONTERREY, NUEVO LEÓN, MEXICO), 1-4 DECEMBER 2004

From 1-4 December 2004 ninety Judges, Central Authority officials and other experts from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, United Sates of America, Uruguay and Venezuela, and representatives from several international organisations, met in Monterrey, Mexico, to discuss how to improve, among the countries represented, the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

The Latin American Judges' Seminar was designed as a regional Seminar (the first of its kind for the Hague Conference in the region) to bring together judicial and governmental leaders in child protection matters. It drew on the experience and expertise from each country represented as well as from the co-organising organisations: the Hague Conference on Private International Law, the United States Department of State (Office of Children's Issues), the Law School of *Instituto Technologico y de Estudios Superiores de Monterrey*, the Organization of American States - Inter-American Children's Institute, the American Bar Association Latin American Law Initiative Council, the Texas-Mexico Bar Association and the International Centre for Missing and Exploited Children.

To achieve a core of judges with experience dealing with international child abduction cases, each of the nineteen participating States nominated an appellate judge familiar with the Hague Convention and / or at least one trial court judge with experience with international child abduction cases. At least one representative from the national Central Authority also participated from most of the States. The participation by Central Authority representatives at the Seminar was essential as, for the Convention to work well, the Central Authorities need to work in close co-operation with the judiciary.

The stated objectives of the Seminar were to improve the international protection of children; limit the harmful effects of international child abduction; improve the operation of the Convention within the region; develop mutual understanding of how the Convention is applied in the different jurisdictions represented; share any helpful developments in practice under the Convention; promote administrative and judicial co-operation at the international level; examine the interrelationship with the *Inter-American Convention on the International Return of Children*; and to work towards the formulation of conclusions embodying the shared understandings reached by the participants, for further consideration by the relevant national authorities.

The Seminar consisted primarily of discussion among the participants both in plenary and in small discussion groups with simultaneous Spanish and English interpretation. As is Hague practice, the Seminar was framed around a comparative law methodology with use of hypothetical cases and judicial opinions to illustrate the discussion topics, emphasising the active participation and exchange of views among the judges and other experts, and supported by presentations on Convention principles and country reports.

The hypothetical cases set out fact patterns focusing on basic principles and objectives of the Convention, key Convention concepts, case management, problems surrounding abduction by primary carers, ensuring the safe return of the child, judicial communications, issues of enforcement and access / contact in the abduction context. Following small group discussions, reporters presented to the plenary a summary of any conclusions reached in respect of the hypothetical cases and the central issues discussed. These summary reports were followed by lively plenary debate in plenary sessions.

Following three days of discussions and presentations agreement was reached on twenty Conclusions and Recommendations covering international cooperation; accession to the Convention; the nature of and speed in Hague proceedings including appeal procedures; the exceptional nature of defences; the importance of effective access to the courts; the use of safe return and protective measures as well as preventive measures; use of implementing measures, regional training programs and liaison judges; the maintenance of statistics, websites and judicial reference materials; and the use of materials such as The Judges' Newsletter on International Child Protection and The International Child

Abduction Database (INCADAT). The interrelationship with the principles outlined in the *Convention on the Rights of the Child of 20 November 1989* as well as those in the *Inter-American Program on Co-operation to Prevent and Remedy Cases of International Abduction of Children by One of their Parents* with the Hague Convention was also recognised.

The potential advantages 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*, as an adjunct to the 1980 Convention, were also recognised and States encouraged to consider its ratification or accession.

It was recommended that a follow-up Seminar be held in approximately two years, and in the meantime, further initiatives pursued to encourage more frequent meetings and contacts.

As a result of the Seminar a network has been established of Judges and other experts in the countries concerned who are committed to continued improvement in the operation of the 1980 Convention in particular, but also more generally in international judicial and inter-State co-operation to improve international child protection. Follow up work continues as the established regional Judicial / Central Authority network plans several national judicial seminars for the spring / summer 2005, and regional expansion of INCADAT and The Judges' Newsletter.

The Permanent Bureau is currently finalising plans for a one year Latin American Programme as a follow up to the Mexico Seminar, to improve the operation of the Hague Children's Conventions in the region and to encourage more active participation by the Latin American countries in the work of the Hague.

The full Conclusions and Recommendations from The Latin American Judges' Seminar are set out at Annex B.

The Seminar was generously supported, financially or in-kind, by the United States Department of State (Office of Children's Issues), the International Centre for Missing and Exploited Children, the Law School of *Instituto Technologico y de Estudios Superiores de Monterrey*, and local government authorities.

ANNEX A: Malta Declaration
ANNEX B: Monterrey Conclusions

A N N E X E S

The Malta Judicial Conference on Cross-Frontier Family Law Issues
Hosted by the Government of Malta in Collaboration
with the Hague Conference on Private International Law

DECLARATION[1]

On 14-17 March 2004, Judges and Experts from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, the European Commission, the Council of the European Union, the International Social Service and Reunite, as well as the Hague Conference on Private International Law, met in St. Julian's, Malta, to discuss how to secure better protection for cross-frontier rights of contact[2] of parents and their children and the problems posed by international abduction between the States concerned.

The participating Judges and Experts agreed the following:

1. The principles set out or implicit in the *United Nations Convention on the Rights of the Child* of 1989 are affirmed as a basis for action. In particular:

   a) in all actions concerning children, the best interests of the child shall be a primary consideration;
   b) a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents;
   c) a child should have the opportunity to learn to know and respect the culture and traditions of both parents;
   d) States are obliged to take measures to combat the illicit transfer and non-return of children abroad.

2. Efficient and properly resourced authorities (Central Authorities) should be established in each State to co-operate amongst one another in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. Such cooperation should include at least:

[1] The Declaration is non-binding. It may inspire, but is not intended to replace, possible bilateral or other arrangements between States.

[2] The word "contact" is used in a broad sense to denote any means, ranging from communications to periods of visitation, by which the relationship between a child and a parent may be maintained.

- assistance in locating a child;
- exchange of information relevant to the protection of the child;
- assistance to foreign applicants in obtaining access to local services (including legal services) concerned with child protection.

3. Steps should be taken to facilitate, by means of mediation, conciliation, by the establishment of a commission of good offices, or by similar means, solutions for the protection of the child which are agreed between the parents.

4. The use of guarantees and safeguards to help ensure the effective exercise of contact rights, and to prevent their abuse, should be explored and promoted. This should include financial guarantees, preventive measures and the use of methods appropriate within the cultural, religious and legal traditions of the parties.

5. The importance is recognised of having common rules which specify which country's courts or authorities are competent to make decisions concerning custody and contact.

6. Decisions concerning custody or contact made by a competent court or authority in one country should be respected in other countries, subject to fundamental considerations of public policy and taking into account the best interests of the child.

7. Speed in both administrative and judicial processes is of the essence because delays which prolong the separation of a child from a parent may have devastating consequences for the parent-child relationship.

8. The cases under consideration need to be handled by experienced judges. Judicial training, as well as concentration of jurisdiction among a limited number of courts, contribute to the development of the necessary expertise.

9. States should facilitate the cross-frontier movement of parents or children, where necessary, to enable rights of contact to be exercised. To this end, visas should be made available,[3] free circulation should be guaranteed within the country in which contact is to take place, and consideration should be given to the establishment of contact centres.

10. Successful inter-State co-operation in child protection depends on the development of mutual trust and confidence between judicial, administrative and other competent authorities in the different States. The regular exchange of information, as well as meetings between judges (and other officials) at a bilateral or a multilateral level, are a necessary part of building this trust and confidence.[4]

11. Networking between judges concerned with international child protection is a growing phenomenon, ideally assisted by the appointment of liaison judges. Judicial networking facilitates the exchange of information as well as direct communications between judges, where appropriate, in specific cases.

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[3] This is dependent on the provision by parents to the relevant authorities of all the documentation and other information necessary to determine the visa application.

[4] For example, in the Euromed context.

12. There should be established, with the assistance of the Hague Conference, an international database containing relevant information concerning laws and procedures in each State. Judges should transmit significant decisions and other judicial measures to the Hague Conference with a view to their inclusion on the existing International Child Abduction Database (INCADAT).

13. The process of dialogue should continue, with the assistance of the Hague Conference in co-operation with other international organisations including the European Union, with a view to the progressive elaboration and implementation of these conclusions.

14. Translations into Arabic should be prepared of the texts of the essential Conventions of the Hague Conference on Private International Law, in particular those concerning the protection of children,[5] to enable widespread diffusion of the norms and principles contained in these international instruments and to spread knowledge and awareness of the texts.

Thanks are extended to Germany, the Netherlands, Sweden and the United Kingdom for their financial support for this conference, and to the Government and judiciary of Malta for its active role in promoting and providing an ideal setting for successful dialogue.

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[5] The two Conventions particularly relevant are the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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 LATIN AMERICAN JUDGES' SEMINAR ON THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

co-organized by

Hague Conference on Private International Law
United States Department of State (Office of Children's Issues)
Law School of Instituto Technologico y de Estudios Superiores de Monterrey
Organization of American States
American Bar Association Latin American Law Initiative Council
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Agreement was reached on the following Conclusions and Recommendations:

International Cooperation

1. The effective functioning of the Hague Convention of 1980 in the interests of children depends on close co-operation among the Judges and among the Central Authorities of the 75 Contracting States. Regular international meetings and contacts among Judges and Central Authorities for the purpose of exchanging information, ideas and good practice are needed. These meetings and contacts help to develop and maintain the mutual understanding and trust necessary for the Convention to work well.

   A follow-up Seminar should be held in approximately two years. In the meantime, further initiatives should be pursued to encourage more frequent meetings and contacts, including the establishment of a website for this purpose.

<u>Speed in Hague Proceedings, including appeal procedures</u>

2. The Judges present endorse the Conclusions and Recommendations of the March 2001 Fourth Meeting of the Special Commission to Review the Operation of the 1980 Convention:

   - underscoring the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures;

   - calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications; and

   - calling for the firm management by judges, both at trial and appellate levels, of the progress of return proceedings.

The Pérez-Vera Report

3. Attention is drawn to the value of the Explanatory Report on the 1980 Convention, drawn up by Elisa Pérez-Vera, as an aide to the interpretation and understanding of the Convention.

Exceptional Nature of Defenses

4. The exceptional nature of the defenses under Articles 13 and 20 of the Convention is emphasized. The "grave risk" defense under Article 13(1)(b) should, in keeping with the Pérez-Vera Report, be narrowly interpreted. Any tendency to give a broad interpretation to that Article undermines the operation of the Convention.

Nature of Hague Proceedings

5. The clear distinction should be maintained by Judges between proceedings for the return of a child under the Hague Convention and a hearing on the merits in relation to custody and access. The hearing on the merits of custody and access should be conducted by the courts of the country in which the child has his / her habitual residence and to which the child is returned.

Statistics

6. Contracting States in the region should maintain up-to-date statistics concerning the volume, the outcome and the profile of Hague cases. They should transmit these annually to the Permanent Bureau in accordance with the approved statistical forms. They should also co-operate in the special survey which is being undertaken of all Hague cases commenced in 2003.

Judicial Reference Materials

7. Consideration should be given to the development by a group of experts mainly constituted of Judges, with the support of the Permanent Bureau of the Hague Conference, of Judicial Reference Materials containing a broad range of examples from Contracting States of practices and procedures which have proved to be useful.

The Judges' Newsletter

8. Judges and Central Authorities are encouraged to make use of *The Judges' Newsletter on International Child Protection* as a means of exchanging ideas and good practices, and to help promote consistent approaches to the interpretation and operation of the Convention.

Implementing Measures

9. Contracting States in the region are encouraged to consider the value of enacting laws and taking other measures to ensure that the Hague Convention will operate effectively. In this respect, attention is drawn to the *Guide to Good Practice on Implementing Measures.*

Publicity

10. Contracting States in the region are encouraged, by all available means, including by the establishment of Central Authority websites, to publicize in the national languages the existence and provisions of the 1980 Hague Convention as well as on the procedures and measures giving effect to the Convention in the respective States.

Effective Access to the Courts

11. The importance is emphasized of giving parents effective access to the courts. This applies both to a parent who is seeking a return or access order under the Convention and to a parent who is involved in proceedings concerning custody in the country to which the child is returned.

Acceptances of Accessions

12. Concern is expressed that, in respect of some States which have acceded to the Hague Convention in recent years, there have been delays on the part of other States in accepting those accessions. The attention of acceding States is drawn to the value of completing the Standard Hague Questionnaire as a means of providing information so as to facilitate acceptance of their accessions by other States.

Safe Return and Protective Measures

13. For the purpose of effecting the safe return of the child, Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child, or for facilitating the recognition of protective measures ordered in the country from which the child is returned. Central Authorities should make every effort to provide information on, and access to, available protective measures.

Training Programs

14. Contracting States in the region should promote and facilitate the establishment of national training programs concerning the 1980 Hague Convention for Judges, Central Authority personnel and practitioners.

Liaison Judges

15. The growth of the network of liaison judges is noted as a significant aid to international judicial communication, collaboration and understanding.

International Child Abduction Database (INCADAT)

16. The establishment of INCADAT and its free availability on the internet are welcomed by judges as an important contribution to the spread of knowledge about the Convention and as a means of promoting consistent interpretation of the Convention internationally. Contracting States in the region are encouraged to collaborate with the Permanent Bureau in ensuring the full representation on INCADAT of case law from the Latin American countries.

Inter-relationship with other Instruments

17. It is recognized that the 1980 Hague Convention, by facilitating the prompt return of children wrongfully removed from or retained outside their country of habitual residence, supports the fundamental principles and rights of the child, including the child's right to maintain personal relations and direct contacts with both parents, as recognized in human rights instruments, in particular the *Convention on the Rights of the Child of 20 November 1989*. In applying the 1980 Hague Convention judges are reminded that it serves as an instrument to give effect to those principles.

18. Judges and Central Authorities are encouraged to become familiar with the Inter-American Program on Co-operation to Prevent and Remedy Cases of International Abduction of Children by One of their Parents, approved by the General Assembly of the Organisation of American States by Resolution AG/Res. 2028, and, consistently with the terms and objectives of the 1980 Hague Convention, to make use of this instrument where appropriate to facilitating the return of children.

Preventive Measures

19. Greater efforts should be made to develop and apply judicial, administrative and other measures aimed at preventing abductions from taking place. The forthcoming publication by the Hague Conference of a Guide to Good Practice on Preventive Measures is welcomed.

Hague Convention of 1996 on International Child Protection

20. The potential advantages 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*, as an adjunct to the 1980 Convention, are recognized. States in the region are encouraged to consider its ratification or accession.