

The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017

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| Title | Delays in the Return Process | |
| Author | Permanent Bureau | |
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| Mandate(s) | States' responses to Preliminary Document No 2, "Questionnaire on the Practical Operation of the <i>Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction</i> " | |
| Objective | This paper introduces the topic and presents a brief overview of: (1) the 1980 Convention provisions and existing Hague Conference materials relevant to addressing delays; (2) key statistics on delays; (3) good practices of States with respect to the Central Authority, judicial and enforcement phases of the return process, as well as the use of mediation; and (4) possible ways forward in addressing the problem of delays. | |
| Action to be taken | For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/> | |
| Annexes | | |
| Related documents | | |

A. Introduction

1. The prompt return of abducted children is essential to the effective operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter “the 1980 Convention”).

2. Every day counts when it comes to child abduction cases. In fact, each day that the child remains abducted from his / her place of habitual residence has repercussions for the child and contributes to the escalation of the conflict between the parents, the eroding of contact between the child and the left-behind parent (if it has not been severed altogether), and the child’s integration into the place to which he / she has been abducted. These factors have a great impact at the time when return is enforced, since the passage of time may cause the child to suffer once again severe emotional instability at the time of return.

3. Besides the harm that delays in the resolution of cases can cause to the child and the parents, delays also make it more difficult for judges to administer the 1980 Convention. This is because the passing of time complicates the assessment and application of key concepts, such as habitual residence, custody, grave risk, and settlement of the child. It may also raise questions about the jurisdiction of authorities of the place of habitual residence to decide the merits of the case.

4. Therefore, the drafters of the 1980 Convention have established an urgent mechanism, which can only meet the 1980 Convention’s goals if applied efficiently, without significant delays. It is important to note that the 1980 Convention suggests that there is a presumption of a case being delayed if a decision on return is not made within six weeks from the date of initiation of the proceedings (in other words, it can be inferred that the drafters of the 1980 Convention considered six weeks to be the reasonable time frame in which a case should be decided).¹

5. Nonetheless, delays in return continue in many Contracting States, as shown by the statistics presented in Section C, below. Such delays have significant human rights implications and in some cases can constitute violations of States’ treaty obligations contained in human rights conventions.² In this regard, the European Court of Human Rights (ECtHR) has considered the question of reasonable time frames, and has sanctioned States for violating children’s rights due to unreasonable delays in handling Hague 1980 Conventions cases.³ In turn, the Inter-American Court of Human Rights has established in several decisions that “[t]he right to access

¹ See E. Pérez-Vera, “Explanatory Report on the 1980 Hague Convention on the Civil Aspects of International Child Abduction”, in *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child Abduction*, The Hague, SDU 1982, pp. 426-473, available on the Hague Conference website at < www.hcch.net > under “Child Abduction”, which states, at para. 105, that Art. 11 “determines the maximum period of time within which a decision on this matter should be taken”. The second paragraph of Art. 11 of the 1980 Convention provides that “[i]f the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.” The Inter-American Model Law on Procedure for the Application of the Conventions on International Child Abduction establishes short time frames that allow cases to be decided at first instance and appellate level within a six week term. The Model Law has inspired procedural regulations such as the Uruguayan Law No 18.895, approved on 11 April 2012, and Resolution No 480-2008 of the Supreme Court of the Dominican Republic, adopted on 6 March 2008. See Hague Conference on Private International Law and the Inter-American Children’s Institute, *Model Law on Procedure for the Application of the Conventions on International Child Abduction*, available on the Hague Conference website at < www.hcch.net > under “Child Abduction” then “Latin America and Caribbean Section”. In addition, the proposal for the recasting of the Brussels II *bis* Regulation includes three mandatory time frames of six weeks each at the Central Authority, first instance and appellate levels for the handling of return applications. See European Commission, *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, COM(2016) 411 final, 30 June 2016, proposed Arts 23(1) and 63(1)(g).

² See, e.g., the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Arts 6 (right to a fair trial) and 8 (right to respect for private and family life); and the 1969 Inter-American Convention on Human Rights, Arts 8 (right to a fair trial), 17 (rights of the family) and 25 (right to judicial protection). However, it should be noted that in the past appeal to the ECtHR has itself been a source of additional delays (e.g., up to two to three years) in various international child abduction cases.

³ See, e.g., *Iosub Caras v. Romania*, No 7198/04, ECtHR, 27 July 2006 [INCADAT Reference HC/E/ 867]; and *H.N. v. Poland*, No. 77710/01, ECtHR, 13 September 2005 [INCADAT Reference HC/E/ 811].

to justice should ensure that a person's rights are determined within reasonable timeframes. An unreasonable timeframe constitutes - in principle and in and of itself – a violation of judicial safeguards".⁴

6. This paper seeks to assist States in addressing the challenges linked to delays by presenting a brief overview of: (1) the 1980 Convention provisions and existing Hague Conference materials relevant to addressing delays; (2) key statistics on delays; (3) good practices of States with respect to the Central Authority, judicial and enforcement phases of the return process, as well as the use of mediation; and (4) possible ways forward in addressing the problem of delays.

B. 1980 Convention requirements and existing Hague Conference material

7. The 1980 Convention in several places emphasises the need for the rapid return of children who have been wrongfully removed or retained. The first object of the 1980 Convention set forth in Article 1 is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" (Art. 1(a)). As mentioned above, Article 11 establishes a benchmark of six weeks as the time frame within which a decision on return should be made. The need for the prompt return of abducted children is also stated in the Preamble (third paragraph), Article 2, Article 7, and Article 9.

8. Given the centrality of expeditious procedures to the effective operation of the 1980 Convention, achieving prompt action has repeatedly been addressed at meetings of the Special Commission on the practical operation of the 1980 Convention, and has been the subject of good practices developed by Contracting States over the years and collected by the Hague Conference. In this regard, the Permanent Bureau has prepared a compilation of existing Hague Conference materials relevant to delays from a variety of sources, including 1980 Convention provisions, Special Commission Conclusions and Recommendations and Guides to Good Practice (see Prel. Doc. No 10 B).⁵

C. Statistics

9. The Statistical Analysis of Applications Made in 2015 under the 1980 Convention⁶ (hereinafter "2015 Statistical Analysis") notes the critical importance of timing with regard to the successful operation of the Convention. The 2015 Statistical Analysis documents a trend of increasing delays in the operation of the 1980 Convention between 1999 and 2008, with some reversal in that trend during the period between 2008 and 2015. The following table presents the average time taken to achieve a voluntary return of the child, the average time taken to reach a judicial decision of return, and the average time taken to reach a judicial decision refusing return:

The mean number of days taken to reach a final conclusion from the date the application was received by the requested Central Authority

| | <u>1999</u> | <u>2003</u> | <u>2008</u> | <u>2015</u> |
|------------------|-------------|-------------|-------------|-------------|
| Voluntary return | 84 | 98 | 121 | 108 |
| Judicial return | 107 | 125 | 166 | 158 |
| Judicial refusal | 147 | 233 | 286 | 244 |

⁴ See *Fornerón e hija c. Argentina*, Inter-American Court of Human Rights, 27 April 2012, par. 66: "El derecho de acceso a la justicia debe asegurar la determinación de los derechos de la persona en un tiempo razonable. La falta de razonabilidad en el plazo constituye, en principio, por sí misma, una violación de las garantías judiciales."

⁵ Regarding good practices with respect to the enforcement of judicial decisions to return abducted children, see also Permanent Bureau of the Hague Conference on Private International Law, *Guide to Good Practice under the Hague Conference of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement*, Bristol, Family Law (Jordan Publishing Limited) 2010.

⁶ See "A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Global Report", prepared by Prof. Nigel Lowe and Victoria Stephens, Prel. Doc. No 11 A of September 2017 for the attention of the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

10. These figures show a significant increase between 1999 and 2008 in the time needed in each category, whereas between 2008 and 2015 there was a modest decline (ranging from 5-15%) in the categories. The 2015 levels still exceed those for 1999 and 2003. A similar trend is reflected in the number of applications taking over 300 days to reach a final conclusion (without distinction as to the outcome):

Percentage of applications taking over 300 days to resolve

| <u>1999</u> | <u>2003</u> | <u>2008</u> | <u>2015</u> |
|-------------|-------------|-------------|-------------|
| 5% | 12% | 21% | 15% |

11. According to the 2015 Statistical Analysis, in considering all cases (without distinction as to the outcome), on average in 2015 the Central Authority held the case for 87 days before sending it on to the court, up from 76 days in 2008, whereas in 2015 the court took an average of 124 days to resolve the matter, down from 153 days in 2008. Thus, the overall reduction in the time needed to reach a final conclusion can in general be attributed to more efficient judicial procedures (although this varied among States, as some Central Authorities dealt with applications very quickly).

12. However, improvement is still needed. For example, the percentage of cases resulting in a return order that were resolved in 90 days or less continued to decline:

Percentage of cases resulting in a return order that were resolved in 90 days or less from the date the application was received by the requested Central Authority

| <u>1999</u> | <u>2003</u> | <u>2008</u> | <u>2015</u> |
|-------------|-------------|-------------|-------------|
| 59% | 51% | 43% | 36% |

13. Appeals, which add a substantial amount of time to the return process, are increasing. In 2008, 24% of all applications that went to court involved an appeal, whereas in 2015 that figure increased to 32% of all such applications. However, there has been significant improvement in the average number of days needed for the conclusion of the overall return process when appeals are involved (most often one level of appeal, but sometimes two levels, and in a few cases three levels):

The average number of days to conclude a return application decided on appeal

| | <u>2008</u> | <u>2015</u> |
|--------------------------------|-------------|-------------|
| Judicial return by consent | 280 | 167 |
| Judicial return not by consent | 281 | 249 |
| Judicial refusal | 369 | 286 |

14. These figures reinforce the conclusion that, while more progress is needed to reduce delays, important efficiencies are being achieved by the courts handling return cases.

15. At the regional level, the second Inter-American Meeting of Central Authorities and International Hague Network Judges on International Child Abduction was held in Panama from 29 to 31 March 2017, and aimed to address the problem of delays. Within the framework of this meeting, the Permanent Bureau conducted research on the time frames of proceedings in the Americas. A questionnaire was prepared in order to obtain information on delays in the administrative and judicial phases of the return process. On the basis of the estimates provided by Central Authorities and Hague Network Judges, it was possible to: 1) identify and measure the average length of each key part of the return process, *i.e.*, the administrative and judicial phases, and assess the impact on the overall length of the process in a given case; and, 2) propose possible actions with a view to avoiding delays. The discussions at the meeting led to the adoption of several Conclusions and Recommendations.

16. The synopsis of responses to the questionnaire and the Conclusions and Recommendations from the meeting are available, as Information Document No 5, and might be helpful for those jurisdictions willing to review their relevant procedures with a view to avoiding delays.

D. Good practices

1. Central Authority, judicial and enforcement phases

17. To determine how some States are achieving swift returns, the Permanent Bureau has examined the Country Profiles for the 1980 Convention for a selected number of States that have had success in this regard, namely: Australia, Austria, Canada (Ontario and Quebec), Chile, Germany, Netherlands, New Zealand, United Kingdom (England and Wales), and Uruguay. Preliminary Document No 10 C provides fact sheets for each State that identify practices that contribute to maintaining expedient procedures for 1980 Convention cases.

18. On the basis of the information contained in the above-mentioned fact sheets, common features of the practice of these States have been compiled for the three main phases of the process: (1) when the Central Authority receives a return request and acts upon it; (2) when the case goes before a court for a judicial decision; and, (3) when the return order is enforced.

19. Common features at the Central Authority phase of States with demonstrable success in bringing about swift returns include:

- Sufficient resources allotted to Central Authorities, with the presence of qualified, and if the volume of cases requires, dedicated Central Authority staff who deal only with 1980 Convention applications and related issues.
- Acceptance of the requesting State's application form or the Hague Conference Model Application Form.
- Acceptance of return applications that are sent electronically, allowing the originals (if and when needed) to be sent subsequently by mail.
- Where information in the application is incomplete, beginning to process the application while informing the requesting State of the additional information that is needed.
- To avoid delays where efforts are made to obtain the voluntary return of the child, either: (1) initiating court proceedings at the same time as the voluntary return efforts; or, (2) starting court proceedings after a relatively short deadline, if voluntary return efforts are not successful.
- Providing regular training to Central Authority staff, including updates on legal developments related to the 1980 Convention.

20. At the judicial phase of the process, common features of successful States include:

- "Concentration of jurisdiction" of courts in respect of applications under the 1980 Convention.
- The judges who decide return applications are specialists in family law, and in some cases international child abduction.
- Either requiring or recommending legal representation in return proceedings.
- The availability of reduced rate or free legal assistance, most often based upon eligibility.
- The availability of such legal assistance also for appeals and enforcement proceedings (this can be subject to an assessment of the likelihood of success of an appeal for which the assistance is sought).
- Adopting either legislation or procedural rules to ensure that judicial and administrative authorities act expeditiously in return proceedings.
- Where the child is to be heard, having procedures in place to prevent this from delaying the process unnecessarily, for example: determining whether hearing the child is desirable at an early stage in the proceedings; making such arrangements on an urgent basis; or, scheduling the child's testimony to be given in conjunction with the hearing on the return application.

- Appeal at the first level being available by right, with expedited procedures.
- Designating at least one judge to the International Hague Network of Judges.
- Training of judges including participation in judicial seminars.

21. Common features at the enforcement phase include:

- Not allowing the merits of the proceedings for return to be reviewed in enforcement proceedings.
- The availability of coercive measures (which vary by State) to enforce a return order.

2. Mediation

22. Mediation is an important tool in the return process, as it can result in an agreement between the taking parent and the left behind parent on the return of the child to the State of habitual residence without the need for a litigated decision. A mediated agreement can improve the relations between the parents, which is beneficial to the child. Mediation also offers flexibility in addressing a broad range of issues. At the same time, there is a risk that mediation efforts, if not managed carefully, can unnecessarily delay the return process. A parent should not be permitted to use mediation as a delaying tactic. A balance needs to be found between exploring the possibility of a mediated outcome while ensuring that return is achieved in an expedient manner.

23. The Guide to Good Practice on Mediation underscores that “[m]ediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced”. Mediation should be suggested at an early stage, and its suitability should be assessed before attempting it. In some States, return proceedings start immediately, before beginning mediation, and can later be stayed if mediation is initiated and proves effective. In other States, mediation is initiated before return proceedings begin. In either case, it is essential that there be a clearly defined and limited time frame for mediation.

24. Recognising that States employ a variety of models or methods for mediation, the Guide does not recommend a particular model or method as being superior to others. For illustrative purposes, below are features of the cross-border mediation process in the Netherlands, which includes a strict time frame for the conduct of mediation (nicknamed the “pressure cooker” approach) so as not to delay the overall process:

- Each case has two specialised mediators, a lawyer and a psychologist.
- The cross-border mediation is conducted by the Mediation Bureau, which is associated with the International Child Abduction Centre.
- The Central Authority initially sends a letter to the abducting parent notifying him or her of the return application and requesting co-operation in the child’s voluntary return. That letter also recommends mediation as an option for resolving the matter.
- The abducting parent has two weeks to respond.
- The Central Authority then addresses a letter to the left-behind parent informing him or her of the letter sent to the abducting parent. Again, mediation is recommended.
- The possibility of mediation is repeated during the pre-trial hearing.
- There is a maximum period of two weeks between the pre-trial review and the hearing before a judicial panel.
- The court will not approve additional time for the mediation process.
- The mediation consists of three sessions, each of three hours, over the span of two days.

- The first session is for preliminary talks / caucus; the second is for seeking solutions and drafting a concept agreement; at the third, the agreement (if reached) is finalised and signed by the parents.
- The Ministry of Security and Justice will pay for most or all of the cost of the mediation.
- In legal aid cases, the Legal Aid Board also contributes.

E. Possible ways forward

25. Practices that States may wish to consider to minimise delays and improve their efficiency in responding to return applications are suggested below:

- Revision of procedures – administrative and judicial – in line with good practices. Implementing adjustments, where needed, so that cases are dealt with within reasonable time frames, including at the enforcement phase.
- Strengthening administrative and judicial co-operation; States that have not already done so may wish to consider the designation of a member or members to the International Hague Network of Judges.
- Training and post-Convention assistance (from the Permanent Bureau or other Contracting States); this can involve the twinning of Central Authorities.
- The carefully-managed use of mediation and other forms of alternative dispute resolution (ADR).

26. States may wish to propose additional means of achieving swift procedures. They may also wish to consider whether a new tool – *e.g.*, a compilation of good practices – would assist in this regard.

27. States may wish to consider whether it would be useful to adopt Conclusions and Recommendations relating to delays and addressing, *inter alia*, the following themes:

- The obligation of Contracting Parties to the 1980 Convention to take all appropriate measures to secure the objects of the 1980 Convention.
- Recognition that considerable delays in the return process remain, and that therefore there is a need to find ways to reduce such delays.
- Review of existing procedures and the possible adoption of improvements to the Central Authority phase of the return process.
- Review of existing procedures and the possible adoption of improvements to the judicial phase of the return process.
- Review of existing procedures and the possible adoption of improvements to the enforcement phase of the return process.
- The benefits of mediation as an option for resolving return cases, as long as the timing is carefully managed, to avoid unnecessary delays.
- The role of the Permanent Bureau, and other States, in providing training and post-Convention assistance (including financial resources to enable the same).