AFFAIRES GENERALES ET POLITIQUE
GENERAL AFFAIRS AND POLICY

Doc. prél. No 12
Prel. Doc. No 12

mars / March 2008

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

OBSERVATIONS REÇUES SUR LE PROJET DE PROTOCOLE A LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLEVEMENT INTERNATIONAL D'ENFANTS, PROPOSE PAR LA SUISSE

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COMMENTS RECEIVED ON THE PROPOSAL BY SWITZERLAND FOR A PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Document préliminaire No 12 de mars 2008
à l'intention du Conseil d'avril 2008
sur les affaires générales et la politique de la Conférence

Preliminary Document No 12 of March 2008
for the attention of the Council of April 2008
on General Affairs and Policy of the Conference

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ARGENTINE - *ARGENTINA*

De l'Autorité centrale d'Argentine pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of Argentina under the 1980 Hague Child Abduction Convention*

(Unofficial Translation provided by the Central Authority)

Supplementary Protocol to the Hague Convention of 1980 on the Civil Aspects of International Child Abduction

Within the framework 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 with regard to jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, the conclusions and recommendations adopted by the meeting of the Special Commission held on 30 October-9 November 2006 accepted the possibility of drafting an Additional Protocol to the 1980 Convention, especially regarding measures to ensure the safe return of the child.

Although the Special Commission recognized the potential value of drafting a Protocol, this was not considered an immediate priority and it expressed that the State Parties to the Conference should focus on the implementation of The Hague Convention of 1996.

Despite the above, the Protocol drafted by Switzerland was submitted to the evaluation of the Council on General Affairs and Policy of The Hague Conference.

Although we cannot ignore that the drafting of an additional Protocol could be very useful for the State Parties to The Hague Convention of 1980, we believe it would be more appropriate if the scope and contents of the Protocol were to be discussed and assessed in a forum whose members specialize in the topic, which will allow them to debate and examine the proposal's contents in depth so as to provide appropriate solutions to the problem under consideration.

Therefore, taking into account that The Hague Conference currently has a forum as described above, we believe the proposal could be submitted to the consideration of the experts at the next meeting to review the operation of The Hague Convention of 1980 which will take place in 2010.

Furthermore, it is worth pointing out that the States are making all necessary efforts to examine The Hague Convention of 1996 which supplements The Hague Convention of 1980 and, therefore, the drafting and analysis of a Protocol on protection measures at present would bring about a transfer of the focus of attention and of the States' resources and efforts towards an instrument other than the 1996 Convention.

With regard to the proposed articles and to ensure greater clarity in this presentation, we will proceed to separately analyze the different articles of the Protocol.

SCOPE (Article 1)

Under the Scope Chapter, the Protocol states it will only apply to cases of abduction, such as defined in the Convention.

One of the objects of The Hague Convention -as set forth in its first article- is to secure the prompt return of children wrongfully removed to or retained in any Contracting State.

For the purpose of the Convention, an international abduction takes place when a child under the responsibility of a natural or legal person which exercises a legitimate right of custody is wrongfully removed from or retained outside the child's habitual environment.

Firstly, it thus enshrines the re-establishment of the status quo by stating that children wrongfully removed to or retained in any Contracting State must be immediately returned to the child's habitual residence.

Secondly, the Convention sets forth the object of respecting the rights of custody and access, and states this object is applied independently as a protection measure to prevent wrongful removals or retentions.

Although the Convention does not fully address the issue of respect for access rights, we must acknowledge that it is one of its purposes and as such all efforts should be made so that the Convention operates in this regard too.

The States do not uniformly construe the Convention regarding access rights. Both the case law used as a guide to good practice and the explanatory report on the Convention drafted by Dr. Pérez Vera establish that the provisions of the Convention on cross-border access should be considered applicable to the requests made by an applicant within the framework of a child return procedure as well as to requests made in those circumstances in which the respect for or establishment of access rights are at stake, either by recognizing an order issued abroad or when one of the parents living abroad tries to obtain an access order within the State of the child's habitual residence.

Despite the above, the Protocol only addresses access so as to protect the right of the parent filing a request for the child's return to have direct, fluent contact with the child during the process.

On several occasions, the problem of cross-border access has aroused the interest of the States and has led to the development of a series of studies and documents on the subject to achieve a better interpretation and the drafting of uniform rules to fill the gaps of the 1980 Convention.

In this manner, when drafting The Hague Convention of 1996 on the protection of children - whose ratification this country is assessing- a full, separate set of rules on access was included, among others, measures to protect minors in cross-border access. Thus the uniform rules on jurisdiction, recognition, enforcement and cooperation among States are considered applicable to all those decisions made to ensure the effective exercise of access rights and the right to keep direct, regular contact between parents and children.

The Conclusions of the Fourth Meeting of the Special Commission on The Hague Convention of 1980 -held in 2002- highlighted the inputs The Hague Convention of 1996 can make to solving the problem under consideration by urging the States to ratify or sign the Convention.

On the other hand, it was considered too soon to draft a Protocol to the 1980 Convention stating that, for the time being, it would be very useful to prepare a Guide to Good Practice with regard to access, within the context of The Hague Convention of 1980, to promote consistent good practices with respect to jurisdiction and obligations of the Contracting States and offer practical examples of this kind of case.

Even when we consider that the ratification of the 1996 Convention could fully solve the problem of access rights, only a few States have ratified it so far given its complexity, and therefore the problem of access has not been clearly solved in all State Parties to the 1980 Convention.

Although the Convention is being analyzed by a great number of States with a view to its ratification, we believe it is important to promptly draft and publish a Guide to Good Practice on cross-border access to provide the States with guidelines to be taken into account when the time comes to face international access cases.

MEDIATION OR CONCILIATION PROCEDURE (Article 2)

Article 2 establishes that the Central Authority or the judicial or administrative authority shall endeavour to set up a mediation or conciliation procedure to reach an amicable resolution leading to the child's voluntary return.

In this regard, it is worth pointing out that The Hague Convention of 1980 does not include an express reference to mediation but has considered the possibility to solve cases of wrongful removal or retention through amicable agreements or solutions.

This criterion was reflected in Articles 7 c) and 10 which state that the Central Authority must adopt, either directly or through intermediaries, appropriate measures to secure voluntary return of a child or to bring about an amicable resolution of the issue.

Within this context, mediation experiences have taken place successfully between the States concerned in cases including international issues, particularly in situations that comprise assumptions foreseen by The Hague Convention of 1980[1].

Furthermore, The Hague Convention of 1996 on the protection of children, whose ratification our country is analyzing, reflects the idea of dispute settlement in a non adversarial manner. However, given that its drafting took place when mediation in family affairs was more widely disseminated, it contains a more specific provision than the 1980 Convention, since Article 31 b) establishes that the Central Authorities shall "either directly or through public authorities or other bodies, take all appropriate steps to ….facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies".

In this same regard, The Hague Conference on International Private Law published a document in 2007 with the main purpose of establishing the feasibility of drafting an instrument on international family mediation, and provided a detailed analysis of mediation in this kind of issue, both at the national and international levels. Furthermore, it analyzes certain legal and practical aspects of the development of international mediation in family issues, providing accurate details on the use of mediation in the cases foreseen in The Hague Convention of 1980.

Pursuant to the above, this Central Authority deems that Article 1 of the Protocol reiterates the principles already enshrined in the Convention, setting forth what has already been considered a good practice and is gradually being implemented by the State Parties in a more complex and organized manner, with great effectiveness. Thus mediation is extremely efficient to resolve in an agile and effective manner any disputes relating to the wrongful removal to or retention of children in a State other than that of the child's habitual residence, benefiting not only parents but also children affected by issues of this sort.

The last paragraph of Article 1 establishes that if the parties reach an agreement, the competent authority can approve such agreement and declare it enforceable. With regard to this point, and pursuant to the provisions of the Protocol, it must be pointed out that each country shall decide, according to its domestic legislation, whether the willingness of the parties as set forth in the agreement suffices or whether it is necessary to take an additional step and request a court approval for the agreement to come into force.

In our country, Law 24,573 on Mediation and Conciliation included mediation prior to any trial, with the exceptions established in Article 2 among which are the claims for parental rights and filiation, save for property issues stemming therefrom.

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1 French-German Parliamentary Commission on Mediation, French-German binational professional mediation project, German-USA Mediation Project, Mediation Service of the International Social Service (ISS), REUNITE - United Kingdom Pilot Project, Alternative Dispute Settlement system of the England and Wales Court of Appeals, Mission to Aid in International Family Mediation (MAMIF) - France.

Doctrine, however, has considered that both custody as well as access is subject to prior mediation since none of the above assumptions have been expressly excluded from mandatory mediation. Moreover, mediation plays a relevant role in this kind of disputes as proven by experience throughout time. Therefore mediation, characterized by its non adversarial nature, appears to be beneficial in these cases for reestablishing family ties and dialogue between parents who can thus reach an agreed solution to the dispute.

In this regard, the Argentine National Congress is evaluating a series of bills to implement a special regime for family mediation. All of them consider that if the parties reach an agreement, it must be submitted to a judge for its ratification. Should the agreement adjust to public interest, to family interest and to the best interest of the child, it can be ratified by the judge after its approval by the Attorney-General's Office.

As pointed out above, the topic of family mediation in cross-border disputes is being thoroughly analyzed within The Hague Conference. We therefore believe that the provisions adopted in the Protocol do not suffice to provide a clear, uniform answer to the issue of mediation in this kind of dispute, leaving to the will of each State's authorities and to their internal legislation the application of mediation and the recognition of the agreements reached by the parties on this issue, as has been done so far.

In this regard, the State's response should stem from a more thorough examination of the topic so as to provide specific answers to a widespread phenomenon these days, which can certainly be very useful for resolving international family-related disputes since parents will be more willing to fulfill an agreement they have reached jointly than an order issued by a third-party that is not familiar with the family problems and dynamics.

RIGHT OF THE CHILD TO BE HEARD (Article 3)

Article 3 of the Protocol establishes the right of the child to be heard since it states that the Central Authority or the administrative or judicial authority of the requested State shall hear the child in an appropriate manner or arrange for a qualified person to do so, unless this appears inappropriate in view of the child's age or degree of maturity.

This principle was enshrined in the Convention on the Rights of the Child adopted by the UN General Assembly on 20 November 1989. Since it is the instrument on human rights that was most speedily ratified by the greatest amount of governments (save for Somalia and the United States) its principles are considered universal. Article 12 of the CRC establishes that "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Likewise, The Hague Convention of 1980 includes as an exception to the return of the child, his or her objection to such return by stating in Article 13, paragraph 2 that: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views". Thus as Dr. Pérez Vera holds in her explanatory report, the Convention provides children with the possibility of interpreting their own interest.

Likewise, the Protocol holds that the Central Authorities should, as far as possible, hear the parties in person.

The subpoena served upon the parties by the Central Authorities will depend on the role such authorities play in each State. If the Central Authority is not in charge of deciding on the return of the child, or of implementing the conciliation procedure foreseen in Article 10, we do not see to what extent it could be useful for such Authority to come into direct contact with the parties involved to resolve the dispute.

Therefore the provisions of this paragraph are not clear and it is hard to understand to what extent it is necessary for the Central Authority to hear the parties, nor the scope and purposes thereof, beyond the fact that it is authorized to do so or must do so pursuant to the powers vested upon it by the pertinent State.

The subpoena served upon the left-behind parent should only be done when his/her presence can help to progress in resolving the case or to a potential solution of the case since normally the parent must travel to the State where the child lives which means spending money and time.

PROTECTION MEASURES (Article 4)

Article 4 lists protection measures to be taken by the judicial or administrative authorities of the State in which the child is. The authorities:

a) Shall assist in the implementation of protection measures taken by the competent authorities of the State in which the child was habitually resident immediately before his/her removal or retention;

b) shall take measures for the protection of the child, in particular to secure the rights of access and rights of contact during the proceedings relating to the application of the return of the child;

c) may, before ordering the return and if the child's situation after the return requires special precautions to be taken, ask the authorities of the State to which the child should be returned to take protection measures, especially in securing rights of access and contact for the person who removed or retained the child and that person's participation in any subsequent proceeding relating to his / her relationship with the child;

d) may, in its decision to return the child, include measures to ensure the protection of the child on its return.

All the assumptions foreseen in this article have been analyzed and enshrined as good practice in the enforcement of The Hague Convention of 1980. The authorities in charge of resolving return requests use mirror orders, undertakings and other measures in those cases where there is evidence of risk should the minor be returned. Protection measures to secure the safe return of the child provide security to the authority in charge of issuing the return order, thus diminishing those cases in which the requested return is rejected pursuant to the provisions of Article 13 b) of the Convention when the reason is not clearly specified but when it can be inferred or suspected that there is some kind of risk for the child in his/her habitual residence.

In this manner, Chapter 6.3 of the First Part of the Guide to Good Practice – Central Authority Practice, refers to the safe return of the child and establishes the importance of State parties to consider the possibility of setting up procedures which shall allow provisional measures to be in place to protect the child in the jurisdiction to which he/she shall be returned before issuing a return order. Furthermore, reference has been made to immigration, visa and criminal issues as well as to the participation of parents in the procedures to be carried out in the habitual State of residence of the child after his/her return so as to settle custody and access issues, considering it is the State's duty to take the necessary measures to secure the rights of children and parents.

Likewise, in the conclusions of the Fifth Meeting of the Special Commission held in 2006, the same criterion was applied to consider appropriate that the authorities in charge of deciding on a return request should take measures to secure the child's safe return. In this regard, reference was made to mirror orders, conditions, commitments, orders for child's safe return, etc. providing them with contents and a scope which is in agreement with the provisions in this regard of The Hague Convention of 1996 for taking protection measures.

With regard to measures to secure contact with the children involved in cases in which the child is returned to the left-behind parent, it must be pointed out that, even when the return

procedure is foreseen to take place within six weeks, indeed a great number of cases take more time than the term desired by the Convention. Therefore, a measure must be taken to secure contact between the child and the parent that has requested the child's return to the country of habitual residence. Otherwise the child's inalienable right would be violated and we would run the risk of harming the child and separating him/her from the parent he/she has lost contact with as a result of the wrongful removal or retention.

The assumptions mentioned in the Protocol are only a few of the many options that can crop up in practice and are only a list of good practices already enshrined in practice and in the conclusions reached by the States when analyzing the problem of children's safe return and the implementation of protection measures.

A practical, complete answer can be found to all these assumptions in the provisions of the 1996 Convention which also provides for ipso jure recognition of the measures and the enforceability of emergency protection measures taken in the Country of refuge by the authorities of the child's State of habitual residence which should ensure such measures are fulfilled until the pertinent measures called for by the situation have been taken.

INFORMATION AND MUTUAL ASSISTANCE (Article 5)

The Protocol establishes in Article 5 that the Central Authority of the State where the child is or the judicial or administrative authority to which the request for the return of the child has been submitted shall notify the competent authorities of the State where the child was habitually resident immediately before its removal or retention, of ongoing proceedings and any decision taken. Furthermore, it states that the authorities of the States concerned shall cooperate to ensure direct access to any relevant documents, evidence and expert reports available in one or the other of these States.

Once again the Protocol reflects principles already enshrined in The Hague Convention of 1980 as well as in the Guide to Good Practice. Article 7 lists the duties of the Central Authorities, among them, to provide information of a general character as to the law of their State in connection with the application of the Convention. A similar criterion is included in the First Part of the Guide to Good Practice under paragraphs 3.5 and 5.4. Likewise, paragraph 4.19 reflects the duty of the Central Authorities to report the court's decision to the requesting Central Authority as soon as it is known.

DUTY TO PROTECT AND INFORM AFTER THE RETURN (Article 6)

This Article includes the duty of the State's Central Authority to which the child has been returned or of any other competent authority of that State to notify the Central Authority of the State where the return of the child has been ordered of any decision on the merits of the rights of custody made subsequently to such return and to reply to reasoned requests for information about the particular situation of this child made within a period of one year after the return of the child by the Central Authority or any other public authority of the State where the return has been ordered.

In principle, it must be pointed out that the authorities of the country of refuge that have ordered the child's return will not have jurisdiction to hear any issues on the child's well-being after his/her return. The judge or competent authority of the State to which the child has been removed or where he/she is wrongfully retained shall have jurisdiction only for the purpose of ordering whether the minor should be returned or not. Once the child's return has been resolved, such authorities no longer have the jurisdiction to decide on any issue related to his/her well-being, and such jurisdiction is transferred to the authorities of the State of habitual residence or to which the child has been returned.

Although we understand that for the Convention to operate properly it is of vital importance that the authorities in charge of deciding on the child's return trust that the child will be well protected and cared for in the State of habitual residence as the child would be if such return

would not be ordered, we believe there are certain circumstances in which the judge or authority ordering the return can be interested in hearing about the child's conditions.

If we favour mirror orders and protection measures to secure the child's safe return, we must leave open the possibility for the State authorities ordering the child's return to request information on the child's conditions after such return.

This must not be construed as a lack of confidence in the authorities of the State to which the child was returned but instead as a legitimate interest on behalf of the authorities that have issued a resolution on a child's person to ensure his/her rights are respected.

FINAL CLAUSES (Articles 7-12)

They contain general rules on The Hague Convention's coordination, the examination of the practical operation of the Protocol, reservations, signature, ratification and accession by the States, regional economic integration organizations, and its entry into force.

CONSTRUCTION OF ARTICLE 13 1) b)

It is deemed necessary to reformulate the scope and meaning of Article 13 1 b) given the growing amount of wrongful removals or retentions by the parent responsible for the child's support, normally the mother.

Therefore we believe that the reason included in Art. 13 b) must be construed in the sense that the child's return should be rejected when the return order places that child in an intolerable situation, especially if such a return to the left-behind parent is against the best interest of the child and when it is not possible nor can it be expected that the parent who removed or retained the child can return with such child to his/her habitual residence.

There is particular interest in avoiding the issuance of a return order when the requesting parent does not intend to be granted the child's custody but instead that the exercise of the access rights be secured or that a regime be established which shall allow the parent to maintain fluent contact with the child. In this case, rejection will depend on the possibility of the authorities in the country of refuge of the child to ensure the left-behind parent that his/her rights to maintain direct, regular contact with the child will be duly respected.

Thus an interpretation is proposed for Art. 13 1 b) that places the best interest of the child at the heart of the analysis.

Article 13 b) of the Convention refers to situations in which wrongful retention or abduction of a child give rise to a request for the child's return but where such return would be contrary to the child's interest. It enshrines the child's interest of not being physically or psychologically exposed to harm or placed in an intolerable situation.

In her explanatory report Dr. Pérez Vera establishes that this exception should be restrictively construed. Accordingly, case law issued in this matter throughout time as well as the conclusions reached by experts at different seminars on the return of minors have considered that the defenses foreseen in articles 13 and 20 of the Convention are of an exceptional nature. The "grave risk" defense envisaged in Article 13.1 b) should thus be narrowly construed, in the understanding that any attempt to give it a broader interpretation undermines the Convention's operation. Likewise, it has been estimated that the rejection to return a minor on the grounds of article 13, 1 b) should not be contemplated unless the court has taken into account and considered that all other alternative means available to protect the minor are inadequate.[2]

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[2] International legal seminar on The Hague Convention of 1980 on the civil aspects of international child abduction, De Ruwenberg Conference Center, The Netherlands, 20-23 October 2001. Seminar of Latin American Judges on The Hague Convention of 1980 on the civil aspects of international child abduction, Monterrey, Mexico 1-4 December 2004. The Hague Project on international cooperation and protection of children. Operation of The Hague Conventions on children and cross'border protection of children in Latin America, The Hague, 28 November - 3 December 2005.

Indeed for the reasons held to be applicable, it is necessary for the parent filing the claim to submit clear, convincing evidence that if the child is ordered to return to his/her country of habitual residence, the child would be exposed to grave risk and that such country cannot protect the child through available protection measures.

Regarding the comments of the Swiss delegation, we consider that the exception foreseen in Art. 13 b) of the Convention was drafted on the grounds of protecting the child's best interest. Indeed, in the light of the Convention, such interest consists of the immediate return of the child that has been wrongfully removed or retained to his/her habitual residence.

As an exception, and in an attempt to protect the child's best interest, it is stated that grave risk is an exceptional reason and must be admitted only in those cases of proven grave, true risk. A potential risk does not suffice to reject the requested return.

As stated in the analysis made by Switzerland of Article 13.b), reality has shown that, in practice, many left-behind parents request the return of their children even when their only intention is to ensure compliance with access rights or the regulation of a new regime to secure their rights appropriately.

It must be pointed out that the Convention recognizes and enshrines the jurisdiction of the State authorities of the State of the child's habitual residence to hear all issues related to custody and access rights.

Vis-à-vis a case of international abduction, the Convention cannot give up ground so that the authorities of the habitual place of residence hear these matters since the purpose is to combat wrongful removals and retentions, avoiding any legal consequences.

The left-behind parent deprived of having any contact with the child as a result of wrongful removal or retention has the possibility of requesting the child's return pursuant to the Convention or of requesting the establishment of an access regime through the Convention.

Although it would not be reasonable for a parent who only wishes to secure access rights to file a request for return because that would entail spending time, resources and energy and exposing the minor to harm, having to remove the child again, when the child would then surely return to the country of refuge with the abducting parent, it is also true that there is no obstacle to filing such a request if such parent believes his/her rights will be secured in a fairer manner by the authorities of the country of habitual residence. More so taking into account the difficulties which arise in the States when the time comes to make cross-border requests pursuant to the 1980 Convention.

In those cases in which the parent's willingness is expressed in the process of return, it is advisable for the authorities in charge of deciding on such return to urge the parties to make all necessary efforts to reach an agreement which will benefit both and essentially the child.

Furthermore, we consider it is of utmost importance for the Central Authorities in charge of receiving requests to have operators with the necessary training to interpret the needs and desires of the parents to be able to guide them appropriately on the path to be followed when the children are the victims of wrongful removal or retention.

CONCLUSIONS:

The Draft Protocol prepared by Switzerland is appreciated in the understanding that its purpose is to provide greater protection to abducted or wrongfully retained children, always bearing in mind the best interest of the child enshrined in the 1980 Convention and in the Convention on the Rights of the Child.

Without prejudice to the above, and taking into account the provisions of the above paragraphs, we believe - in principle - such as was pointed out by the 2006 Special

Commission that the State Parties to the Conference should study the possibility of adopting The Hague Convention of 1996.

Finally, in the assumption that it is deemed advisable to analyze the Draft Protocol, which has been the subject-mater of this report, it should be addressed within the Special Commission to Review the Operation of the 1980 Convention since that is the proper forum where the State Parties to this Convention could appraise the need to have a Protocol as proposed by the Swiss delegation.

* * *

Protocolo adicional al Convenio de La Haya de 1980 sobre los aspectos civiles de la sustracción internacional de menores.

Las conclusiones y recomendaciones adoptadas por la Comisión especial en el marco de la Quinta Reunión de la Comisión Especial para revisar el funcionamiento del Convenio de la Haya del 25 de octubre de 1980 sobre los aspectos civiles de la sustracción internacional de menores y la implementación práctica del Convenio de La Haya del 19 de octubre de 1996 relativo a la competencia, la ley aplicable, el reconocimiento, la ejecución y la cooperación en materia de responsabilidad parental y de medidas de protección de los niños, llevada a cabo entre los días 30 de octubre y 9 de noviembre de 2006, receptó la posibilidad de la elaboración de un Protocolo adicional al Convenio de 1980, especialmente en lo que a la toma de medidas para asegurar el regreso seguro del niño se refiere.

Si bien se reconoció el valor potencial que podría acarrear la elaboración de un protocolo, se consideró que no era una prioridad inmediata, manifestando la Comisión Especial que en estos momentos, los Estados Parte de la Conferencia deben centrarse en la implementación del Convenio de La Haya de 1996.

No obstante lo expuesto, el protocolo elaborado por Suiza ha sido presentado para su evaluación por el Consejo de Asuntos Generales y Política de la Conferencia de La Haya.

Si bien no podemos desconocer que la elaboración de un protocolo adicional podría ser de gran utilidad para los Estados parte del Convenio de La Haya de 1980, consideramos que sería mas apropiado que los alcances y el contenido del mismo sean discutidos y evaluados en un ámbito en el cual los asistentes posean un grado de especialidad en la temática que les permita discutir y examinar el contenido de la propuesta en profundidad, con el fin de brindar soluciones adecuadas a la problemática en análisis.

Es por ello que, teniendo presente que la conferencia de La Haya cuenta al momento con un ámbito como el descripto, estimamos que la propuesta podría ser presentada para su consideración por los expertos en la próxima reunión de evaluación del funcionamiento del Convenio de La Haya de 1980, a realizarse en el año 2010.

Asimismo, cabe señalar que los esfuerzos de los Estados se encuentran abocados al estudio del Convenio de La Haya de 1996, que viene a complementar el Convenio de La Haya de 1996, por lo que el desarrollo y análisis de un protocolo relativo a medidas de protección en éstos momentos, implicaría en cierta medida trasladar el foco de atención y por consiguiente los recursos y esfuerzos de los Estados hacia un ámbito diferente del Convenio de 1996.

Con relación al articulado propuesto, y para una mayor claridad en la exposición, procederemos a realizar un análisis diferenciado de los distintos artículos que integran el Protocolo.

AMBITO DE APLICACIÓN (Art. 1)

El protocolo, al determinar su ámbito de aplicación, establece que solo se aplicará a los casos de sustracción, tal como han sido definidos en el Convenio.

Una de las funciones del Convenio de La Haya, tal como ha sido establecido en su artículo 1º, es la de garantizar la restitución inmediata de los menores trasladados o retenidos de manera ilícita en cualquier Estado contratante.

A los fines del Convenio, se considera que ha habido un caso de sustracción internacional cuando se produce el trasladado o retención ilícita de un niño que se encontraba bajo la

responsabilidad de una persona física o jurídica que ejercía sobre él un legítimo derecho de custodia, fuera de su entorno habitual.

Queda entonces consagrado, en primer lugar, el restablecimiento del statu quo mediante la restitución inmediata de los menores trasladados o retenidos de manera ilícita en cualquier Estado contratante al lugar de su residencia habitual.

En segundo lugar, el Convenio enuncia como finalidad el respeto de los derechos de custodia y visita, otorgándole a dicha finalidad un carácter autónomo destinado a actuar como medida preventiva de los traslados y retenciones ilícitas.

Si bien el Convenio se ocupa de forma incompleta del respeto de los derechos de visita, no podemos dejar de reconocer que es una de sus finalidades y, como tal, debe procurarse que el Convenio resulte también operativo para estas cuestiones.

Los Estados no realizan una interpretación uniforme del Convenio en lo que al respeto de los derechos de visita se refiere. Tanto la jurisprudencia elaborada en la materia como la guía de las buenas prácticas, e incluso el mismo informe explicativo del Convenio, realizado por Dra. Pérez Vera, han establecido que las previsiones contenidas en el Convenio, relativas a las visitas transfronterizas, deben ser consideradas aplicables a las solicitudes realizadas por un solicitante en el marco de un procedimiento de restitución, así como a las solicitudes realizadas en todas aquéllas circunstancias en que se encuentre en juego el respeto o el establecimiento de derechos de visita, sea mediante el reconocimiento de una orden dictada en el extranjero, o cuando un progenitor radicado en el extranjero intenta conseguir una orden de visita en el Estado de residencia habitual de su hijo.

A pesar de lo expuesto, el protocolo no se ocupa del tema de las visitas sino para proteger el derecho del progenitor que se encuentra tramitando un pedido de restitución, a mantener contacto directo y fuído con su hijo mientras dura el proceso.

La problemática de las visitas transfronterizas ha despertado en reiteradas oprtunidades el interés de los Estados, habiéndose desarrollado una serie de estudios y documentos en la materia, con el fin de lograr una interpretación y la elaboración de reglas uniformes que llenen las lagunas dejadas por el Convenio de 1980.

De este modo, al elaborarse el Convenio de La Haya de 1996 sobre protección de niños, cuya ratificación este país está evaluando, se ha incluido una regulación completa y autónoma del derecho de visitas, incluyendo entre las medidas de protección de menores las relacionadas con las visitas transfronterizas. De este modo, las reglas uniformes relativas a competencia, reconocimiento, ejecución y cooperación entre Estados son consideradas aplicables a todas aquellas decisiones que se dicten en orden a asegurar el ejercicio efectivo de un derecho de visita, así como el derecho a mantener contactos directos regulares entre padres e hijos.

Las Conclusiones de la Cuarta Reunión de la Comisión Especial sobre el Convenio de La Haya de 1980, llevada a cabo en el año 2002, destacaron los aportes que el Convenio de La Haya de 1996 puede realizar a la resolución de la problemática que analizamos, instando a los Estados a ratificar o adherirse al Convenio.

Por otra parte, se consideró prematura la elaboración de un Protocolo al Convenio de 1980, estableciéndose que por el momento sería de gran utilidad la elaboración de una guía de buenas prácticas en relación con el derecho de visitas en el contexto del Convenio de La Haya de 1980, que promueva buenas prácticas coherentes en relación con la competencia y obligaciones de los Estados contratantes y que ofrezca ejemplos de práctica en este tipo de casos.

Aún cuando consideramos que la ratificación del Convenio de 1996 podría dar una respuesta acabada a la problemática del derecho de visitas, lo cierto es que, por su complejidad, cuenta al momento con la ratificación de un escaso número de Estados, lo que hace que la problemática de las visitas no se vea claramente resuelta entre todos los Estados parte del Convenio de 1980.

Si bien el Convenio está siendo analizado en un gran número de Estados con miras a su ratificación, consideramos de importancia la elaboración y publicación inmediata de una Guía de Buenas Prácticas relativa al derecho de visitas tranfronterizo, que brinde a los Estados

pautas orientadoras a tener en cuenta al momento de enfrentarse con casos de visitas internacionales.

PROCEDIMIENTO DE MEDIACIÓN O CONCILIACION (Art. 2)

El artículo 2° establece que las autoridades centrales, judiciales o administrativas deberán esforzarse para establecer un procedimiento de mediación o conciliación para arribar a una resolución amigable que derive en el retorno voluntario del niño.

En este sentido, cabe señalar que el Convenio de La Haya de 1980, si bien no contiene una referencia expresa a la mediación, ha previsto la resolución de los casos de traslado o retención ilícita mediante la promoción de acuerdos y soluciones amistosas.

Este criterio ha sido receptado por los Artículos 7 inc. c) y 10, que establecen que corresponderá a la Autoridad Central adoptar, ya sea directamente o a través de intermediarios, todas las medidas tendientes a garantizar la restitución voluntaria del menor o facilitar una solución amigable.

En este contexto, se han llevado a cabo experiencias de mediación en casos con elementos internacionales, especialmente en situaciones que comprenden los supuestos previstos por el Convenio de La Haya de 1980[3] con gran éxito por parte de los Estados involucrados.

Asimismo, el Convenio de La Haya de 1996 sobre protección de niños, cuya ratificación nuestro país está analizando, recepta la idea de la resolución de los conflictos por una vía no adversarial. Sin embargo, y dado que su elaboración se ha producido cuando la mediación en asuntos de familia había cobrado difusión, contiene una disposición más específica que la del Convenio de 1980, estableciendo en su Art. 31 b) que las Autoridades Centrales deberán tomar, "ya sea directamente o con la cooperación de Autoridades públicas o de otros organismos, todas las medidas apropiadas para … facilitar por la mediación, la conciliación o cualquier otro procedimiento análogo, acuerdos amistosos para la protección de la persona o de los bienes del niño, en las situaciones a las que se aplica el Convenio".

En el mismo sentido, la Conferencia de La Haya de Derecho Internacional Privado ha publicado en el año 2007 un documento que tiene como principal objetivo determinar la factibilidad de la elaboración de un instrumento relativo a mediación familiar internacional, brindando un análisis detallado de la situación de la mediación en este tipo de cuestiones, tanto en el plano nacional como internacional. Asimismo, analiza determinadas cuestiones legales y prácticas relativas al desarrollo de la mediación internacional en asuntos de familia, y aporta detalles precisos del uso de la mediación en los casos previstos por el Convenio de La Haya de 1980.

De conformidad con lo expuesto, ésta Autoridad Central considera que el Art. 1º del Protocolo reitera principios ya consagrados en el Convenio, limitándose a enunciar lo que ha sido ya previsto como una buena práctica que gradualmente está siendo llevada a buen término por los Estados Parte de un modo cada vez mas complejo y organizado, y con un alto grado de efectividad. De este modo, la mediación resulta de suma eficacia para resolver de una manera ágil y efectiva los conflictos relativos al traslado o retención ilícitos de menores en un Estado diferente al de su residencia habitual, lo que redunda en beneficio, no solo de los padres, sino fundamentalmente de los niños afectados por este tipo de cuestiones.

En el último párrafo, el Artículo 1º establece que en caso de que las partes arriben a un acuerdo, la autoridad competente podrá aprobar el mismo y declararlo ejecutable. Con relación a este punto, y de conformidad con lo establecido en el protocolo, cabe señalar que será cada país el que determine, según su legislación interna, si es suficiente con la voluntad de las partes plasmada en el acuerdo o hay que dar un paso más, solicitando su homologación judicial para que el acuerdo tenga eficacia.

En nuestro país, la Ley 24.573 de Mediación y Conciliación, incorporó la mediación previa a todo juicio, con las excepciones establecidas en el artículo 2, entre las que se incluyen las acciones de filiación y patria potestad, con excepción de las cuestiones patrimoniales derivadas de éstas.

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[3] Comisión Parlamentaria de mediación franco-alemana, Proyecto franco-alemán de mediación profesional bi-nacional, Proyecto de mediación germano-Estadounidense, Servicio de mediación del Servicio Social Internacional (ISS), Proyecto Piloto REUNITE – Reino Unido, Esquema de resolución alternativa de conflictos de la Corte de Apelaciones de Inglaterra y Gales, Misión de Ayuda a la Mediación Internacional para las Familias (MAMIF) – Francia.

Sin embargo, la doctrina ha entendido que tanto la tenencia como el régimen de visitas son materia sujeta a mediación previa, ya que ninguna de las dos hipótesis ha sido excluida expresamente de la mediación obligatoria. Además, es en este tipo de controversias donde la mediación está llamada a prestar un rol relevante, tal cual lo indica la experiencia recogida a través del tiempo. De allí que la mediación, caracterizada por su carácter no adversarial, aparezca en éstos casos como beneficiosa para la recomposición de las relaciones familiares y para el restablecimiento del diálogo entre los progenitores, que de éste modo podrán arribar a una resolución consensuada del conflicto.

En este sentido, el Congreso de la Nación Argentina está evaluando una serie de proyectos tendientes a la instauración de un régimen especial de mediación familiar. En todos ellos, se prevé que si las partes arribaren a un acuerdo, éste deberá presentarse al juez para su homologación. Si el acuerdo se ajustare al interés público, al interés familiar y al interés superior del niño, podrá ser homologado por el juez, previa vista al Ministerio Público.

Como lo señalamos anteriormente, el tema de la mediación familiar para conflictos transfronterizos está siendo analizado exhaustivamente en el ámbito de la Conferencia de La Haya. Por ello, consideramos que las previsiones adoptadas por el protocolo no resultan suficientes para brindar una respuesta clara y uniforme al tema de la mediación en éste tipo de conflictos, dejando librada a la voluntad de las autoridades de cada Estado y a su normativa interna, la aplicación de la mediación y el reconocimiento de los acuerdos a que las partes hubieran arribado en la materia, tal como se viene realizando hasta el presente.

La respuesta que los Estados deben brindar en este aspecto, debe provenir de un análisis más acabado del tema, para poder brindar respuestas concretas a un fenómeno de gran difusión en estos días, que ciertamente puede ser de suma utilidad para la resolución de los conflictos familiares internacionales, ya que los padres estarán mejor predispuestos a cumplir un acuerdo al que han arribado conjuntamente, que una orden emanada de un tercero ajeno a la problemática y dinámica familiar.

DERECHO DEL NIÑO A SER OIDO (Art. 3)

El Artículo 3 del Protocolo consagra el derecho del niño a ser oído al establecer que la Autoridad Central o la autoridad administrativa o judicial del Estado requerido deberá escucharlo de un modo apropiado o realizar los arreglos necesarios para que lo haga una persona idónea, a menos que ello resulte inapropiado debido a la edad del niño o su grado de madurez.

Este principio ha sido consagrado por la Convención sobre los derechos del niño adoptada por la Asamblea General de las Naciones Unidas el 20 de Noviembre de 1989. Por ser el instrumento de derechos humanos que ha sido ratificado con mas celeridad que cualquier otro y por un mayor número de gobiernos (todos excepto los de Somalia y Estados Unidos), sus principios gozan del carácter de universales. En su Art. 12 establece: "1. Los Estados Partes garantizarán al niño que esté en condiciones de formarse un juicio propio el derecho de expresar su opinión libremente en todos los asuntos que afectan al niño, teniéndose debidamente en cuenta las opiniones del niño, en función de la edad y madurez del niño. 2. Con tal fin, se dará en particular al niño oportunidad de ser escuchado, en todo procedimiento judicial o administrativo que afecte al niño, ya sea directamente o por medio de un representante o de un órgano apropiado, en consonancia con las normas de procedimiento de la ley nacional".

Asimismo, el Convenio de la Haya de 1980, prevé como supuesto de excepción al reintegro la oposición del niño, estableciendo en su Art. 13, 2º párr. que: "La autoridad judicial o administrativa podrá asimismo negarse a ordenar la restitución del menor si comprueba que el propio menor se opone a la restitución, cuando el menor haya alcanzado una edad y un grado de madurez en que resulte apropiado tener en cuenta sus opiniones". De este modo, tal como lo sostiene la Dra. Pérez Vera en su informe explicativo, el Convenio brinda a los menores la posibilidad de convertirse en intérpretes de su propio interés.

El Protocolo sostiene, asimismo, que las Autoridades Centrales deberán, en la medida de lo posible, escuchar a las partes en persona.

La citación a las partes por las Autoridades Centrales, dependerá de la función que realicen en cada Estado. Si la Autoridad Central no es la encargada de resolver la restitución o no del niño,

ni de llevar a cabo la instancia conciliatoria prevista en el Art. 10, no vemos en que medida podría ser de utilidad para la resolución del caso que tome contacto directo con las partes involucradas.

Es por ello que no resulta claro lo dispuesto en éste párrafo, no entendiéndose en que medida, con que alcances, ni a que fines se prevé la necesidad de que la Autoridad Central escuche a las partes, mas allá de que ésta esté habilitada o deba hacerlo en virtud de las atribuciones que le han sido conferidas para el ejercicio de su función por parte del Estado a que pertenezca.

La citación del progenitor desplazado deberá procurarse solo cuando su comparecencia pueda significar un avance o posible solución del caso, ya que habitualmente deberá trasladarse al Estado en que se encuentra el niño, lo que implica un gran dispendio de tiempo y medios económicos.

MEDIDAS DE PROTECCIÓN (Art. 4)

El Art. 4 enumera un listado de medidas de protección que deberán tomar las autoridades judiciales o administrativas del Estado parte en que el niño se encuentre. De este modo, establece que:

a) Deberá asistir en la implementación de medidas de protección adoptadas por las autoridades del Estado de residencia habitual del menor inmediatamente antes del traslado o retención.

b) Deberá tomar medidas de protección del niño, en particular para segurar los derechos de visita y el contacto durante el procedimiento de reintegro del niño.

c) Podrá, antes de ordenar el reintegro del niño y cuando la situación del niño luego del reintegro requiera la toma de medidas especiales de protección, solicitar a las autoridades del Estado al que el niño deba ser reintegrado, que tomen medidas de protección, especialmente para asegurar los derechos de contacto y visita para la persona que sustrajo o retuvo al niño y su participación en cualquier proceso sucesivo relativo a su relación con el niño.

d) Podrá, en su decisión de reintegro del niño, incluir medidas para asegurar la protección del niño en su regreso.

Todos los supuestos previstos en éste artículo han sido analizados y consagrados como buenas prácticas en la aplicación del Convenio de La Haya de 1980. Las autoridades encargadas de resolver pedidos de restitución recurren a la utilización de órdenes espejo, undertakings y otras medidas, en aquellos casos en los que se evidencia la presencia de algún riesgo para el menor a su reintegro. La toma de medidas de protección que garanticen el regreso seguro del niño, brinda tranquilidad a la autoridad encargada de dictar la orden de reintegro, disminuyendo, por consiguiente, los casos en los que se produce el rechazo de la restitución solicitada en virtud del Artículo 13 b) del Convenio cuando la causal no se encuentra claramente configurada pero se infiere o se tiene sospechas de la existencia de algún tipo de riesgo para el menor en el lugar de su residencia habitual.

De este modo, en el Capítulo 6.3 de la Primera Parte de la Guía de Buenas Prácticas, relativo a la Práctica de las Autoridades Centrales, se ha hecho referencia al regreso seguro del menor, estableciéndose la importancia de que los Estados parte contemplen la posibilidad establecer procedimientos que permitan obtener, con anterioridad al dictado de la orden de reintegro, medidas provisionales de protección del menor en la jurisdicción a la cual menor deba ser reintegrado. Asimismo, se ha hecho referencia a cuestiones de inmigración, de visado, penales y de participación de los padres en los procedimientos a realizarse en el Estado de residencia habitual del niño luego de su regreso, con el fin de dirimir cuestiones de custodia y derecho de visitas, considerándose que es deber de los Estados tomar las medidas necesarias para que los derechos del niño y sus padres se vean garantizados.

Asimismo, en las conclusiones de la Quinta Reunión de la Comisión Especial, llevada a cabo en el año 2006, con igual criterio, se consideró apropiada la toma de medidas por parte de las autoridades encargadas de resolver un pedido de restitución, con la finalidad de garantizar el regreso seguro del niño. En tal sentido, se hizo referencia a las órdenes espejo, condiciones, compromisos, órdenes de regreso seguro del niño, etc., confiriéndoles un contenido y alcances

coincidentes con lo previsto al respecto con el Convenio de La Haya de 1996 para la toma de medidas de protección.

Con relación al dictado de medidas tendientes a garantizar el contacto de los niños involucrados en casos de restitución con su progenitor desplazado, cabe señalar que, aún cuando el procedimiento de restitución de un menor está previsto para ser realizado en un plazo de 6 semanas, lo cierto es que en un gran número de casos este lapso de tiempo se extiende más allá del deseado por el Convenio. Es por ello que debe recurrirse a alguna medida para garantizar el mantenimiento del contacto entre el niño y el progenitor que ha solicitado su reintegro a país de su residencia habitual. De lo contrario, se estaría violando un derecho inalienable del niño, corriéndose el riesgo de perjudicarlo y alienarlo del progenitor con el que ha perdido contacto como consecuencia del traslado o la retención ilícita.

Los supuestos mencionados por el protocolo, son solo algunas de las múltiples opciones que pueden presentarse en la práctica, y no van mas allá de una mera enunciación de buenas prácticas ya consagradas por la práctica y por las conclusiones a que han arribado los Estados al momento de estudiar la problemática del regreso seguro del niño y la implementación de medidas de protección.

Todos estos supuestos encuentran una respuesta práctica y acabada en las disposiciones del Convenio de 1996, que incluso establece el reconocimiento de pleno derecho y la ejecutoriedad de las medidas de protección de urgencia dictadas en el Estado de refugio por parte de las autoridades del Estado de residencia habitual del niño, las cuales deberán velar por su cumplimiento hasta tanto hayan adoptado las medidas exigidas por la situación.

INFORMACIÓN Y ASISTENCIA MUTUA (Art. 5)

El Protocolo establece en su Art. 5 que la Autoridad Central del Estado en que se encuentra el niño o la autoridad judicial o administrativa del Estado ante la cual fue realizado el pedido de restitución, deberá notificar a las autoridades competentes del Estado de residencia habitual del niño inmediatamente antes del traslado o retención de los procedimientos y cualquier medida que fuere adoptada. Asimismo, establece que las autoridades de los Estados involucrados deberán cooperar para asegurar el acceso directo a la documentación relevante, pruebas e informes de expertos disponibles en uno u otro de esos Estados.

Una vez más, el protocolo recoge principios que han sido consagrados tanto en el Convenio de La Haya de 1980, como en la Guía de Buenas Prácticas. De este modo, el Artículo 7 enuncia entre las funciones de las autoridades centrales las de facilitar información general sobre la legislación de su país relativa a la aplicación del Convenio de La Haya de 1980. Similar criterio ha sido recogido por la Primera parte de la Guía de Buenas prácticas en los puntos 3.5 y 5.4. Asimismo, en el punto 4.19, recoge el deber de las Autoridades centrales de informar a la autoridad central requirente tan pronto como lo sepa, de la decisión del tribunal.

SEGUIMIENTO DEL CASO POST REINTEGRO (Art. 6)

Este artículo incorpora el deber de la Autoridad Central del Estado al que el niño ha sido reintegrado u otra autoridad competente, de notificar a la Autoridad Central del Estado en que el reintegro del niño ha sido ordenado, cualquier decisión relativa al derecho de custodia realizada luego del reintegro y de responder a requerimientos de información motivados acerca de la situación del niño, solicitados en el período de un año a partir del reintegro del niño, por la autoridad Central u otra autoridad pública del Estado en que fue ordenada la restitución.

En principio, cabe señalar que las autoridades del Estado de refugio que han ordenado la restitución del niño, no tendrán competencia para entender en ningún tipo de cuestiones relativas a su bienestar, posteriores al reintegro. El juez o la autoridad competente del Estado al que el niño ha sido trasladado o en el cual ha sido retenido ilícitamente, poseen competencia solo a los fines de ordenar la restitución o no del menor. Una vez que han resuelto el regreso del niño, la competencia para dirimir cualquier tipo de cuestiones relativas a su bienestar cesa, siendo competentes para dirimirlas las autoridades del Estado al que el niño ha sido restituido o en el cual tenga su residencia habitual.

Si bien entendemos que para que el Convenio funcione correctamente es de vital importancia que las autoridades encargadas de decidir la restitución de un niño tengan la confianza suficiente en que el niño va a estar tan bien protegido y cuidado en el Estado de su residencia

habitual, como lo estaría en su Estado si no ordenara el reintegro, consideramos que hay determinadas circunstancias en las que el juez o la autoridad que han ordenado la restitución pueden manifestarse interesadas en saber en que condiciones se encuentra el niño.

Si nos manifestamos a favor de las órdenes espejo y de la toma de medidas de protección del niño que garanticen su reintegro seguro, debemos dejar una puerta abierta a la posibilidad de que las autoridades del estado que ordenaron el reintegro del niño, soliciten información sobre su Estado con posterioridad al reintegro.

Ello no debe entenderse como falta de confianza en las autoridades del Estado al que ha sido restituido el niño, sino como un interés legítimo, por parte de las autoridades que han dictado una resolución sobre la persona de un niño, en que sus derechos sean respetados.

CLAUSULAS FINALES (Art. 7-12)

Contienen normas generales relativas a la coordinación con el Convenio de La Haya, evaluación del funcionamiento del protocolo, reservas, firma, ratificación y adhesión por los Estados, organismos de integración económica regional, y entrada en vigor

INTERPRETACION DEL ARTÍCULO 13 1) b)

Se establece la necesidad de reformular el alcance y sentido del Artículo 13 1 b), en virtud del fenómeno creciente de sustracciones o retenciones ilícitas llevadas a cabo por el progenitor responsable del cuidado primordial del niño, normalmente la madre.

Es por ello que se entiende que debe interpretarse que la causal enunciada en el Art. 13 b), debe interpretarse en el sentido de que deberá rechazarse la restitución del niño cuando la orden de retorno lo coloque en una situación intolerable, especialmente si su reintegro al progenitor desplazado es contrario al interés superior del niño y no fuera esperable o posible que el progenitor que realizó el traslado o la retención regresara con él al lugar de su residencia habitual.

Particularmente, se manifiestan interesados en prevenir el dictado de una orden de restitución cuando el progenitor que la solicita no tiene la intención d58e que se le confiera el ejercicio de la custodia del niño, sino que pretende que se le garantice el ejercicio de sus derechos de visita o establecer un régimen que le permita mantener un contacto fluido con su hijo. En este caso, el rechazo dependerá de la posibilidad de las autoridades del Estado de refugio del niño de brindar al progenitor desplazado una garantía de que sus derechos a mantener un contacto directo y regular con su hijo sean respetados.

De este modo, se propone una interpretación del Art. 13 1 b) instaurando al interés superior del niño en el centro del análisis.

El apartado b) del artículo 13 del Convenio se refiere a situaciones en las que la sustracción o retención ilícitas de un menor dan lugar a una solicitud de reintegro del niño, pero en las que su regreso sería contrario a su interés. De este modo, se consagra el interés del menor a no ser expuesto a un peligro físico o psíquico, o colocado en una situación intolerable.

La Dra. Pérez Vera, establece, en su informe explicativo, que esta excepción debe ser interpretada restrictivamente. Con un criterio concordante, la jurisprudencia elaborada a través del tiempo en la materia y las conclusiones a las que han arribado los expertos en los diversos seminarios realizados sobre el tema de restitución de menores, han considerado que las defensas previstas en los artículos 13 y 20 del Convenio poseen una naturaleza excepcional. La defensa de 'grave riesgo" prevista por el artículo 13.1 b), debe ser entonces estrechamente interpretada, entendiéndose que cualquier tendencia a darle una interpretación amplia a este artículo, socava la operación del Convenio. Asimismo, se ha considerado que no debería contemplarse el rechazo a la restitución del menor sobre la base del artículo 13, 1 b) a no ser que por parte del tribunal se hayan considerado y se aprecien como inadecuadas todas las formas alternativas disponibles para proteger al menor.[4]

[4] Seminario judicial internacional sobre el Convenio de La Haya de 1980 sobre los aspectos civiles de la sustracción internacional de menores. Centro de Conferencias De Ruwenberg. Países Bajos, 20 al 23 octubre de 2001. Seminario de Jueces Latinoamericanos sobre el Convenio de La Haya de 1980 sobre los aspectos civiles de la sustracción internacional de menores. Monterrey, Mexico, 1 al 4 de diciembre de 2004. Proyecto de La Haya para la cooperación internacional y la protección de los niños. Funcionamiento de los Convenios de La Haya sobre niñez y la protección

En efecto, para que ésta causal proceda, es necesario que el progenitor que la alega pruebe de un modo claro y convincente que si el regreso del niño al país de su residencia habitual fuera ordenado, éste se vería expuesto a una situación de riesgo grave y cierto y que dicho país no puede, mediante las medidas de protección disponibles, proteger al niño.

En cuanto a lo mencionado por la delegación Suiza, consideramos que el supuesto de excepción previsto en el Art. 13 b) del Convenio ha sido redactado tomando como fundamento la protección del interés superior del niño. De hecho, a la luz del Convenio, dicho interés consiste en la restitución inmediata del niño traslado o retenido ilícitamente al lugar de su residencia habitual.

Excepcionalmente, y en procura de proteger el interés superior del niño, se establece el grave riesgo como causal de excepción, debiendo admitirse solo en aquéllos casos en que la existencia de un riesgo cierto y grave hubiera sido comprobada, no siendo suficiente con la existencia de un riesgo potencial para rechazar la restitución solicitada.

Tal como se expone en el análisis realizado por Suiza al artículo 13 b, la realidad ha demostrado que en la práctica, muchos son los progenitores desplazados que solicitan la restitución de sus hijos, aún cuando solo tienen intenciones de asegurar el cumplimiento de sus derechos de visitas o la reglamentación de un nuevo régimen que garantice sus derechos de manera apropiada.

Cabe señalar que el Convenio reconoce y consagra la jurisdicción de las autoridades del Estado de residencia habitual del niño para entender en todas aquellas cuestiones relacionadas con los derechos de custodia y de visita.

Ante un caso de sustracción internacional, el Convenio no puede ceder terreno a las autoridades del lugar de residencia habitual para entender en éstas cuestiones, ya que su finalidad es la de combatir los traslados y retenciones ilícitas, privándolas de toda consecuencia jurídica.

El progenitor que se ve desplazado y privado de todo contacto con su hijo como consecuencia de un traslado o retención ilícitas, tiene la posibilidad de solicitar la restitución del mismo en virtud del Convenio o de solicitar el establecimiento a través del mismo.

Si bien es cierto que no sería razonable que el progenitor que solo desea que su derecho de visitas se vea garantizado, realizara un pedido de restitución, dado el dispendio de tiempo, recursos y energía que ello acarrearía y el perjuicio al que se expondría al menor al tener que realizar un nuevo traslado, para luego regresar, seguramente con el progenitor sustractor al país de refugio, también es cierto que nada obsta a que realice tal pedido, si considera que sus derechos se verán garantizados de un modo mas justo por las autoridades del país de su residencia habitual. Máxime teniendo en cuenta las dificultades que surgen en los Estados al momento de realizar solicitudes de visitas transfronterizas en virtud del Convenio de 1980.

En los casos en que la voluntad del progenitor sea manifestada en el proceso de restitución, es aconsejable que las autoridades encargadas de decidir sobre la restitución insten a las partes a realizar los esfuerzos necesarios para llegar a un acuerdo, que redundará en beneficio de ambos y fundamentalmente del menor.

Asimismo, consideramos de vital importancia que las Autoridades Centrales encargadas de recepcionar las solicitudes, cuenten con operadores que posean la capacitación necesaria para interpretar las necesidades y deseos de los padres de modo que puedan orientarlos correctamente en el camino a seguir cuando sus hijos han sido víctima de un traslado o retención ilícitos.

CONCLUSIONES:

Se valora el Proyecto de Protocolo elaborado por Suiza en el entendimiento que su finalidad es otorgar una mayor protección a los niños sustraídos o retenidos ilícitamente; teniendo siempre como consigna el interés superior del niño, consagrado en el Convenio de 1980 y en la Convención sobre los Derechos del Niño.

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transfronteriza de los niños en América Latina. La Haya, 28 de noviembre al 3 de diciembre 2005.

Sin perjuicio de ello, y teniendo en cuenta los manifestado en los párrafos precedentes, consideramos -en principio-, tal como lo indicara la Comisión Especial del 2006, que los Estados Parte de la Conferencia deben estudiar la posibilidad de adoptar el Convenio de La Haya de 1996.

Por úlrimo, en el supuesto caso que se considerara conveniente el análisis del Proyecto de Protocolo, materia del presente informe, conrrespondería su tratamiento en el ámbito de la Comisión Especial para revisar el funcionamiento del Convenio de 1980, por ser éste el ámbito pertinente, en el cual los Estados Parte de este Convenio podrán valorar la necesidad de un Protocolo con las características propuestas por la delegación Suiza.

BRÉSIL – *BRAZIL*

De l'Autorité centrale du Brésil pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of Brazil under the 1980 Hague Child Abduction Convention*

Considering that this issue was discussed during the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 1980, and as our Central Authority is already working with mediation in child abduction cases, the proposal of Switzerland is a matter of interest. However, we believe this issue should be incorporated in a broader agenda of discussions of similar proposals. In addition, I inform that our Central Authority is only prepared to present preliminary comments to the draft at this stage.

In our opinion, the document presented by Switzerland deals with the issue of mediation within the scope of administrative or judicial proceedings. It offers a formal perspective to promote mediation on child abduction cases by establishing a set of rules that will guide the persons and authorities concerned. In this respect, a more comprehensive analysis of the document will still be undertaken by our Central Authority and the Brazilian Liaison Judges before we commit ourselves to any final position since some of the points which are included in the document refer to obligations that might not be enforceable in our legal system.

The points that we believe deserve careful attention are the following:

1. Article 4, b, which states; "shall take measures for the protection of the child, in particular to secure the rights of access and rights of contact during the proceedings relating to the application for the return of the child". This is a relevant issue but in our legal system rights of access and rights of contact can only be determined by a ruling issued by a competent court or by a judicial authorization during the course of proceedings for the return of the child.

2. Article 4, d: ''may, in its decision to return the child, include measures to ensure the protection of the child on its return". At a first glance it seems that any measures to ensure the protection of the child on its return should be negotiated between the judicial authorities of the requested state and the competent authorities of the requesting state before a decision for return is issued. Otherwise the conditions established for the return by a given court might not be enforceable in the requesting state once the child is returned.

3. About the observation included in Article 6, we agree with the position of Switzerland with respect to the problem of abductions carried out by the primary care taker of the child, normally the mother. This is the main reason why many judges in our country fail to return a child as they usually understand that the child's best interest would be better preserved if the minor remained with the person mainly responsible for his/her support. A thorough re-examination of this issue is certainly of great interest to our Office.

4. Article 9 Reservations. "No reservations may be made to this protocol". It is our understanding that this particular clause could only be considered after a final draft is approved by member countries.

Furthermore, the proposal of Switzerland does not address some issues of interest like the possible role of a mediator, how conciliation should be conducted, duration of the conciliation procedures, the role of private attorneys, and what type of special training would be required for a person to act as a mediator. We believe all this points should also be considered in a broader discussion for a future protocol on the issue of mediation.

CANADA

Du Ministère de la Justice du Canada – *From the Department of Justice of Canada*

Le Canada a examiné le Projet de Protocole à la *Convention de La Haye du* 25 *octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* (Projet de Protocole) présenté par la Suisse. Les préoccupations abordées dans cette proposition ne sont pas sans fondement, notamment en ce qui a trait au retour sûr de l'enfant. Toutefois, le Canada n'est pas en faveur de l'inclusion du Projet de Protocole en tant qu'élément prioritaire du plan de travail de la Conférence de La Haye.

Le Projet de Protocole traite de nombreuses questions qui figuraient dans une proposition antérieure présentée par la Suisse concernant un protocole à la *Convention de 1980* (Proposition de 2006), dont la Commission spéciale sur le fonctionnement de la *Convention de La Haye du* 25 *octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* et la mise en œuvre la *Convention de La Haye du 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants* a discuté longuement pendant sa réunion d'octobre et de novembre 2006.

Le Canada est d'avis que les mesures prévues par le Projet de Protocole proposé peuvent être mises en œuvre par les autorités compétentes en vertu de la *Convention de 1980.* Ce même point de vue avait été exprimé à l'égard de la Proposition de 2006, tel qu'il appert de l'annexe aux conclusions et recommandations découlant de la réunion de 2006 de la Commission spéciale. À ce titre, nous croyons qu'il s'agit de mesures de bonnes pratiques non exécutoires qui n'exigent pas l'établissement d'un Protocole. Cela est d'autant plus vrai en ce qui a trait aux dispositions concernant la médiation et la conciliation (article 2), la possibilité d'être entendu (article 3) et l'échange d'information, l'entraide et la coopération entre les autorités compétentes (articles 5 et 6). Le Canada est aussi d'avis que l'efficacité de la *Convention de 1980* augmentera avec l'élaboration d'un formulaire relatif au profil des pays et d'un guide de bonnes pratiques en matière d'exécution, des projets appuyés par la Commission spéciale en 2006.

Par ailleurs, le Canada croit que la *Convention de 1996* peut déjà répondre à la plupart des préoccupations sous-jacentes concernant l'établissement de mesures de protection (article 4 du projet de Protocole) et que les efforts consacrés à la mise en œuvre de celle-ci devraient donc demeurer une priorité pour la Conférence de La Haye. Cette orientation cadre avec le point de vue exprimé par la Commission spéciale lors de sa réunion de 2006 (paragraphe 1.7.3) et à notre avis, elle est d'autant plus pertinente aujourd'hui, car l'on peut raisonnablement s'attendre à ce que le nombre d'États parties à la *Convention de 1996* augmente sensiblement dans un avenir prochain. Au Canada, on continue à songer sérieusement à ratifier la *Convention de 1996* en tant qu'outil pour garantir la protection de l'intérêt supérieur des enfants canadiens et étrangers et, le cas échéant, pour accroître l'efficacité de la *Convention de 1980.* Nous craignons que les efforts qu'il faudrait consacrer à l'élaboration d'un projet de Protocole viennent gruger les ressources précieuses nécessaires aux États membres et au Bureau Permanent pour terminer les travaux qui permettront d'obtenir que la *Convention de 1996* soit ratifiée par le plus grand nombre d'États possible.

* * *

Canada has reviewed the Draft Additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction *("Draft Protocol") submitted by*

Switzerland. The concerns addressed by the proposal are not without merit, especially in regard to protection measures to ensure the safe return of a child. However, Canada does not support the inclusion of the Draft Protocol as a priority matter for the Hague Conference's work plan.

The Draft Protocol deals with many of the issues contained in an earlier proposal made by Switzerland for a possible Protocol to the 1980 Convention *("2006 Proposal"), which was discussed at length during the October-November 2006 meeting of the Special Commission to review the operation of the* Hague Convention of 25 October 1980 on the Civil Aspect of International Child Abduction *and the implementation of the* Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Authority and Measure for the Protection of Children*.*

Canada is of the opinion that the measures contained in the proposed Draft Protocol can be undertaken by the competent authorities under the 1980 Convention*. This view had also been expressed in respect of the 2006 Proposal, as it appears from the Appendix to the Conclusions and Recommendations of the 2006 Meeting of the Special Commission. As such, we believe that these are non-binding measures of good practice that do not require the establishment of a Protocol. This is especially true of the provisions pertaining to mediation and conciliation (Article 2), the right to be heard (Article 3) and the sharing of information/mutual assistance/cooperation between competent authorities (Articles 5 and 6). Canada also believes that the effectiveness of the* 1980 Convention *will be increased through the establishment of a country profiles form and a guide to good practice on enforcement issues, projects that were endorsed by the Special Commission in 2006.*

Canada is also of the opinion that most of the underlying concerns regarding the establishment of protection measures (Article 4 of the Draft Protocol) can be addressed under the 1996 Convention *and that efforts in relation to the implementation of the latter should therefore remain a priority of the Hague Conference. This direction is consistent with the view expressed by the Special Commission at its 2006 meeting (paragraph 1.7.3), and, in our view, has since become even more relevant given the reasonable expectation that the number of States Parties to the* 1996 Convention *will significantly increase in the near future. In Canada, serious consideration continues to be given to the possible ratification of the* 1996 Convention *as a means of ensuring the protection of the best interests of Canadian and foreign children and, where applicable, of increasing the effectiveness of the* 1980 Convention*. We are very concerned that the efforts that would be required to develop a Draft Protocol would take away from valuable resources needed by Member States and the Permanent Bureau to finalize the work needed to achieve the broadest possible ratification of the* 1996 Convention*.*

EGYPTE – *EGYPT*

Du Ministère de la Justice de la République arabe d'Egypte – *From the Ministry of Justice of the Arab Republic of Egypt*

Comments of the Ministry of Justice of the Arab Republic of Egypt regarding the proposal of Switzerland for the draft protocol to the Hague Convention of October 25th, 1980, on civil aspects of International Child Abduction.

1. Article I; "This Protocol applies to all cases of international child abduction as defined in the Convention provided both the State in which the child was habitually resident immediately before his / her removal or retention and the State to which it was abducted are parties thereto".

The Ministry of Justice of Egypt considers the article I puts restriction on the Protocol applications to a large extent, without justification while there is nothing to prevent expanding the accede to the Protocol to include all countries even though they are not parties to the Hague Convention 1980.

2. Article II/B; "Reply to reasoned requests for information about the particular situation of this child made within a period of one year after the return of the child by the Central Authority or any other public authority of the State where the return has been ordered". The Ministry of Justice of Egypt considers that there is no need for the requirement of time restrictions, as the interest of the child requires continuing identify the particular situation of the child, not only after his / her return but throughout the period of custody to - the age of eighteen. Aimed at safeguarding the right of the child as contained in the international Convention of child rights (1989). The Ministry of Justice of Egypt proposes to delete the reference to this restriction or amend the article to be in line with the custody period delivered either by a court or agreed upon by the concerned parties.

LITUANIE – *LITHUANIA*

Du Ministère de la Justice de la République de Lituanie– *From the Ministry of Justice of the Republic of Lithuania*

The Ministry of Justice of the Republic of Lithuania presents its compliments to the Permanent Bureau of the Hague Conference on Private International Law and welcomes the initiative of drafting the Additional Protocol (hereinafter referred to as the Protocol) to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter referred to as the Convention). Our assumption is that in order to observe the principle of legal certainty terms used in the Convention and in the Protocol should be as much harmonized as possible. Phrases used in the Protocol should also accord each with other. Consequently, as concerns the Protocol, we have the following comments and suggestions:

1. *A term "in an appropriate manner" used in Paragraph 2 of Article 2 of the Protocol is not clear enough. Additionally, considering provisions of Article 2 of the Convention, we suggest to use a phrase "shall take all appropriate measures". Considering provisions of Paragraph 1 of Article 2, a phrase "in a mediation or conciliation procedure" is suggested instead of a phrase "in such an undertaking" used in Paragraph 2 of Article 2 of the Protocol.*

2. *It is suggested to supplement Paragraph 3 of Article 2 of the Protocol by indication that efforts put in order to achieve voluntary return of a child may not be a due cause for delay under Paragraph 2 of Article 11 of the Convention.*

3. *It is not clear a competent institution of which state (of an addressing state or of a state to which one addresses) is meant in Paragraph 3 of Article 2 of the Protocol. In addition, it is suggested to provide in the Protocol for an obligation of States Parties to the Convention (Protocol) to submit information on such competent institutions empowered to approve agreements reached in mediation or conciliation procedure. As well, it is worth noticing that a condition in Paragraph 4 of Article 2 of the Protocol requires approval only of these agreements, which are reached in a mediation procedure. Referring to Paragraph 1 of Article 2, it is suggested to apply the same requirement to an agreement reached in a conciliation procedure.*

4. *It is not clear whether there will be established any mechanism for recognition by a State Party to the Protocol of decisions on return of a child, taken by the administrative institutions specified in Article 4 of the Protocol. Additionally we suggest to concretize what kind of protective measures are mentioned in Item (d) of Article 4.*

5. *We suppose that the procedure of informing in Paragraph 1 of Article 5 of the Protocol should be specified more. In addition, a phrase "of ongoing proceedings and any decision taken" should also be specified because we think that it is inexpedient to inform about each interim decision taken.*

6. *Provisions of Paragraph 2 of Article 5 of the Protocol should be put in more detail by specifying subjects who would be guaranteed a right to get acquainted with all documents. Additionally, we consider that reservations (provisos) to application of Paragraph 2 of Article 5*

of the Protocol should be provided since national laws of States Parties to the Protocol may contain provisions limiting in certain cases submission of certain information to other institutions or subjects.

7. *A phrase "made subsequently to such return" used in Item (a) of Article 6 of the Protocol is not clear enough; therefore, it should be specified.*

8. *As concerns Item (b) of Article 6, it is suggested to make a term "reasoned requests" more specific (to provide for some model list thereof).*

9. *As far as "Observation" is concerned, we agree with the opinion in the Protocol that making Item (b) of Paragraph 1 of Article 13 of the Convention more detailed or that uniform and accurate interpretation of application of this Item (b) should have positive effect on application of provisions of the Convention in practice. Nevertheless, it is not clear whether such explanatory notes will be incorporated in the Protocol by reference and what legal effect such explication will have.*

10. *As concerns final provisions, the draft Protocol does not provide for a procedure of making amendments and supplements to provisions of the Protocol. It also does not contain a procedure for termination of the Protocol (denunciation).*

11. *It is suggested that the final provisions of the Protocol would include an obligation by the Ministry of Foreign Affairs of the Kingdom of Netherlands to notify Parties to the Conference and states acceding to the Protocol under Paragraph 2 of Article 10 of each signatory under Paragraph 1 of Article 10 and of each accession under Paragraph 2 of Article 10 as well as of each regional economic integration organization's signatory, admission, and ratification under Article 11.*

12. *It is suggested to include a provision that provisions of the Protocol do not affect broader regulation established by bilateral or multilateral treaties between contracting parties.*

13. *As far as application of the Protocol is concerned, it is suggested that the Protocol would be applicable to such cases of illegal taking and keeping, which occurred after the effective date of the Protocol.*

MALAYSIE – MALAYSIA

De l'*Attorney General's Chamber* de la Malaisie - *From the Attorney General's Chamber of Malaysia*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
PREAMBLE	*The signatory States of this Protocol,* *Desiring to improve the protection of children from the harmful effects of an unlawful removal or retention as defined in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,* *Updating this Convention by taking account of the development of children's rights since its adoption,* *Taking into consideration the paramount importance of the best interest of children,* *Have resolved to conclude a Protocol to this effect and have agreed on the following provisions:*	*It is proposed that the words "an unlawful" be replaced with the word "a wrongful" to be consistent with Article 3 of the Convention.* *It is noted that this paragraph is consistent with the principle "best interests of the child shall be the paramount consideration" enunciated in the Convention on the Rights of the Child 1989 in relation to adoption. Hence, this paragraph is acceptable.* *Subject to the above comments the Preamble is acceptable as it is non-contentious.* *<u>Comments from the Syariah perspective</u>* *The welfare of a child is always the main consideration in settlement of custodial dispute. On this point, Syed Sabiq concluded that –* *"The primary consideration in all cases of custody under the Islamic law is that the right of the child over whom custody is claimed must be given preference to the right of the persons claiming custody, as the purpose of custody is for the interest and welfare of the child and not for the interest and welfare of the parties contending for custody."* *Apart from that, this matter has also been highlighted by Ibn Qudamah in al-Mughni whereby he stated that –* *"The objective of hadhanah is to ensure the welfare of a child is well-protected."* *From the above statements, it can be said that the concept of welfare of a child is closely related to the principle of custody of a child. This can be seen in the Prophet's hadith which emphasised on the mother's right of*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
		custody if the child is still breastfeeding: *"You have the first right to the child as long as you do not marry."* *The above hadith is based on the Quranic injunction on mothers to give suckling to their offspring:* *"The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child nor father on account of his child." [Al-Baqarah: 233].* *It is clear that the priority of right of custody is given to mother so that the child would get suckling and hence his or her welfare is well protected.*
Article 1 *Scope*	*This Protocol applies to all cases of international child abduction as defined in the Convention provided both the State in which the child was habitually resident immediately before his/her removal or retention and the State to which it was abducted are parties thereto.*	*It is noted that this Protocol only applies to cases where the requested State and the requesting State are parties to the Convention.* *This Article can be given due consideration.* *<u>Comments from the Syariah perspective</u>* *Generally, in the event of a child being removed or retained unlawfully, the child should be returned to the jurisdiction from which he or she was removed. Nevertheless, if in doing so, it defeats the purpose of protecting the welfare and interest of the child, the protection and welfare of the child should prevail and the religion of the child should be part and parcel of it.*
Article 2 *Mediation or conciliation procedure*	*The Central Authority or the judicial or administrative authority of the requested State shall endeavour to set up a mediation or conciliation procedure in order to obtain the voluntary return of the child or an amicable resolution. At the request of the requested*	*We are of the view that mediation or conciliatory procedure to obtain the voluntary return of the child can be given due consideration. However, we would like to seek clarification on the following matters:* *- how is the venue for the mediation or conciliation to be determined;*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
	State, the requesting State shall assist in setting up mediation. *The authorities shall encourage in an appropriate manner the persons concerned to participate in such an undertaking.* *Efforts to obtain the voluntary return of the child or an amicable resolution shall not delay the return of the child.* *If an agreement is reached through mediation, the competent authority may approve such an agreement and declare it enforceable.*	*- mechanism for the enforcement of the agreement reached through mediation; and* *- the words "competent authority may approve such an agreement and declare it enforceable".*
Article 3 *Right to be heard*	*The Central Authority or the judicial or administrative authority of the requested State shall hear the child in an appropriate manner or arrange for a qualified person to do so, unless this appears inappropriate in view of the child's age or degree of maturity.* *As far as possible, the Central Authority shall hear the parties in person.*	*We are of the view that the first paragraph of this Article can be given due consideration.* *We propose that the following mechanism be included:* *- Right of representation; and* *- Right of review, the duration and question of stay.* *Kindly clarify as to why the words "administrative authority" is omitted from paragraph 2. It is proposed that the words "or administrative authority" be inserted immediately after the words "Central Authority" as an administrative authority should also hear the parties in person. For the judicial authorities, we are of the view that they are governed by the court rules and procedures.* *Malaysia is a State Party to the CRC, having acceded to the Convention on 17 February 1995. It is noted that Article 12 of the CRC provides:* *"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
		2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." *In Malaysia, the definition of the child is governed under relevant legislations according to their respective purposes. The definition of a "child" in the Child Act 2001 is consistent with the definition of "child" under the CRC. However, certain legislations in Malaysia adopt a different formulation on the definition of "child". For instance, the Adoption Act 1952 defines a "child" as a person below 21 years of age, while the Guardianship of Infants Act 1961, defines an infant as a person who has yet to attain majority. However, positive measures are being undertaken to study this issue to streamline the definition of "child" in Malaysia for the purpose of consistency with the CRC.* *Malaysia has also enacted the Evidence of Child Witness Act 2007 [Act 676] to make provisions relating to the giving of evidence by child witnesses, and for other matters connected therewith. Under this Act, "child witness" means a person under the age of sixteen years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence.* *<u>Comments from the Syariah perspective</u>* *Article 3 can be given due consideration as both parties are entitled to the right to be heard, whether in trial or mediation process, in order to ensure that the process is conducted in a fair and just manner.* *With regard to the child's age or degree of maturity, there is a slight difference between a male and female child under Syariah principles. The age of puberty for a male child is 7 years old and for a female child is 9 years old, as provided for in subsection 84(1) of the Islamic Family Law (Federal Territories) Act 1984 as follows :* *"84.(1)The right of the hadhinah to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female, but the Court may,*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
		upon application of the hadhinah, allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female.".
Article 4 *Protection measures*	*The judicial or administrative authorities of the State in which the child is:* *a) shall assist in the implementation of protection measures taken by the competent authorities of the State in which the child was habitually resident immediately before his/her removal or retention;* *b) shall take measures for the protection of the child, in particular to secure the rights of access and rights of contact during the proceedings relating to the application for the return of the child;* *c) may, before ordering the return and if the child's situation after the return requires special precautions to be taken, ask the authorities of the State to which the child should be returned to take protection measures, especially in securing rights of access and contacts for the person who removed or retained the child and that person's participation in any subsequent proceeding relating to his/her relationship with the child;* *d) may, in its decision to return the child, include measures to ensure the protection of the child on its return.*	*It is proposed for the words "judicial or" to be deleted as the judicial authorities are governed by the court rules and procedures.* *Subject to the above comments, this Article can be given due consideration.*
Article 5 *Information and mutual assistance*	*The Central Authority of the State where the child is or the judicial or administrative authority to which the request for the return of the child has been submitted shall notify the competent authorities of the State where the child was habitually resident immediately before its removal or retention of ongoing proceedings and any decision taken.*	*It is proposed for the words "judicial or" to be deleted as the judicial authorities are governed by the court rules and procedures.* *Subject to the above comments, this Article can be given due consideration.*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
	The authorities of the State concerned shall cooperate in order to ensure direct access to any relevant documents, evidence and expert reports available in one or the other of these States.	
Article 6 *Duty to protect and inform after return*	*The Central Authority of the State to which the child has been returned or any other competent authority of that State shall:* *a) notify the Central Authority of the State where the return of the child has been ordered of any decision on the merits of the rights of custody, made subsequently to such return;* *b) reply to reasoned requests for information about the particular situation of this child made within a period of one year after the return of the child by the Central Authority or any other public authority of the State where the return has been ordered.* *Observation* *Following the adoption at international level of the Convention of 20 November 1989 on the Rights of the Child and the increased attention now placed on the greater interest of the child in all matters concerning him or her, it seems advisable to take this opportunity to re-examine the practical application and interpretation of Article 13, paragraph 1 b), of the Convention. This provision should only in exceptional cases permit the return of the child to be refused. Nonetheless, the practical decision-making procedure in these exceptional cases cannot be the same as that which inspired the authors of the Convention in 1980, in particular in situations, now increasingly common, of abductions carried out by the person mainly responsible for the support of the child, normally the mother. Switzerland is fully aware of the delicate nature of this issue, crucial for the smooth running of*	*The duties proposed under this Article are reasonable and can be given due consideration.* *It is noted that Article 13(b) of the Convention states the following:* *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –* *a)…; or* *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."* *Malaysia is of the view that Article 13(b) of the Convention is reasonable as it gives power to the court not to order the return of the child under certain circumstances in order to protect the child from harm.* *<u>Comments from the Syariah perspective</u>*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
	the Convention. Taking account of the changes that have come about in actual children's abductions since then, it considers, however, that it is worth making a thorough re-examination of this matter. *With this in mind, the significance of Article 13, paragraph 1 b), could be understood to mean that the relationship between the principle of returning the abducted child and the child's interest will be clarified.* *This reason for refusal should be understood to mean that the return places the child in an intolerable situation particularly if the placement with the parent making the request or with a third person is clearly not in the interests of the child and what it would be unreasonable to expect that of this parent.* *This reason for refusal should in particular prevent the return of the child where the parent making the request does not intend that the child will be entrusted to him or her on his/her return but that the parent merely intends to secure his/her right to personal relations with the child or regulate that again in an appropriate manner. Refusal is also dependent on the authorities of the State to which the child was abducted guaranteeing this right of contact and visit in an appropriate manner.*	*We are of the view that there is no need for re-examination of Article 13, paragraph 1 (b) of the Convention because the present provision is an ideal solution to overcome the harmful effects of an unlawful removal or return of the child.* *The existing provision of the Convention gives discretion to the court in deciding the valid ground for refusal to return the child. Any re-examination of Article 13, paragraph 1(b) of the Convention with a view to restrict the scope of the provision will only limit the discretion of the court and this might defeat the purpose of protecting the interest of the child.*
Article 7 *Coordination with the Convention*	*This Protocol does not derogate from the provisions of the Convention.*	*This Article can be given due consideration as the purpose of the Protocol is to complement the Convention.*
Article 8 *Examination of the practical operation of the Protocol*	*The Secretary General of the Hague Conference on Private International Law shall periodically convene a Special Commission to review the practical operation of the Convention and the Protocol and to encourage the development of good practices in accordance with*	*This Article can be given due consideration as such review is useful to improve the practical operation of the Protocol.*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
	the Protocol.	
Article 9 *Reservations*	*No reservations may be made to this Protocol.*	*This Article excludes all reservations including reservation on provisions that are inconsistent with the Syariah legal system.* *This Article would require further consideration.* *<u>Comments from the Syariah perspective</u>* *As have been stated earlier, there seems nowhere in the Draft Protocol that guarantees protection of religion of the child, especially in cases where one of the parents renounces Islam. Thus, reservation must be allowed in the Draft Protocol as a move to provide leeway for the Muslim parties in order to ensure that the religion of the child (Islam) is protected alongside the welfare of such child.*
Article 10 *Signature, ratification and accession*	*This Protocol is open to the signature of the States parties to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction who were Members of the Hague Conference on Private International Law during its 30th session.* *Any other State party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction shall be able to accede to the Protocol.* *The instruments of ratification, acceptance, approval or accession will be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.*	*As of 18 January 2008, Malaysia is not a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.* *It is noted that the twentieth session of The Hague Conference on Private International Law was held on 30th June 2005 and the nineteenth session was held in 2002. Kindly clarify as to when was the thirtieth session.*
Article 11 *Regional economic integration organisations*	*A regional economic integration organization constituted by sovereign States, having jurisdiction in certain matters laid down in this Protocol and being a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction may also sign, accept and approve this Convention or accede to it. In such a case, the regional economic*	*The word "Convention" which appears in the 7th line of this paragraph should be substituted with the word "Protocol".* *Malaysia notes that this Article is similar to Article 29 of the Convention on Choice of Court Agreements 2005.*

ARTICLES	*PROVISIONS OF THE DRAFT PROTOCOL*	*COMMENTS BY THE ATTORNEY GENERAL'S CHAMBERS, MALAYSIA*
	integration organization will have the same rights and obligations as a contracting State, insofar as this organisation has competence in the matters laid down in this Protocol. *On the date of signature, acceptance, approval or accessions, the regional economic integration organisation shall notify Depositary State in writing of matters laid down in this Protocol and for which its member States have delegated their powers to this organisation. The regional economic integration organisation shall, without delay, notify the Depository State in writing of any change occurring in the delegation of powers specified in the notification made in accordance with this paragraph and of any new delegation of powers.* *Any reference to the "Contracting State" or "Contracting States" in this Protocol also applies to a regional economic integration organisation if the context requires that this be so.*	*By virtue of an amendment made to the Statue of the Hague Conference on Private International Law in 2005, membership of the Conference would also be open to a Regional Economic Integration Organisation.* *This Article can be given due consideration.*
Article 12 *Entry into force*	*The Protocol enters into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession.* *With regard to the States acceding thereto, it enters into force on the first day of the third calendar month following the deposit of the accession instrument.*	*This is a standard provision hence can be given due consideration.*

MONACO

De l'Autorité centrale de Monaco pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of Monaco under the 1980 Hague Child Abduction Convention*

La modernisation de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants apparaît comme l'objectif principal affiché par le projet suisse de protocole. La proposition tend au renforcement de la protection de l'enfant, d'une garantie de la prise en compte effective de son intérêt « en vue d'un retour le plus harmonieux possible ».

Il propose des solutions pratiques destinées à contourner les difficultés d'application de cet instrument, accordant une plus large place à la médiation ou conciliation ainsi qu' à l'avis de l'enfant, tentant de préciser la notion de l'intérêt supérieur de l'enfant et d'instaurer une procédure de suivi renforcée après le retour de l'enfant.

Si les magistrats monégasques interrogés s'accordent à dire que les objectifs poursuivis sont légitimes et ont souligné tout l'intérêt de ce texte, ils ont également fait part des interrogations que suscitent certaines dispositions. Il peut également être souligné que le Parquet Général estime pour sa part que la Convention « mère » offre des garanties suffisantes et que l'adoption d'un tel protocole ne revêt pas un caractère urgent.

Procédure de médiation ou de conciliation

Il a été noté que l'article 7 c) et la formulation générale de l'article 10 de la Convention de 1980, obligent déjà l'Autorité centrale de l'Etat où se trouve l'enfant à prendre toute mesure propre à assurer sa remise volontaire. Cette disposition impose aux Etats de rechercher une solution amiable et donc indirectement une procédure de médiation ou de conciliation.

Le projet a néanmoins le mérite d'utiliser les termes précis de « médiation » et de « conciliation » dont les avantages tels que « celui de dépassionner un conflit » ont été rappelés. En revanche, des craintes ont été exprimées sur l'efficacité de telles procédures si elles ne s'accompagnent pas d'un délai maximum imposée aux parties pour parvenir à un accord. La rédaction du 3ème alinéa de l'article 2 – dont le but est d'empêcher que les tentatives de trouver une solution amiable retardent le retour de l'enfant- ne permet pas d'appréhender de manière suffisamment claire l'articulation entre procédures de médiation ou conciliation et retour de l'enfant. Afin de lever ces difficultés, il a été proposé d'instaurer un délai maximum pour la tentative de conciliation.

L'avis de l'enfant

Sur le principe, le recueil de l'avis de l'enfant est souhaitable. Toutefois, eu égard aux risques psychiques engendrés par de telles auditions, il conviendrait de préciser la nature de la qualification requise pour entendre l'enfant. L'expression « personne qualifiée » semble trop générique. Ainsi, faudrait-il déterminer si cette personne doit occuper une fonction judiciaire (juge des enfant) ou médicale (psychiatre ou pédopsychiatre) ou autre. Il semble que celle-ci devrait à tout le moins avoir des compétences spécifiques dans le domaine de l'enfance.

Le Parquet estime, quant à lui, que la prise en considération de l'avis de l'enfant constitue déjà une exigence en application de l'article 13 de la Convention de 1980 qui prévoit que l'Autorité judiciaire ou administrative peut s'opposer au retour de l'enfant si elle constate qu'il s'y oppose « et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion » (alinéa 2).

Le droit à l'information des autorités de l'Etat qui prononce la décision de retour

En dépit des interrogations qui peuvent se poser quant aux moyens des Etats, sur le long terme, d'assurer le suivi du devenir de l'enfant, la limitation à une année suivant la date de

retour de l'enfant pour formuler une demande d'information sur sa situation dans le pays d'origine ne semble pas être justifiée. Dans la mesure où elle est motivée et fondée sur un intérêt légitime, la demande d'information devrait pouvoir être possible durant toute la minorité de l'enfant.

La portée de l'article 13 alinéa 1 b) de la Convention des Nations Unies sur les Droit de l'enfants

La notion d'intérêt supérieur de l'enfant semble clarifiée. Le retour de l'enfant doit avoir pour objet principal de le confier à parent demandeur mais sans pour autant empêcher la reprise des liens familiaux ou de contacts réels avec l'autre parent, auteur du déplacement litigieux.

Dans la pratique, certaines procédures révèlent en effet que le but poursuivi par les parents n'est pas de préserver l'intérêt de leur enfant mais est davantage de le priver de toute relation avec leur ex-conjoint plutôt que de vouloir assumer eux-mêmes leurs responsabilités. En ce sens, l'observation émise sur cet article paraît tout à fait légitime.

NORVÈGE – *NORWAY*

De l'Autorité centrale de la Norvège pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of Norway under the 1980 Hague Child Abduction Convention*

On a general note, the Norwegian Central Authority hesitates to support any suggestions that might water out the convention with regard to its potential as an efficient instrument for returning abducted children to their country of habitual residence. We believe that the focus should be on the current convention and the implementation of the current convention (and also on the promotion of the 1996 Convention), rather than a protocol to the convention.

Furthermore, we would like to point out that the convention states, when ratifying / acceeding to the convention, already have taken the position that returning the children and restoring status quo is in the best interest of the children. We believe that Article 13 is sufficient as an exception clause, and that the convention has sufficient mechanisms to protect the children concerned. We are concerned that the Swiss proposal seems to open up for further use of the exception clause, and we are worried that this will potentially undermine the purpose of the convention.

ROUMANIE – *ROMANIA*

De l'Autorité centrale de la Roumanie pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of Romania under the 1980 Hague Child Abduction Convention*

Referring to the draft Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction proposed by the Swiss contracting State, the Romanian Ministry of Justice – Directorate for International Law and Treaties, as competent Central Authority for the enforcement of the provisions of the above-mentioned Convention, wishes to mention the following:

1. Chapter II, Article 2 – The amiable resolution is also provided for in the current version of the Convention and thus introducing the mediation procedure for further specification is not justified. Moreover, the reality of the legal framework differs from State to State, as there are States in which the term of mediation is not known and there are no special proceedings provided for accordingly. If those provisions shall be included in the Protocol, we are considering that a more accurate limitation of the term "competent authority" would be appropriate in paragraph 4, to the meaning of mentioning the fact that it concerns the competent authority designated in accordance with the law of the requested contracting State.

2. Chapter II, Article 3 (1) – given the fact that the national authority which decided upon the return or upon granting an international access right differs from one State to another (as there might be a court of law, an administrative body etc.) we are inclining towards the reformulation of the first part of paragraph 1 of this Article, to the meaning of replacing the text "The Central Authority or the judicial or administrative authority of the requested State" with the phrase "The Authority of the requested State competent to decide upon the return or upon granting an international access right". The latter would avoid misinterpretation or any other practical difficulties which may occur, given the fact that, on an internal level, the authorities which have the competence to hear the parties are different from one State to another.

3. Chapter II, Article 5 – Provisions of Article 7 of the Hague Convention are reiterated and therefore a new regulation of mutual assistance between Central Authorities is not justified.

SLOVÉNIE – *SLOVENIA*

De l'Autorité centrale de la République de Slovénie pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of the Republic of Slovenia under the 1980 Hague Child Abduction Convention*

We agree with the findings of The Permanent Bureau of the Hague Conference on Private International Law and the National and Contact Organs of the Member States and join the efforts to correct imperfections and improve efficiency of procedures based on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

We have been faced with certain problems in child return procedures, both as a requesting country and as a requested country, and we become aware of certain imperfections of the Convention provisions. In our opinion one of such deficiencies in connection with the Convention on the Civil Aspects of International Child Abduction arises because benefits of children are not enough taken into account.

We agree with the statement that the level of children protection in the course of return procedures in accordance with the Convention should be increased as well as all security and support should be provided during the course of the return. A parent escort during a return of a child should become a rule, but can be omitted only in exceptional cases when this rule could not apply.

Several cases were treated in practise, where court or other competent authority decided contrary to the benefits of children. Allow us to bring forward three cases: In the first one Court decided that a child should be placed in an institution because the parents failed to agree upon who would take care of the child. Custody of the child was requested by both parents, and both fulfilled all conditions. No harmful treatment or neglect of the child could be proved to neither of them and neither was such a procedure started.

The second case refers to a situation that we, as a requested state, should carry out a return a 14-year old child, who vigorously refused the return and the fulfilment of the court's decision. It was established that the child was at such a stage of development to be clearly aware of responsibilities and consequences of the decision. In such cases it is impossible to return a child in an appropriate way to a requesting country without a considerable interference in the child's integrity and dignity.

The same dilemma arose in case when a child was to be returned to a residential state following a court decision, which did not take in account that the child was subject to procedure. A (inconvenient) parent was selected as guardian of a child because the parent responded to court's summons; the other (convenient) parent was disregarded only because he/she did not appear in court due to his/her ignorance of the legislation and wrong instructions of his/her lawyer.

We therefore express our support for the draft Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction submitted by the Switzerland, which gives greater importance to children's rights. We support the proposal that exactly the rights and benefits of children should form the basic guideline in decision making, also for decisions taken on the basis of the Convention. A child's opinion must be heard and taken into consideration, especially if a child is able to understand the situation.

Our remarks to the Swiss proposal are as follows:

Article 2:
We suggest that a procedure for an approval of an agreement, reached through mediation, should be more precisely defined. It should be clearly defined, who is supposed to give a proposal or to start a procedure for confirming the agreement with a competent authority, and what documents should be presented. In this way it would be possible to avoid both additional and often long procedures with judicial authorities and delays, which are unnecessary and contrary to the convention, for the return of an unlawfully taken child.

Article 4:
We second the provision on the person's obligatory cooperation in any subsequent proceeding relating to his/her relationship with the child, but, there is a question how to achieve such cooperation in case the person does not want to cooperate. We agree with the proposal that authorities should strive to obtain such a consent and cooperation, respectively.

Article 11:
In our opinion widening of competencies to accept and approve Convention on the Civil Aspects of International Child Abduction to organisations and other claimants, except for sovereign states, is not reasonable. A state that adopted the Convention has a possibility to decide how to implement the Convention and may grant concession for the implementation of the Convention on its territory. We think that such a widening of competencies may diminish the efficiency in executing tasks and obligations, provided by the Convention.

We are aware that the adoption of the proposed Protocol may result in increased competencies of Central Authorities and of states in deciding on the return of children; this may also increase the possibility to outwit or disrespect the provisions of the Convention, and the Convention itself would lose its importance. In spite of all, benefits of children are more important than a possible damage, which can be avoided by giving a special stress to benefits of children and by binding the signing countries to consider the above as a priority principle.

TURQUIE – *TURKEY*

Du Ministère de la Justice de la République de Turquie – *From the Ministry of Justice of the Republic of Turkey*

Turkish Ministry of Justice reviewed the proposal of the Switzerland for a draft Protocol to the Hague Convention on the Civil Aspects of International Child Abduction and concluded that:

- *Article 2 of the draft Protocol prescribes the mediation and conciliation for the return of the child or an amicable resolution. In accordance with the last paragraph of the mentioned Article "the competent authority may approve such an agreement and declare it enforceable". However in Turkish legislation, the mediation and conciliation do not exist. Therefore it is not possible for Turkey to implement this Article unless it adopts the necessary internal regulations.*

- *Furthermore, Article 3/2 of the draft protocol contradicts with Turkish law numbered 5717. According to the mentioned national legislation, it is foreseen that the Central Authority would carry on the procedures through the local offices of public prosecution and competent courts would decide on return. Hence the office of public prosecution and the courts are competent on hearing the parties in person and not the Central Authority.*

- *As to Article 6 of the draft protocol, the Central Authority of the State to which the child has been returned shall inform the State where the return has been ordered. Therefore a further obligation which has not foreseen in the Convention is burden to the Parties.*

ÉTATS-UNIS D'AMÉRIQUE – *UNITED STATES OF AMERICA*

De l'Autorité centrale des États-Unis d'Amérique pour la Convention de 1980 sur l'enlèvement international d'enfants – *From the Central Authority of the United States of America under the 1980 Hague Child Abduction Convention*

General Comment

Much of the Swiss proposal contains provisions that would require States Parties to take actions which are already obligatory under the 1980 Convention on the Civil Aspects of International Child Abduction. Additionally, many of the objectives of the proposal are covered more thoroughly in the provisions of 1996 Convention on the Protection of Children. The United States would therefore be inclined to devote its efforts and resources to ratifying and implementing the 1996 Convention rather than supporting the ratification and implementation of the proposed Protocol.

Comments on specific aspects of the proposal follow.

Preamble

The United States Central Authority (USCA) has concerns with regard to some of the language in the Preamble.

In our view, the purpose of the 1980 Convention is to determine which authority should assert jurisdiction in cases where rights of custody and access are at issue. We believe the focus of the 1980 Convention should remain on returning children to their habitual residence so that substantive custody issues can be determined by the State of the child's habitual residence. We are concerned that references in the Preamble to children's rights and the best interests of the child will undoubtedly shift the focus of the Convention and change the nature of the determinations made under its authority from jurisdictional to substantive custody decisions.

Article 2
Mediation or Conciliation Procedure

The USCA favors the use of mediation or conciliation procedures wherever possible to expedite the return of the child and/or obtain an amicable resolution. The USCA agrees that efforts to obtain the voluntary return of the child or an amicable resolution should not delay the return of the child and should not delay the filing of a Hague petition with the central authority in the receiving country. The USCA, however, has serious reservations about imposing an obligation on central authorities to devise and implement their own mediation programs. Many States, including the United States, do not have sufficient resources to take on this function.

Currently, the USCA does not have its own mediation or conciliation procedure. Parents may access the mediation or conciliation resources available where the child is located. Once an agreement has been reached, the parents must obtain the approval of the competent authority, a state or Federal court, in order for agreement to be enforceable.

Under the 1980 Convention, there is already an obligation to take appropriate measures to secure the voluntary return of a child and/or to bring about an amicable resolution under Articles 1, 2, 7, and 10. Strengthening efforts to connect parents to appropriate resources to facilitate and increase the use of mediation and conciliation is certainly one way to meet this existing obligation. In this respect, the Swiss proposal is unnecessary.

Article 3
Right to be Heard

Article 13 of the 1980 Convention requires States Party to hear a child who has attained an age and degree of maturity appropriate to consider his/her views, particularly if the child does not want to return to his/her habitual residence. Article 3 of the proposed Protocol, therefore, could be considered redundant. The USCA nonetheless has no objection to the child being heard in the manner described in Article 3.

In the United States, each state as well as the Federal Government prescribes the manner in which a court shall hear a child. The methods of hearing a child are similar to those described in Article 3, including arranging for a qualified person to hear the child unless it is inappropriate to do so in view of the child's age or maturity. In some states these professionals report to the court with respect to the wishes of the children in question. In other states, these professionals report their own conclusions as to the best interests of the child. Other methods include judges interviewing children in camera, outside of the presence of the parties or their attorneys. In rare instances, usually involving criminal charges, children testify directly in court.

The USCA could not support a requirement that parties should appear before a central authority. The USCA does not perform that function, and it is unlikely that the USCA would ever hear parties in person. In the United States, state and Federal courts, not the USCA, are the competent authorities to determine issues that arise under the 1980 Convention. While parties are free to communicate with the USCA, and most do, parties are much more likely to appear in person before the competent authority, not the USCA.

Article 4
Protection Measures

Article 7 (b) of the 1980 Convention obligates States Party to implement provisional measures to prevent further harm to a child. Provisional measures include measures to ensure the protection of a child and measures to ensure the parties' rights of access. Because there is an existing treaty obligation, in addition to the issues enumerated below, the USCA does not believe that Article 4 of the proposed Protocol is necessary.

a) In the United States, the fact that a child was the subject of protection measures where he/she was habitually resident immediately before his/her removal does not necessarily provide the legal authority for the competent authority to invoke protection measures. While this information may be useful to the competent authority, that authority can only implement protection measures if it finds that there is an independent jurisdictional basis to do so.

b) The competent authority has the discretion to determine how access and contact shall take place during the pendency of a proceeding. Issues can arise, however, when the competent authority orders that all contact be supervised. In many situations, unless the child is in foster care, the parents will have to pay the fees of a visitation supervisor, a neutral trained professional, to ensure safe, appropriate access.

c) The competent authority may find recommendations from another State Party to be persuasive. Ultimately, however, the competent authority determines what, if any, protections should be taken regarding rights of access and participation by the taking person in any subsequent proceedings relating to the taking parent's relationship with the child. The USCA has serious reservations about conditional recommendations (undertakings) whereby the authorities of a State insist that certain protections be taken prior to ordering the return of a child even though a return is clearly required under the Convention. Instead, the USCA would support judicial communications, for example those by which a judge in the requested State would communicate with the presiding judge or a liaison judge about protections that can be taken in the requesting State.

d) Article 7 (h) of the 1980 Convention obligates States to make any arrangements that are necessary and appropriate to secure the safe return of the child. It is therefore unnecessary to include this language in the proposed Protocol.

Article 5
Information and Mutual Assistance

Articles 7(i) and 11 of the 1980 Convention obligate central authorities to communicate with one another. Although Article 5 of the proposed Protocol is more specific about this obligation, the USCA believes this provision is unnecessary because central authorities are already engaging in this type of communication.

The USCA can facilitate access to the holder of relevant documents, evidence, and expert reports to the extent allowed by law. The USCA cannot, however, ensure direct access. Documents held by the USCA are released only in compliance with the Federal Privacy Act of 1974 and the 22 Code of Federal Regulations Part 172. Documents held by other entities may only be released in compliance with statutory and regulatory authority and other relevant international conventions.

Article 6
Duty to Protect and Inform After Return

In addition to the comments provided above in respect of Article 5:

a) The USCA already notifies a foreign central authority when a child has been ordered returned or when a decision is made on the merits of the rights of custody subsequent to such a return. Though this precise obligation is not part of the 1980 Convention, this type of communication is embodied in the spirit of the 1980 Convention. Accordingly, the USCA believes that it is unnecessary to repeat this obligation in the proposed Protocol.

b) The USCA would object to provisions requiring reports on a child up to one year after the return has been ordered. While it might be reasonable for a central authority to reply to a foreign central authority's question as to whether a custody determination has been made, it would be unreasonable to require a central authority to reply to a foreign central authority's questions regarding the adjustment of the child to his/her school, community, and family. Such questions would be considered an invasion of privacy under U.S. law. Additionally, courts in the United States may lack jurisdiction to order these types of reports as much as a year after a return order was issued.

Article 8

The Hague Conference already holds periodic Special Commissions to review the practical operation of the Convention. This obligation does not need to be added in the manner suggested by the Swiss proposal.

Other Observations

- *The USCA agrees that Article 13(1)(b) should only be used in exceptional cases to permit the refusal of the return of the child.*

- *The USCA does not agree that a competent authority should rely on Article 13(1)(b) to refuse to order a return where the taking parent asserts that a return to the left-behind parent or a third person may not be in the best interests of the child or that the taking parent cannot return with the child and that it would be unreasonable to expect that of this parent.*

- *To allow the competent authority to engage in a "best interests" analysis would eviscerate the purpose of the 1980 Convention, which is to determine which State is the most appropriate to hear a case where rights of custody and access are at issue. One of the principal points of the Convention is that limiting a requested State from making a "best interests" determination prevents parental abductions because it prevents the taking parent from profiting from the abduction.*

- *The competent authority of the child's habitual residence is in the best position to make a substantive custody and access determination, including whether or not placement with the left-behind parent or a third person is in the best interests of the child. The relevant evidence to make such a determination (including, for example, information from the child's school, or the child's doctors, recreational instructors, religious community, etc.) is usually located in the child's habitual residence.*

- *If a parent approaches the competent authority and avoids an abduction, there is no issue as to whether the parent could not return with the child.*

- *The USCA does not believe it would be appropriate for a competent authority to rely on Article 13 (1)(b) to refuse the return of a child where the parent making the request is intending to secure access and visitation. Again, the competent authority in the child's habitual residence is in the best position to determine the terms for access and visitation. For this reason, the return should not be denied.*

COMMUNAUTE EUROPEENNE - *EUROPEAN COMMUNITY*

Du Conseil de l'Union européenne - From the Council of the European Union

On 1 November 2007 the Permanent Bureau of the Hague Conference on Private International Law invited Members to submit comments on the Proposal of Switzerland for a draft additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Swiss proposal'). The European Community thanks the Permanent Bureau for this opportunity to submit comments.

At the Fifth Meeting of the Special Commission to review the operation of the 1980 Hague Convention the practical examples raised indicated that it might be useful to improve the legal framework for the taking of protective measures to secure the safe return of the child. Against this backdrop the European Community understands the Swiss initiative which aims at tackling some of the problems highlighted in connection with the 1980 Hague Convention.

The European Community would support the launching a feasibility study to explore further the need for an additional Protocol as proposed by Switzerland as well as the precise scope of such an instrument. A feasibility study would, in particular, enable the Members of the Hague Conference to identify whether there is sufficient support for a new legal instrument or whether the development of best practice tools would be the appropriate way forward. The European Community believes that the 1996 Hague Convention which the Member States of the European Community will be ratifying in the near future in the interest of the Community already remedies some of the problems with the 1980 Hague Convention. It would therefore suggest that the feasibility study should also explore whether the two Conventions together when applied correctly would not be sufficient to improve the framework for the taking of protective measures to secure the safe return of the child.

Without prejudging the result of a feasibility study the European Community would however already at this stage like to highlight a number of problems which it sees in the Swiss proposal. With respect to Article 2 the added value would seem limited since Article 7(c) of the 1980 Hague Convention already provides for an obligation for Central Authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issue. Furthermore, the European Community has doubts as to how any

additional rules on mediation and conciliation in child abduction cases would fit in with the Hague Conference's possible work in the field of cross-border mediation in family matters.

The European Community would also like to stress the need to avoid that a possible additional Protocol to the 1980 Hague Convention in any substantial way affects the proper functioning of the existing system of child protection within the European Community as set out in 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. In this respect, especially Article 4 of the Swiss proposal seems not to be in line with the Regulation's key objective of letting the competent court in the EU Member State where the child was habitually resident before his or her abduction have the last word on whether or not the child has to be returned.

Finally, the European Community would like to stress that possible future negotiations on an additional Protocol to the 1980 Hague Convention must not affect or alter the interpretation of existing key Convention articles, as this may undermine the carefully balanced consensus of the Contracting States in the area of parental child abduction.

ADDENDUM NO 1 –RÉPONSES AU QUESTIONNAIRE DE LA RÉGION ADMINISTRATIVE SPÉCIALE DE HONG-KONG, RÉPUBLIQUE POPULAIRE DE CHINE ET DE L´ESPAGNE/ RESPONSES TO QUESTIONNAIRE FROM THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE´S REPUBLIC OF CHINA AND OF SPAIN

CHINE (RÉGION ADMINISTRATIVE SPÉCIALE DE HONG-KONG) – *CHINA (HONG KONG SPECIAL ADMINISTRATIVE REGION)*

Preliminary Comments from the Hong Kong Special Administrative Region of the People's Republic of China on the Draft Additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

General Comments

According to the experience of the Hong Kong Special Administrative Region (HKSAR) in implementing the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Convention), the HKSAR Government sees no urgent need to adopt the draft Protocol. Moreover, we have the following observations:

(a) the Convention aims to ensure speedy return of the abducted child. The additional procedures and measures proposed in the draft Protocol may delay the process to secure the return of the abducted child; and

(b) the Convention does not seek to prescribe substantive rules and procedures. This is to allow Contracting States more flexibility in implementing the Convention. Some of the proposed provisions in the draft Protocol may alter domestic rules and procedures substantively, thus causing difficulties to the Contracting States concerned. The additional cost and resource implications must be assessed carefully and weighed against the merit of draft Protocol.

Specific Comments

Article 2: Mediation or conciliation procedure

2. The first paragraph of Article 2 provides, inter alia, that the Central Authority or the judicial or administrative authority of the requested State shall endeavour to set up a mediation or conciliation procedure to obtain the voluntary return of the child or an amicable resolution.

3. Subject to other comments below, the above suggestion does not conflict with the spirit of Article 10 of the Convention. Article 10 provides that the Central Authority of the State where the child is shall take or cause to be taken all appropriate measures to obtain the voluntary return of the child. Likewise, the same applies to the second and third paragraphs of Article 2. From this perspective, the suggestions may be further explored or considered.

4. However, we have reservations about making it obligatory for the Central Authority, the judicial or administrative authority of the requested State to endeavour to set up a mediation or conciliation[5] procedure for the following considerations:

(a) mediation and conciliation are voluntary alternative dispute resolution processes. There is no guarantee that the parties concerned will reach an agreement on the voluntary return of the child or any other amicable resolution after mediation or conciliation.[6] In such circumstances, mediation and conciliation may have the undesirable effect of delaying the return of the child to his habitual residence;

[5] To our understanding, "conciliation" is sometimes used interchangeably with "mediation", and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator and the other (conciliation) involving a more facilitative mediator.

[6] The use of mediation and conciliation is subject to the mutual consent of the parties. It may not be meaningful for the Contracting States to pursue mediation if the parties concerned are unwilling to do so.

(b) before assessing the feasibility of the proposal further, very careful consideration has to be given to the relationship / interface between mediation or conciliation procedure and the judicial proceedings under the Convention; and

(c) the financial and manpower implications may be significant. For instance, the authorities concerned will have to accredit and appoint mediators, define their duties and responsibilities, as well as provide for the venue.

5. It is not entirely clear as to the meaning of the draft provision in the Article reading "the competent authority may approve such an agreement and declare it enforceable". Reading it literally, the suggestion is unacceptable as it works against the spirit of mediation and conciliation. Mediation or conciliation is voluntary and the parties concerned should not be forced to adopt the agreement if he/she decides to withdraw from it on further consideration. Moreover, matters relating to the approval and enforcement of an agreement reached by mediation or conciliation are subject to the domestic law of the Contracting States and should not be imposed by the Convention.

Article 3: Right to be heard

6. We agree that if the age or degree of maturity of the abducted child permits, his view should be heard and also be taken into account in Convention proceedings. However, the intended scope of the word "hear" is unclear.[7]

7. The Central Authority in the HKSAR is not exercising an adjudicating function in any Convention application. It is not practical, necessary or acceptable to make it mandatory for the Central Authority to "hear the child" and as far as possible, the parties in persons, as they may physically be in different Contracting States.

Article 4: Protection measures

8. It is not clear as to the type of protection measures the Article expects of the authorities in the requested States. It is difficult to comment on the Article on this basis. At present, the relevant authorities in the HKSAR will take proper measures to protect the abducted child if the child is or at risk of abuse, harm, etc.

9. Notwithstanding the above, we have the following comments on the Article:

(a) an authority in the requested State is not subject to the instructions from any authority in the requesting State, which is situated in another jurisdiction. The requesting State may, however, inquire about the protective measures to be taken in the requested State;

(b) the protective measures to be taken are subject to the law of the requested State. It may not be possible for the authority in the requested State to assist in the implementation of protective measures in the child's habitual residence;

(c) the relevant authority of the requested State should decide on the appropriate protective measures having regard to the circumstances of each individual case;

(d) such assistance provided by the requested State will be subject to financial and resource constraints; and

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[7] As far as we understand it, "hearing the view of the child" may refer to investigating the living conditions of the child and/or interviewing the child. It may also go as far as the giving of evidence by the child in the hearing of an application under the Convention, by means of an affidavit filed or testimony given in Court.

(e) it is not appropriate to mandate the requested State to assist in implementing protective measures the way the Article proposes. The assistance provided should be limited to "to the extent practicable and appropriate as determined by the relevant authorities" in the requested State, and the protective measures to be taken must be "appropriate and necessary".

Article 5: Information and mutual assistance

10. At present, the Central Authority of HKSAR informs the Central Authority of the requesting State of any steps taken or to be taken after considering the relevant documents and information relating to the alleged wrongful removal or retention provided by the requesting State. The Central Authority in the HKSAR will also inform the counterpart in the requesting State of any significant development, including the outcome of court proceedings, if any. For outgoing requests for the return of a child to the HKSAR, the Central Authority in HKSAR also requests the Central Authorities of other States to keep it so informed.

11. The exchange of relevant information and mutual assistance between the Central Authorities of the requesting State and of the requested State may help facilitate the processing of requests under the Convention. However, any exchange of information is only possible if its implementation will not violate any applicable law, rules and regulations on personal data protection in the requesting State and/or in the requested State. In particular, the access to relevant documents and evidence should be subject to the privacy or secrecy law of each State. They should not be governed by the draft Protocol directly.

12. The meanings of "the competent authorities" and "the authorities of the States concerned" in Article 5 are unclear as to whether they should include bodies other than the Central Authority.

Article 6: Duty to protect and inform after the return

13. Article 6 does not appear to be very useful. On the pragmatic level, there is no legal duty on the private parties to a Convention application to provide the Central Authority with the information of the merits of custody rights of the child and/or any other information of the matrimonial proceedings taken out by them concerning the child. The obligation on Central Authorities to enquire about and/or obtain such kind of information for the purpose of notifying the Central Authority of requested State will likely be practically difficult.

14. Moreover, the scope of "reasoned requests" and definition of "any other public authority of the State" in the Article is unclear. It would be very burdensome on the Central Authorities to monitor the situation of the returned child for a period of one year after return of the child.

Other Comments

15. While we have reservations about the merits of the draft Protocol, we would like to offer some additional comments:

Other possible provisions

16. The issue of costs under the Convention has not been resolved. The draft Protocol should address the issue of costs arising from its possible implementation.

Chapter III: Final clauses

17. There should be provisions dealing with States with more than one system of law applicable in different territorial units, similar to Articles 31-33 and Article 40 of the Convention.

ESPAGNE - *SPAIN*

Objeciones al Protocolo Adicional al Convenio de la Haya de 25/10/1980

Art. 2: Intentos de mediación o conciliación: Problemas con la legislación interna. No se ha dictado aún ley estatal sobre la mediación, tal como establecía la LEY 15/2005, de 8 de julio, de separación y divorcio, basada en los principios establecidos en las disposiciones de la Unión Europea, y en todo caso en los de voluntariedad, imparcialidad, neutralidad y confidencialidad y en el respeto a los servicios de mediación creados por las Comunidades Autónomas. Las CCAA han dictado su Ley de Mediación.

Si bien se está impulsando la mediación en los Juzgados de Familia, en los casos de sustracción de menores, la competencia está atribuida a los Juzgados de 1ª Instancia del lugar del domicilio del menor.

Art. 4 b): La experiencia en estos casos nos muestra que los Jueces son reacios a establecer visitas en los procedimientos de restitución. Se han denegado en numerosas ocasiones.

Art. 4 c) Precauciones específicas, problemas en su interpretación, plazos para que se adopten, autoridad que debe adoptarlas, y problema especialmente en garantizar la participación en el procedimiento subsiguiente.

Art. 5: El segundo párrafo, si se refiere a la Autoridad Central, imposible. Necesitaríamos unos medios de los que no disponemos.

Art. 6 a): ¿Cómo conseguir esa información?

Art. 6 b) Interpretaciones de lo que pueda suponer "solicitud motivada" y aspectos prácticos. ¿Quién hace las valoraciones? ¿En base a qué informaciones? Posibles abusos.

Observaciones. Los dos últimos párrafos, referido a la aplicación del art. 13 b) convenio Haya: El primer párrafo puede chocar con la interpretación que del art. 13b) hace el nuevo Reglamento europeo 2201/2003. El segundo párrafo, o bien conduce a una nueva interpretación del Convenio Haya o a interpretaciones subjetivas sobre las intenciones del solicitante.