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## ندوة خليجية حول "حماية مصالح الطفل الفضلى في النزاعات الاسرية عبر الحدود" الدوحة، قطر

### Gulf Regional Seminar Protecting the Best Interests of the Child in Cross-Border Family Disputes Doha, Qatar, 29-30 March 2016

#### Background

On 29 – 30 March 2016, government representatives, judges, civil society, academic and child rights experts from Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Canada, Germany, Pakistan, and the United States of America, the Secretary General of the Hague Conference on Private International Law (HCCH), the Doha International Family Institute (DIFI), member of Qatar Foundation for Education, Science and Community Development, the Organization of Islamic Cooperation (OIC), Vice Chairperson of the UN Committee on the Rights of the Child from Bahrain, and UNICEF participated in the first Gulf Regional Seminar on "Protecting the Best Interests of the Child in Cross-Border Family Disputes" held in Doha, Qatar.

Co-hosted by Canada and the Doha International Family Institute, with the support of the Ministry of Justice in Qatar and the Permanent Bureau of the Hague Conference the seminar objective was to further promote dialogue and engagement between regional government officials, judges, independent experts and other stakeholders on emerging cross-border family disputes involving children.

Guided by the principles of the United Nations Convention on the Rights of the Child, the seminar aimed to: explore regional perspectives on children's rights in the context of cross-border family disputes, particularly when it results in the wrongful removal of a child across international borders; provide information on relevant child protection conventions adopted under the auspices of the Hague Conference; examine dispute resolution mechanisms, including family mediation, in the region available to address cross-border family disputes; and to strengthen international legal co-operation in the search for solutions in the best interests of the child to resolve these complex cases.

#### Summary of Discussion

Ms. Noor Al Malki Al Jehani, Executive Director of the Doha International Family Institute (DIFI), formally opened the Gulf regional seminar by thanking the the Ministry of Justice in Qatar for providing full support in organizing this seminar and Canada for partnering with DIFI in organizing this important dialogue in the region where increasing number of families engage in child custody disputes of an international character. Ms. Al Jehani emphasised the need for raising awareness of the cross-border family disputes in child custody matters in Qatar and the region, especially in light of increasing rates of mixed marriages in the region.

Justice Tassaduq Hussain Jillani (ret'd), co-Chair of the Working Party on Mediation from Pakistan, and Ms. Beatrice Maille, Director General, Consular Policy Global Affairs Canada, in set the stage for the seminar objectives through their respective opening remarks. They highlighted the need for dialogue and cooperation on international child abduction issues. It was noted that international family disputes are more common in today's globalized world as families are increasingly transnational and mobile. Child custody disputes, once primarily domestic family matters, are now a global issue of concern for States, including in the Gulf region.

Ms. Najat Al Khalaf, Director of International Conventions and Cooperation, Ministry of Justice in Qatar, presented keynote remarks on behalf of the Minister of Justice. She outlined the importance the Qatar attaches to the rights of children and implementing the UN Convention on the Rights of the Child. Qatar's Constitution recognizes the critical role of the family in the society and the need to protect and strengthen families, including childhood. She noted that the 2006 Family Law of Qatar and the national child protection strategy further underscore the importance Qatar attaches to children.

Secretary General Dr. Christophe Bernasconi provided an overview of the Hague Conference and outlined the scope and jurisdiction of the three Hague Children Conventions.<sup>1</sup> Concerning the work of the Hague Conference, Dr. Bernasconi noted that the Conference works towards the unification of private international law and builds bridges between various legal systems. Dr. Bernasconi encouraged participation of Gulf countries in the Hague Conference and recognized the membership submission of the Kingdom of Saudi Arabia, the first GCC country to join the Conference. In addressing some of the common misconceptions concerning the Hague Child Abduction Convention, Dr. Bernasconi noted that the 1980 Convention is not about child custody or domestic rules concerning child custody matters. The Convention is a civil treaty and does not deal with criminal matters. It provides a framework to States in addressing the wrongful removal or retention of a child from their habitual residence.

The UN Committee on the Rights of the Child (CRC) Vice-Chair from Bahrain, Ms. Amal Aldoseri recalled that child rights are emphasised in various international human rights instruments such as CEDAW.<sup>2</sup> Referring to the concept of the child's best interest, Ms. Aldoseri noted that this right is "individual based" and all encompassing, including in situations of child abductions. She noted that CRC does not specifically define the best interests of the child. The UN Committee through its General Comment No 14 issued in 2013 provides very useful guidance to member States concerning child right. In situations of child abductions, one should consider whether such an act is in the child's best interest? Ms. Aldoseri noted that the Committee has encouraged States to consider accession/ratification of the Hague Conventions.

Mr. Peter Gross of UNICEF underscored that the Hague Children's Conventions complement and serve to implement the Convention on the Rights of the Child. The Hague instruments ensure further protection of child rights by establishing clear frameworks to address cross-border issues that affect children. Children, Mr. Gross asserted, are innocent party in international family disputes that implicates their rights and best interests. Mr. Gross also emphasized the recognition of taking into account the individual child's opinion and views in each and every matter that concerns them. This right is enshrined in both Convention on the Rights of the Child and Covenant on the Rights of the Child in Islam.<sup>3</sup>

Dr. Fadila Grine, Executive Director of the Department of Family Affairs in the Division of Cultural, Social and Family Issues at the Organization of Islamic Cooperation (OIC), provided an overview of the OIC, which currently boasts 57 member States and is the second largest international body after the UN. Children and Family issues are a priority for the OIC and the organization has organized four Ministerial Conferences on Childhood since 2007.<sup>4</sup> Dr. Grine emphasised that Islam establishes the best interests of the child as a primary consideration in actions and decisions concerning children; accordingly the principles of Sharia place corresponding obligations on the family, on society and on the State.

Referring to the 2004 OIC Covenant on the Rights of the Child, Dr. Grine noted that the Covenant is not currently in force and is only signed by 6 OIC member States.<sup>5</sup>

She highlighted specific articles of the Covenant that addresses child custody matters, including the unequivocal affirmation that no child shall be separated from his/her parents against their will; the importance of child's access to both parents and ensuring the views of the child are heard in domestic judicial process. Dr. Grine noted that international family disputes in child

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<sup>1</sup> 1980 Child Abduction Convention, 1996 Child Protection Convention, 2007 Child Maintenance Convention.

<sup>2</sup> UN Convention on the Elimination of Discrimination Against Women.

<sup>3</sup> See CRC Article 12 and Article 9 of the Covenant.

<sup>4</sup> The 5th Ministerial Conference for Childhood is scheduled to take place in 2016 in UAE (Abu Dhabi).

<sup>5</sup> The ratification of 15 OIC member States is required for the instrument to be in force.

custody matters within OIC member countries is an emerging issue that will be examined by her office to identify and recommend solutions to the OIC member States.

Professor Anver Emon of the University of Toronto presented key findings of the research study on *"Islamic Law, Private International Law and Cross-Border Child Abduction"*. The research focuses on the classical Islamic jurisprudence on child custody (sharia rules) and historic analogs to contemporary views on jurisdiction and private international law in the Muslim world.<sup>6</sup> Addressing the common misconception that Sharia and the Hague Child Abduction Convention are incompatible, Professor Emon pointed out that the lack of acceptance of the Muslim majority countries of private international law instrument (such as the Hague Convention) on a presumed conflict with Sharia is based a false premise.

Professor Emon argued that the real issue of States not joining these instruments is the lack of vibrant private international law in historical Islamic law and its implications for modern Muslim majority states with Personal Status laws drawn from Islamic legal doctrines. The major challenge according to the research study is how to overcome Sharia's silence on conflicts between domestic law and its foreign "legal other". The research study proposes the creation of jurisdictional rules in Muslim majority countries that legally recognize foreign parties and foreign law, exempting them from domestic personal law rules of the State, and instead bringing them under a different regime created in regard to international comity of the modern state system.

Justice Jillani provided a brief overview of the Malta Process initiated in 2004 under the auspicious of the Hague Conference on cross-frontier family law issues involving non-Contracting States to the Hague Conventions whose family laws were based on or influenced by sharia. By recognizing the need for identifying common legal principles between diverse legal systems in family matters, Justice Jillani noted that the Malta Process is a unique dialogue between States to discuss how to secure better protection for the right of contact and access of parents and their children in situations where the Hague Conventions are inapplicable.

Ms. Beatrice Maille presented on the Working Party on Mediation of the Malta Process that promotes international family mediation structures to resolve cross-border disputes concerning custody of, or contact with, children. Guided by the UN CRC, in particular the right of the child to maintain on a regular basis personal relations and direct contact with both parents", the Working Party has developed mediation principles and the structure for a Central Contact Point for international family mediation. Ms. Maille noted that Canada, as co-Chair of the Working Party, attaches great importance to collaboration with non-Contracting States in addressing international child abduction issues and to assist families overcome these complex disputes through amicable solutions.

Drawing on his expertise, Professor Dr. Mohamed Mattar, observed a number of issues in the context of the GCC and the Hague Conventions and proposed certain solutions. In recognizing of the emerging trends in cross-border family disputes in the region, Professor Mattar suggested that the GCC and the League of Arab States might consider developing a non-binding model law that could be used by all Arab and GGC countries in cross-border child custody disputes. Citing the benefit of the Hague Child Abduction Convention, Professor Mattar noted that this private international law instrument only deals with the wrongful removal or retention of the child from their habitual residence. However, the challenge is the lack of subject expertise, training and curricula in the regional legal institutions on private international law, conflict of laws and the Hague Conventions. He also noted the need for collection of key legal decisions, interpretation of child laws that would further enrich the work of judicial and legal practitioners in the region.

Dr. Lena Mollar of the Max Planck Research Group on Family and Succession Law in Islamic Countries presented a comparative assessment of the parental care regimes currently operating in selected GCC countries (Bahrain, Qatar, and the UAE). Her research demonstrates that the

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<sup>6</sup> The full report of the research study on *"Islamic Law, Private International Law and Cross-Border Child Abduction"* can be requested from the authors, Professor Anver Emon, Faculty of Law, University of Toronto (anver.emon@utoronto.ca) and Professor Urfan Khaiq, Cardiff Law School, UK (khaliq@cardiff.ac.uk).

vast majority of cross-border custody disputes adjudicated in the region concern cases in which the divorced parents who claim custody reside in two different Gulf States. Dr. Moller noted that the recent codification of family law in the GCC countries (Bahrain, Qatar and the UAE) has awarded the best interests of the child standard (*maṣlaḥat al-ṭifl, maṣlaḥat al-maḥdūn*) a prominent position and that the new family codes define custody and parental care in very similar terms to the related Hague Conventions. According to Dr. Mollar, this is a highly important development with regard to international family disputes. For one, the new family codes challenge deeply held, but oftentimes distorted presumptions about Muslim custody law as expressed in European courts.

Judge Muhsin Mahmoud Mustafa presented on Qatari judicial experiences in family disputes and child custody matters. He stressed that family should not be looked at from the individual's perspective but in its collective, sometimes involving broader family interests. For the State of Qatar, the concept of marriage and family are fundamental; it is foundational element of the society and requires solid structure. Concerning custody disputes, Judge Muhsin noted that the courts have jurisdiction over these matters in accordance with the law and the State has established family conciliation courts to offer parties a way to resolve their domestic disputes in an amicable way. He further noted that the Court has the power to introduce mediation in the best interest of the child and can appoint arbitrators. Judge Muhsin noted that there are very few cases of child abductions before Qatari courts are practically nil. While domestic law would apply to these situations, there can be a travel ban imposed on removal of a child from Qatari jurisdiction.

Noting the developments Saudi Arabia, Ambassador Dr. Mohamed Al-Shmmeri, Saudi Arabia Ministry of Foreign Affairs referred to the establishment of a Saudi special committee on child custody issues that have a foreign element. The committee is comprised of various Saudi government ministries. According to Ambassador Al-Shmmeri, private international law is of interest to Saudi Arabia and it is joined the Hague Conference to further engage in this area of law. Ambassador Al Shimmri also indicated that a review of the Hague Conventions may be undertaken by Saudi Arabia with interventions from various other government entities to ensure all stakeholders properly review the Convention with their respective mandates. Justice Sa'ad Al-Haqbani, Ministry of Justice Riyadh also presented on how the Saudi courts engage in child custody matters. He underscored the discretionary authority of the judge in adjudicating cases that draws from Hanbali jurisprudence and rules. This authority is stipulated in Saudi law.

Ms. Eman Al Saleh, Department of Family Consultations Ministry of Justice Kuwait, presented on the various Kuwaiti government institutions that would have jurisdiction over matters addressed in the seminar. She noted that the Department of Children's Right and Care would be engaged in child custody disputes and the courts would have overall jurisdiction over these cases. She also noted that Kuwait Ministry of Justice operates family conciliation offices that also assist parties address their family disputes. She also highlighted the right of visitation for both parents notwithstanding if the custody of the child is only with one parent.

Judge Hassan Brahimi, Ministry of Justice and Liberties presented on Morocco's experience since signing the 1980 Hague Child Abduction Convention. He referred to the reforms in the Moroccan family law that allowed for the ratification of the Convention by Morocco. He also noted that given Morocco's experience in addressing cross-border child custody disputes through bilateral arrangements with a number of European countries also assisted the authorities in establishing a Central Authority required for the implementation of the Hague Convention and its coordinative and administrative role with different organs of the State, including with the judiciary.

Professor Lotfi Chedly, Dean Faculty of Legal, Political and Social Sciences, Tunis presented on the legislative and administrative developments in Tunisia to accede to the Hague Convention. Like Morocco, Tunisia has a large diaspora community in Europe and transnational mobility and residence of its nationals, including situations of marriages and divorce, are fairly common. Tunisia had signed a number of bilateral agreements with European countries to address cross-border child custody disputes, including situations where a child was wrongfully removed and brought to Tunisia. Professor Chedly also underscored highlighted the recent political developments in Tunisia that precipitated the need for legal reforms.

The presentations followed engaging question and answer sessions between the participants. These ensuing discussions further informed participants of various developments in the area of child rights, domestic child custody and family laws and the Hague Conventions. Participants also discussed a list of draft recommendations:

### **Recommendations**

The following recommendations were made during the course of the seminar.

- Encourage the consideration of joining the Hague Conference as a member, noting that membership does not require ratification of or accession to a Hague convention, similar to attaining membership within the United Nations.
- Recognize the continuing need of dialogue and co-operation between stakeholders on cross-border family disputes involving children.
- Call for the follow up of the activities of the Malta process and the working party on mediation, which has been established in the framework of this process, while noting that the fourth Malta conference will take place in May 2016 in Malta.
- Encourage the engagement of the Organization of Islamic Cooperation (OIC), the League of Arab States (LAS) and the Gulf Cooperation Council (GCC) to further study cross-border family disputes involving children with a view to informing regional and global developments in addressing these issues.
- Encourage the exchange of expertise, as well as further research and training on judicial matters related to cross-border family disputes involving children.
- Recognize the importance of enhancing the capacities of family consulting services and centers to amicably solve cross-border family disputes involving children, specifically, with regards to their role in raising awareness and legitimizing their status within the national legal systems.
- Encourage regional countries to undergo further research on the 1980 and 1996 Hague Conventions.
- Consider drafting a model law on the protection of children in cases of illicit transfer and non-return of children abroad, based on the objectives and principles of the 1980 Hague Convention, by utilizing the model law mechanism of the league of Arab States and the Gulf Cooperation Council<sup>7</sup>.
- Encourage countries to incorporate a course on international private law including particular information on the Hague Conventions, within the curriculum of law colleges in the Arab region.
- Recognize the importance of setting up a regional database that compiles case law on cross-border family disputes involving children.
- Encourage the establishment of a centralized entity to coordinate domestic procedures and offer services, such as mediation or conciliation, in the resolution of cross-border family disputes involving children<sup>8</sup>.
- Encourage the regular review of family legislations taking into consideration the demographic and legal context of each country.

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<sup>7</sup> The model law will provide guiding principles based on the Hague Convention and the Convention on the Rights of the Child. It is not designed to substitute the Hague Convention, but to provide guidance for its implementation.

<sup>8</sup> The Central Authority will function as a coordinating body between relevant governmental and non-governmental institutions

- Recognizing the importance of the role of the state and non-governmental institutions, in raising awareness on the various issues related to families and the best interests of the child.
- Encourage the preparation, in collaboration with the Hague Conference, of an Arabic guide that provides clarifications on and enhances the understanding of the different provisions of the Hague conventions.