Report of Justice Rajesh Bindal Committee to Examine

The Civil Aspects of International Child Abduction Bill, 2016

and

The Protection of Children (Inter-Country Removal and Retention) Bill, 2016

Vol. I

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FOREWORD

On May 18th 2017, High Level Committee was constituted to examine issues relating to inter-country parental child removal and suggest a model legislation to safeguard interest of the parents and children.

A child is a beam of sunlight. Each day, we make deposits in the memory banks of our children. It is easier to build strong children. It is difficult to repair broken children. Do not worry that children never listen to you. They are always watching you. In fact, children are like wet cement. Whatever falls on them makes a permanent impression. They usually repeat, word for word, what you should not have said. Children are the responsibility of both the parents. The relationship between the father and the mother is of vital practical importance for children. Family disputes cause deep impact on growing children right from birth. The protection of children and child rights are a matter of concern in any civilized system. Keeping in mind this concern, the Ministry of Women and Child Development constituted a Committee to examine in detail the legal issues involved and develop a mechanism needed to address the difficulties being faced by affected parents and children. Large number of women married to Indians abroad, are compelled to come to India with their children when they undergo violence in their marriages. Consequently, the family fabric, particularly the children suffer the most.

The Committee studied the entire problem with deep in-sight. The report of the Committee has been structured into twelve different Chapters. Chapter 1 is devoted to introduction as to how the

Committee came in to existence and the purpose of its constitution. Chapter 2 deals with the Hague Convention of 1980 regarding Civil Aspects of International Child Abduction, the Good Practice Guides issued there under from time to time, statistical data about number of cases dealt with by different countries as available from newsletter published in Spring 2018, by Hague and summary of various international studies conducted regarding working of Hague with special reference to domestic violence. This also highlights that rights of children cannot be decided by a mechanical exercise, rather, proper application of mind should be there at every stage. Speed should not compromise with quality. Hurry should not burry justice to the future of the society. Next Chapter deals with the constitution of Central Authority, which is to be designated by each signatory country to the Hague Convention 1980.

Chapter 4 catalogues various International Conventions relating to protection of women and children. It was also considered relevant to include in the report, the Japanese experiment. Japan was 93rd country to sign Hague Convention in the year 2015, after enacting its Implementation Act in the year 2013.

As issue relating to welfare of children is involved, especially those coming back to India, the Joint Family System in our country, and how the children are taken care of by immediate family as well as extended family has been briefly touched in Chapter 6. Under any circumstances, foster care cannot be assumed to be better than child living with either of the parents or extended family. Another important aspect keeping best interest of child from medical point of view has been touched in Chapter 7. This gives an overview of impact of domestic violence on the children. It's an opinion by a doctor.

This problem is not limited to India. It has global ramifications. In dealing with this problem, the Committee was of the view that Mediation can play an important role in settling various issues involved between the warring parties. This was also recognized by Hague in the year 2012, hence, it was considered necessary to devote Chapter 8 to Mediation.

With the aforesaid background now it is also important to give details how the Committee had proceeded with in the matter, post its constitution. Chapter 9 gives the details thereof alongwith gist of suggestions received from different stakeholders, experts, NGOs, advocates etc. Even USA Embassy had also given its feedback to the Committee. The names of the stakeholders who sent suggestions or appeared before the Committee either in person or through VC have been kept confidential, as requested by them.

After churning the entire material which was produced before the Committee or which could be found by the members of the Committee and the researchers, the recommendations by the Committee are part of Chapter 10. Every effort has been made to keep the report precise, however, without leaving important contents.

The Committee was assigned the job of drafting a proposed Bill, the draft thereof is part of Chapter 11. Latest judgment of Hon'ble the Supreme Court of India in Nithya Anand Raghavan Vs. State of NCT of Delhi & others (AIR 2017 Supreme Court 3137) has been kept in view, being law of the land and further the 'best interest of the child'.

Gist of the material referred in various chapters has been given in the report. Some relevant parts have been reproduced,

wherever found relevant. URL (web links of the websites) have been referred to from where the material and data have been sourced, which is acknowledged, with thanks. Still the Committee considered it necessary to annex certain documents with the report to make it self contained. The supporting documents are part of Chapter 12 (Vol. II).

In preparing this report, concentrated efforts have been put in by different persons besides the members of the Committee. I will be failing in my duty if their contribution is not acknowledged. Dr. Virender Kumar, former Dean Faculty of Law, Panjab University, Chandigarh contributed material regarding the family system in India. Dr. Adarsh Kohli, Prof., Clinical Psychology, Deptt. of Psychiatry, PGIMER, Chandigarh contributed material about the effects of domestic violence on the child. Inputs given by Mr. Sukant Gupta, Advocate, Punjab & Haryana High Court also needs to be acknowledged. Ms. Meenaxee Raj, HCS, Member Secretary had put in lot of efforts and time towards preparation of report. Besides this in giving the report a final shape time spent by my personal staff including Mr. Manoj Manchanda, Special Secretary, Ms. Rekha Siag, Ms. Shalini Bansal, Law Researchers, and official from the Computer Section cannot be lost sight of, who all were available just a call away even at odd hours to assist in preparation of report. Contribution of efforts by the staff working in the Chandigarh Judicial Academy, especially Dr. Kusum Pal, Research Officer also needs to be acknowledged as they had worked tirelessly even during vacations and holidays in academy.

I will conclude by adding that Committee is thankful to all, whosoever has made contribution for this project.

Best efforts have been made to add relevant material in the report and draft the proposed Bill. But we understand that nothing can be perfect. There is always scope for improvement in any work but beginning has to be made from somewhere.

We present this report with the hope that the same may help in bringing a ray of hope in lives of some, by resolving family issues.

RAJESH BINDAL

Chandigarh
April 21, 2018

CHAPTER 1

PREFACE OF THE COMMITTEE

1.1 INTRODUCTION

The world having become a global village, instances of transnational marriages being on the rise and complexities involved in modern day relationships, the protection of rights of parents and children involved is a critical issue of national and international importance. The breakdown of such marriages directly affects the children born out of such wedlock as they become subject-matter of dispute between their parents. This many times, leads to inter-country parental child removal, where the children are removed by either of their own parent to India or to any foreign jurisdiction. Sometimes, this is being done even overlooking/violating the orders of competent courts of law on issue of child custody.

Since the issue had long drawn attention of the international community, a convention was held at Hague (Netherlands) to deal with this private international issue. The Convention concluded on October 25th 1980 and came into force w.e.f. December 01, 1983. It is titled as 'The Hague Convention on the Civil Aspects of International Child Abduction' *(annexed at p. 1 in Vol.II)*. The main objective of the treaty was to provide an expeditious mechanism to return a child internationally, removed by a parent from one member country to another. Initially it was signed by four countries. Till September 2017, 98 States signed the Convention *(details mentioned at p. 23 in Table 2-A in Chapter II)*. The Convention applies only to children below 16 years of age.

Whether India should be a signatory to the Hague Convention was subject matter of consideration from time to time. The Law Commission of India in its 218th Report dated 30th March, 2009, titled as 'Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980) *(annexed at p. 10 in Vol. II)* advised the Government of India to sign the Hague Convention. Thereafter, the Ministry of Women and Child Development, Government of India, drafted a Bill on the Civil Aspects of International Child Abduction in the year 2016 *(annexed at p. 31 in Vol. II)*.

Issue regarding international child removal also came up for consideration before Punjab and Haryana High Court. Vide order dated 24-02-2016 passed in CM No. 14931-CII of 2015 in Civil Revision No. 6449 of 2006-- Seema Kapoor and another vs. Deepak Kapoor & others ***(2016 SCC OnLine P&H 1225)*** *(annexed at p. 43 in Vol. II)*, the matter was referred for consideration by the Law Commission of India, with the following observation:

> 'to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether the recommendations should be made for enacting a suitable law for signing The Hague Convention on Child Abduction'.

Consequently, The Law Commission of India submitted its 263rd Report containing the draft Bill titled as 'The Protection of Children (Inter-Country Removal and Retention) Bill, 2016' *(annexed at p. 54 in Vol. II)*.

Thereafter, the Ministry of Women and Child Development held a national consultation to deliberate upon the issue relating to India's accession to the Hague Convention on the Civil Aspects of International Child Abduction, at New Delhi on 3rd February, 2017. The consultation was chaired by Smt. Maneka Sanjay Gandhi, Hon'ble Union Minister of Women and Child Development. The consultation was attended by Hon'ble Ms. Justice Mukta Gupta (Delhi High Court), Hon'ble Mr. Justice Inderjit Singh, Hon'ble Mrs. Justice Anita Chaudhry (Punjab & Haryana High Court), Hon'ble Mr. Justice (Retd.) Rakesh Kumar Garg Chairman, NRI Commission, Punjab including representatives from Ministries of External Affairs, Home Affairs and Law and Justice, and National Commission of Human Rights, National Commission for Protection of Child Rights, National Institute of Public Cooperation and Child Development besides affected parties and Non-Governmental Organisations also attended the meeting.

Addressing the participants, Smt. Maneka Sanjay Gandhi shared that large number of married women living abroad are compelled to return to India with their children when they undergo violence in their marriage. Concerns were raised about the difficulties being faced by the affected parents, whether men or women, and their children, as a result of breakdown of such marriages abroad.

After considering the viewpoints expressed by various stakeholders, Smt. Maneka Sanjay Gandhi, Minister of Women and Child Development, Government of India, opined that the problems being faced by the parents need to be addressed and an effective mechanism for the same must be created. A model legislation to

safeguard not only the interests of the child as also of the parents, especially women, must be drafted.

Based on the deliberations, it was decided that the Chandigarh Judicial Academy, attached with the Punjab and Haryana High Court, Chandigarh, the Law Commission of India along with the NRI Commission, Punjab be assigned the job to examine the legal issues involved by taking all viewpoints into account including those of suffering parents *(minutes of the meeting annexed at p. 113 in Vol.II)*.

Thereafter, vide Memo No. CW-I-31/59/2016-CW-I dated 18.5.2017 *(annexed at p. 118 in Vol. II)* was issued by the Ministry of Women and Child Development, Union of India, constituting the Committee to examine the Civil Aspects of International Child Abduction Bill, 2016 under the Chairmanship of Hon'ble Mr. Justice Rajesh Bindal, Judge, Punjab and Haryana High Court, Chandigarh .

1.2 <u>The terms of reference of the Committee are as under</u>:

"1. The Committee will examine in detail the legal issues involved by taking all viewpoints into account, including those of the suffering women as several cases were highlighted during the consultation.

2. The Committee report will also provide recommendations as to how the problems of parents and children involved in such situations can be addressed.
3. The Committee will also study the draft of the aspects of International Child Abduction Bill, 2016 prepared by the Ministry and Law Commission.

4. The Committee shall also develop a mechanism required to address the difficulties being faced by the affected parent as a large number of women married to Indians abroad are compelled to return to India with their children when they undergo violence in their marriage.
5. A model legislation to safeguard the interests of parents and children will be drafted by the Committee and the same will be put for public comments before being finalized."

1.3 <u>The constitution of the Committee is as follows</u>:

<u>Chairperson</u>

Hon'ble Mr. Justice Rajesh Bindal
Judge, Punjab and Haryana High Court

<u>Members</u>

a) Hon'ble Ms. Justice Mukta Gupta
Judge, Delhi High Court

b) Hon'ble Mrs. Justice Anita Chaudhry
Judge, Punjab and Haryana High Court

c) Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.)
Chairman, Punjab State NRI Commission

d) Ms. Rekha Sharma
Chairperson, National Commission for Women

e) Ms Astha Saxena, ICAS
Joint Secretary, Ministry of Women and Child Development, Government of India

f) Ms. Uma Sekhar, ILS
Joint Secretary (Law & Treaty), Ministry of External Affairs, North Block, New Delhi

g) Sh. A.K. Upadhya
Addl. Law Officer to Chairman of Law Commission, Law Commission of India

h) Mr. P.K. Behera
Deputy Legal Advisor, Department of Legal Affairs, Ministry of Law and Justice, Government of India

i) Sh. Sudhir Kumar Gupta
Deputy Secretary, Ministry of Home Affairs

The following three members had been co-opted by the Hon'ble Chairperson to assist the Committee, as permitted:

j) Ms. Meenaxee Raj, HCS (Member Secretary)
Joint Director (Admn.), Urban Local Bodies, Haryana

k) Dr. Balram K. Gupta
Director (Academics), Chandigarh Judicial Academy Chandigarh

l) Shri Anil Malhotra, Advocate
Punjab & Haryana High Court, Chandigarh

The Committee, thereafter, held consultations with various stakeholders.

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CHAPTER 2A

BRIEF INTRODUCTION TO THE HAGUE CONVENTION

2.1 INTRODUCTION

The Convention on the Civil Aspects of International Child Abduction was adopted on 25th October, 1980 in the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session, by unanimous vote of the States which were present. At present, 98 countries are signatories to the aforesaid Convention.

2.2. OBJECTIVES OF THE CONVENTION

The Convention of 25th October, 1980 on the Civil Aspects of International Child Abduction seeks to combat parental child abduction by providing a system of co-operation between Central Authorities, as envisaged in the Convention to be established in Contracting States for the return of the child to the country of its habitual residence. The return mechanism which is the principal object of the Convention, besides protecting rights of access, is to protect children from harmful effects of cross-border removal/retention by providing a procedure designed to bring about prompt return of such children to the State of their habitual residence.

- The Convention, places on the top of its objectives **'the restoration of the status quo ante**', by means of prompt return of children wrongfully removed to or retained in any Contracting State.

- The other main objective is '**prompt return of the child**' which answers to the desire to re-establish a situation unilaterally and forcibly altered by the taking parent.
- The Convention does not seek to regulate the custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the issue i.e. custody rights, should take place before the competent authorities/court in the State where the child had its habitual residence prior to its removal.
- The signatory States declared themselves to be '*firmly convinced that the* ***best interest of children is of paramount importance*** *in matters relating to their custody*'.
- The Parliamentary Assembly of the Council of Europe also recognized the principle that **'children must no longer be regarded as parents' property but must be recognized as individuals with their own rights and needs'.**

Source: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14908&lang=en

The Convention also recognizes that removal of the child can sometimes be justified by objective reasons which have to do either with the person or with the environment with which it may be closely connected**.** Therefore, the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure prompt return of children who have been removed or retained**.** These exceptions are based on the principle of 'best interest of the child'. The rule concerning access rights also reflects the concern to provide children with family relationships, which are as comprehensive as possible, so as to encourage the development of a stable personality.

Details regarding the Hague Convention, 1980 are available on the following link:

Source:https://www.hcch.net/en/publications-and-studies/publications2/guides-to-good-practice

"2.3 THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II

CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III

RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own

initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; 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.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an

application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV

RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps

to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V

GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI

FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the

international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44."

2.4 APPLICATION OF THE CONVENTION

For the Convention to apply, both the countries must be signatory to the same at the time of wrongful removal. A remedy is only available under the Convention when the child was wrongfully removed from a signatory country and retained in another signatory country. If the countries involved are not signatories to the treaty, the Convention is inapplicable. The Convention will not govern wrongful removal occurring prior to accession and ratification. Additionally, the child must be under the age of sixteen. If the child is wrongfully removed or retained at an age younger than sixteen, but the proceedings are not concluded till the child attains age of sixteen, the Convention will not apply.

2.5 SIGNATORY COUNTRIES

Sr. No.	Name of Contracting State	Entry into force
1	Albania	August 01, 2007
2	Andorra	July 01, 2011
3	Argentina	June 01, 1991
4	Armenia	June 01, 2007
5	Australia	January 01, 1987

6	Austria	October 01, 1988
7	Bahamas	January 01, 1994
8	Belarus	April 01, 1998
9	Belgium	May 01, 1999
10	Belize	September 01, 1989
11	Bolivia	October 01, 2016
12	Bosnia and Herzegovina	March 06, 1992
13	Brazil	January 01, 2000
14	Bulgaria	August 01, 2003
15	Burkina Faso	August 01, 1992
16	Canada	December 01, 1983
17	Chile	May 01, 1994
18	China, People's Republic of (Hong-Kong &Macao only, by continuation of UK &Portugal)	
19	Colombia	March 01, 1996
20	Costa Rica	February 01, 1999
21	Croatia	December 01, 1991
22	Cyprus	February 01, 1995
23	Czech Republic	March 01, 1998
24	Denmark	July 01, 1991
25	Dominican Republic	November 01, 2004
26	Ecuador	April 01, 1992
27	El Salvador	May 01, 2001
28	Estonia	July 01, 2001
29	Fiji	June 01, 1999
30	Finland	August 01, 1994
31	France	December 01, 1983
32	Gabon	March 01, 2011
33	Georgia	October 1, 1997
34	Germany	December 01, 1990
35	Greece	June 01, 1993
36	Guatemala	May 01, 2002
37	Guinea	February 01, 2012
38	Honduras	March 01, 1994
39	Hungary	July 01, 1986
40	Iceland	November 01, 1996
41	Iraq	June 01, 2014

42	Ireland	October 01, 1991
43	Israel	December 01, 1991
44	Italy	May 01, 1995
45	Jamaica	May 01, 2017
46	Japan	April 01, 2014
47	Kazakhstan	September 01, 2013
48	Korea, Republic of	March 01, 2013
49	Latvia	February 01, 2002
50	Lesotho	September 01, 2012
51	Lithuania	September 01, 2002
52	Luxembourg	January 01, 1987
53	Malta	January 01, 2000
54	Mauritius	June 01, 1993
55	Mexico	September 01, 1991
56	Moldova, Republic of	July 01, 1998
57	Monaco	February 01, 1993
58	Montenegro	June 03, 2006
59	Morocco	June 01, 2010
60	Netherlands	September 01, 1990
61	New Zealand	August 01, 1991
62	Nicaragua	March 01, 2001
63	Norway	April 01, 1989
64	Pakistan	March 01, 2017
65	Panama	May 01, 1994
66	Paraguay	August 01, 1998
67	Peru	August 01, 2001
68	Philippines	April 01, 2016
69	Poland	November 01, 1992
70	Portugal	December 01, 1983
71	Romania	February 01, 1993
72	Russian Federation	October 01, 2011
73	Saint Kitts and Nevis	August 01, 1994
74	San Marino	March 01, 2007
75	Serbia	April 27, 1992
76	Seychelles	August 01, 2008
77	Singapore	March 01, 2011
78	Slovakia	February 01, 2001

79	Slovenia	June 01, 1994
80	South Africa	October 01, 1997
81	Spain	September 01, 1987
82	Sri Lanka	December 01, 2001
83	Sweden	June 01, 1989
84	Switzerland	January 01, 1984
85	Thailand	November 01, 2002
86	The Republic of Macedonia	December 01, 1991
87	Trinidad and Tobago	September 01, 2000
88	Tunisia	October 01, 2017
89	Turkey	August 01, 2000
90	Turkmenistan	March 01, 1998
91	Ukraine	September 01, 2006
92	United Kingdom of Great Britain and Northern Ireland	August 01, 1986
93	United States of America	July 01, 1988
94	Uruguay	February 01, 2000
95	Uzbekistan	August 01, 1999
96	Venezuela	January 01, 1997
97	Zambia	November 01, 2015
98	Zimbabwe	July 01, 1995

(TABLE 2-A)

2.6 MAIN RESERVATION CLAUSES

Based on the provisions of The Hague Convention, 1980, most of the signatory countries have reserved certain clauses while signing the same. Some of the important reservation clauses are as follows:

a) Age of majority (Article 4 of the Convention)-Reservation only by El Salvador as to 18 years.

b) Language for communication (Article 24 of the Convention).

c) Assumption of costs, as referred to in Article 26 of the Convention.

d) Territorial applicability in case of certain Contracting States (Articles 39 and 40 of the Convention).

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CHAPTER 2B

GUIDES TO GOOD PRACTICE AND OTHER PUBLICATIONS BY HCCH

2.7 The catalogue of HCCH comprises the list of publications by the Hague Conference. These are issued in several series which includes proceedings of the Hague Conference on Private International Law, brochures, handbooks, Guides to Good Practice, the Judges' Newsletter on International Child Protection and Annual Report of the Conference.

A table of HCCH Publications is as follows:

Author	Title	Year of publication
HCCH	Collection of Conventions (1951-2009)	
	Brochure: "Direct Judicial Communications"	2013
	Guide to Good Practice Child Abduction Convention - Mediation	2012
	Guide to Good Practice Child Abduction Convention: Part IV - Enforcement	2010
	Guide to Good Practice Child Abduction Convention: Part III - Preventive Measures	2005
	Guide to Good Practice Child Abduction Convention: Part II - Implementing Measures	2003
	Guide to Good Practice Child Abduction Convention: Part I - Central Authority Practice	2003

Author	Title	Year of publication
	The Judges' Newsletter on International Child Protection	
	HCCH International Family Law Briefings	
	Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice	2008
	Brochure: "The Hague Children's Conventions"	2017
HCCH	CD-ROM *the Children's Conventions*	1998
HCCH	*Actes et documents de la Quatorzième session* (1980) - Child Abduction	1982
Elisa Pérez-Vera	Explanatory Report on the 1980 Hague Child Abduction Convention	1982

Source:https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=24

The Catalogue of HCCH publications can be downloaded from the following URL:

https://assets.hcch.net/upload/hcch_catalogue.pdf

Contents in the aforesaid publications in brief are summarised below:

2.7.1 CD-ROM the Children's Conventions(1998):

This CD contains proceedings of the Fourteenth (t. III), Seventeenth (t. II) and Eighteenth (t. II) Sessions.

2.7.2 Explanatory Report on the 1980 Hague Child Abduction Convention (1982):

It is the most frequently cited Explanatory Report in relation to the Hague Convention prepared by Prof. Elisa Pérez-Vera.

It is available on URL: https://assets.hcch.net/upload/expl28.pdf

The *Pérez-Vera Report* is the product of the official reporter for the 1980 sessions of the Hague Conference that led to the approval of the Convention. The report is recognized as the official history and commentary to the Hague Convention and is a "source of the background on the meaning of the provisions of the Convention." U.S. courts routinely cite to this report for guidance on interpreting the treaty.

This document is part of The 1980 Hague Convention on International Child Abduction: A Resource for Judges, a special webpage on the website of the Federal Judicial Center which is the research and education agency of the judicial branch of the U.S. government.

Source: https://www.fjc.gov/content/307023/overview-hague

2.7.3 Guide to Good Practice Child Abduction Convention: Part I - Central Authority Practice (2003)

It includes the detailed guidelines on key operating principles, establishing and consolidating the Central Authority, abduction applications (outgoing) - role of the requesting Central Authority, abduction applications (incoming) - role of the requested Central Authority, access applications - role of requesting and requested Central Authorities; and other important functions and issues for Central Authorities. Its appendices contain conclusions and recommendations of Special Commissions to review the operation of the Hague Convention of 25th October, 1980 on the Civil Aspects of

International Child Abduction (1989, 1993, 1997, 2001), obligations of Central Authorities, sample forms, sample letters, measures taken by Central Authorities, statistics and publications and internet sites dealing with prevention issues.

2.7.4 Guide to Good Practice Child Abduction Convention: Part II - Implementing Measures (2003)

It is a comprehensive guide on implementing measures and includes key operating principles, the path to signature and ratification or accession, methods of implementation, Central Authorities, organisation of the courts, legal procedural matters, legal aid and assistance and aids to interpretation. It also includes chapters on facilitating acceptance of accessions and implementation as a continuing process.

2.7.5 Guide to Good Practice Child Abduction Convention: Part III - Preventive Measures (2005)

This part deals with proactive measures like creating a legal environment which reduces the risk of abduction, proactive measures where there is a heightened risk of abduction and reactive measures to respond to a credible risk of abduction. It elaborates various methods to provide information about various provisions and dissemination of information, training and co-operation of professionals to effectively ensure implementation of preventive measures.

2.7.6 Guide to Good Practice Child Abduction Convention: Part -IV – Enforcement (2010)

It contains the overview of factors which may delay enforcement. It contains the information about the measures available in the requested State, their content and the conditions for their application. Legal challenges available against return orders or against

their enforcement; the effect of legal challenges on the enforceability of return orders; and the enforcement procedure (including the return order to be enforced and the aims of enforcement) and the actors involved have been discussed in detail. It is an elaborate guide on promoting voluntary compliance; co-operation among courts, authorities and other actors within the requested State; and cross-border co-operation to ensure safe return. It also provides guidelines regarding the training and education for professionals in the enforcement of contact orders. It also talks about obligation to explore the wishes and feeling of a child and take due account of them in certain Court proceedings concerning the child.

2.7.7 Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice (2008)

The principles and good practices set out in this Guide serve the following purposes –

- They assist in the more effective implementation and application of those provisions of the Hague Convention of 25th October, 1980 on the Civil Aspects of International Child Abduction which concern trans-frontier contact;
- They draw attention to provisions of the Hague Convention of 19th October, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children which relate to transfrontier contact and which supplement the 1980 Convention, and provide guidance concerning their application;

- They provide an overall model for constructing an international system of co-operation designed to secure effective respect for rights of contact.

As such, the Principles and Guide are intended to be helpful also to those States, which are not Parties to the Hague Conventions, but are considering how best to develop effective structures. The Guide is intended to be of particular use to Judges and Central Authorities appointed under the 1980 or 1996 Conventions, as well as to governments engaged in the development of policies concerning transfrontier contact. It may also be of assistance to other professionals working in the area. Three Guides to Good Practice relating to the 1980 Convention have already been published: Part I relating to Central Authority Practice, Part II on Implementing Measures and Part III on Preventative Measures. This Guide differs from them in two respects. First, it contains general principles as well as examples of good practice. Second, it relates to the 1996 Convention, as well as to the 1980 Convention. While in relation to some matters covered by this Guide, one approach is recommended, such as where it has already been endorsed by a Special Commission, in relation to other matters it will be indicated that there is more than one possible approach. This allows States and other interested parties to give full consideration to the approach that would best suit their legal system. The Guide received the general endorsement of the Special Commission to review the operation of the Hague Convention of 25th October, 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19th October, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility

and Measures for the Protection of Children. However, nothing in this Guide may be construed as binding on State Parties to the 1980 Convention or the 1996 Convention. The general principles set forth in this Guide are purely advisory in nature. All State Parties, and in particular Central Authorities designated under the 1980 and 1996 Hague Conventions, are encouraged to review their own practices, and where appropriate and feasible, to improve them. For both established and developing Central Authorities the implementation of the Conventions should be seen as a continuing, progressive or incremental process of improvement.

2.7.8 Guide to Good Practice Child Abduction Convention – Mediation (2012)

The objective of this guide is to promote good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction. Among the different means of amicable dispute resolution, this Guide primarily addresses 'mediation' as one of the most widely promoted methods of alternative dispute resolution in family law. It, however, also refers to good practices with regard to other processes to facilitate agreed solutions, such as conciliation. A separate chapter 22 is dedicated to these other methods and due consideration is given to their specific nature. In addition, this Guide is intended to assist States that are not Parties to these Hague Conventions, but that are considering how to develop best effective structures to promote cross-border mediation in international family disputes. It is addressed to governments and Central Authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as Judges, lawyers,

mediators, parties to cross-border family disputes and other interested individuals. *(Copy of the Guide to Good Practice Child Abduction Convention-Mediation (2012) annexed at p.124. Vol. II)*

This topic has been extensively dealt with in Chapter 8.

2.7.9 Brochure: 'Direct Judicial Communications' (2013)

This brochure contains emerging guidance regarding the development of the International Hague Network of Judges including the appointment and designation of members of the International Hague Network of Judges. It contains information about members of the Network. It also provides principles for General Judicial Communications:

- Internally – within the domestic court system
- Internally – relationship with Central Authorities
- Internationally – with foreign Judges and the Permanent Bureau

The general principles for direct judicial communications in specific cases including commonly accepted safeguards and communication safeguards have been discussed in it. It also guides about how to initiate the communication and deals with the form of communications and language difficulties. It provides for keeping the Central Authority informed of judicial communications. Additional information and examples of direct judicial communication can be found in the "Report on Judicial Communications in Relation to International Child Protection".

2.7.10 Brochure: "The Hague Children's Conventions" (2017)

This brochure provides a brief overview of main points related with HCCH and four modern Hague Children's Conventions , namely

- 1980 Hague Child Abduction Convention
- 1993 Hague Inter-country Adoption Convention
- 1996 Hague Child Protection Convention
- 2007 Hague Child Support Convention & Protocol

It provides basic information about the Malta Process. Infrastructures supporting the Hague Children's Conventions including Central Authorities and the International Hague Network of Judges (IHNJ) and the post-Convention services developed by HCCH to monitor and support the operation of these Conventions have been summarized in this brochure.

2.7.11 The Judges' Newsletter on International Child Protection

This biannual publication was first published in the spring of 1999 and is the result of the desire of the Hague Conference to guarantee circulation of information relating to judicial co-operation in the field of international protection of children. This publication is therefore a collection of information on the different Hague Children's Conventions and reports on the numerous initiatives taken throughout the world in the framework of these Conventions.

To date, the collection comprises 21 bilingual English/ French volumes and one bilingual special edition. Some editions are also published in Spanish, and others are available in Arabic on an ad hoc basis. They are distributed electronically by the Permanent

Bureau of the Hague Conference, and can be printed from the Hague Conference website (under "Publications" and "Judges' Newsletter"). The latest one is "*The Judges' Newsletter* on International Child Protection - Vol. XXI / Winter-Spring 2018" *(annexed at p. 225 in Vol.II).*

Source: https://www.hcch.net/en/publications-and-studies/publications2/judges-newsletter

2.7.12 Collection of Conventions (1951-2009):

This bilingual volume comprises the authentic texts of all the Conventions adopted between 1951 and 2009. The texts of the Conventions adopted before 1951 are not included in this volume but are available on the website of HCCH.

2.7.13 HCCH International Family Law Briefings:

These are quarterly updates, provided by the Permanent Bureau of the Hague Conference on Private International Law, regarding the work of the Hague Conference in the field of international family law, the latest being HCCH International Family Law Briefings, September 2014.

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CHAPTER 2C

STATISTICAL DATA

2.8 OVERVIEW

Fourth statistical survey (2015) with reference to 1980 Convention was conducted by Professor Nigel Lowe and Victoria Stephens, in consultation with the Permanent Bureau and the International Centre for Missing and Exploited Children (ICMEC). The said survey of 2015 is based on response to a detailed questionnaire sent to the Central Authorities for collection of information from different States about the number of applications, filed parties involved in abduction, outcome of the applications, and the time it took to reach the conclusion.

In the present survey, for the first time information was collected through the INCASTAT online database (www.in-castat.net). Outcome of the survey was taken up for consideration in the seventh meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention held from 10th -17th October 2017.

The survey reveals that replies were received from 76 of the then 93 Contracting States, providing detailed information on 2,270 incoming return applications and 382 incoming access applications. It is estimated that overall there were maximum of 2,335 return (86%) and 395 access(14%) applications made to the Central Authorities under the Hague Convention 1980. Thus the said survey captured 97% of all the applications.

In comparison to 2008 survey, it was observed that there was 3% increase in return applications but decrease of 3% in the access

applications. Many Central Authorities received fewer applications in 2015. However, some States such as United States of America, England and Wales and Germany, continued to receive significantly more applications.

2.9 APPLICATIONS FOR RETURN OF CHILD

In 2015 survey, 76 States responded to the survey. Total 2,270 return applications were received by 72 States. This can be compared with 1,961 return applications received by 54 States in 2008; 1,259 return applications received by 45 States in 2003 and 954 applications received by 30 States in 1999. Comparing the data from the States which responded to the survey in both 2015 and 2008, there has been 3% increase in the number of return applications. This shows decreasing trend in number of applications received, if compared with the 2008 survey which recorded 45% increase in applications in States, who responded to both the 2008 and 2003 surveys.

More return applications were received by the USA than by any other Central Authority (313 applications). This amounts to 14% of the total number of applications received in 2015 (14% in 2008, 23% in 2003 and 22% in 1999). England and Wales received the second highest number with 261 applications amounting to 12% of all applications received (10% in 2008, 11% in 2003 and 16% in 1999). However, no incoming return applications were received by Andorra, Guinea, Montenegro, San Marino, Seychelles, by the Canadian Central Authorities of Newfoundland, North West Territories, Nova Scotia, Nunavut, Prince Edward Island, Yukon, United Kingdom, Central Authorities of Anguilla and Bermuda, as found in the survey of 2015.

While in 2008 there was clear increase in the number of return applications received almost across the board, in 2015 the increase was concentrated in fewer jurisdictions. In 2015, 39% of States received increased number of applications compared with 67% in 2008. United Kingdom and Germany received particularly return applications if compared with more applications received in 2008 (increase of 73 applications (33%) and 57 applications (50%) respectively). This was also the case in the USA, France and Romania (30, 29 and 23 additional applications received, respectively). Whereas lesser applications were received by Mexico (decrease of 85 applications, 51% decrease), Australia (30 applications, 40% decrease) and Poland (18 applications, 27% decrease).

Overall, 21 States received more applications in 2015, seven received the same number and 26 received fewer.

- **Number Of Return Applications and relationship between taking parent and the child**

In 2015, 73% of taking parents were the mothers of the children involved in the application. This marks an increasing trend when compared with the 69% recorded in 2008 and 68% in 2003. 24% were fathers (compared with 28% in 2008 and 29% in 2003). Remaining 3% involved were grandparents, institutions or other relatives, such as step-parents or siblings. Seven applications involved same sex couple, comprising four female couples and three male couples. (Fig. 1)

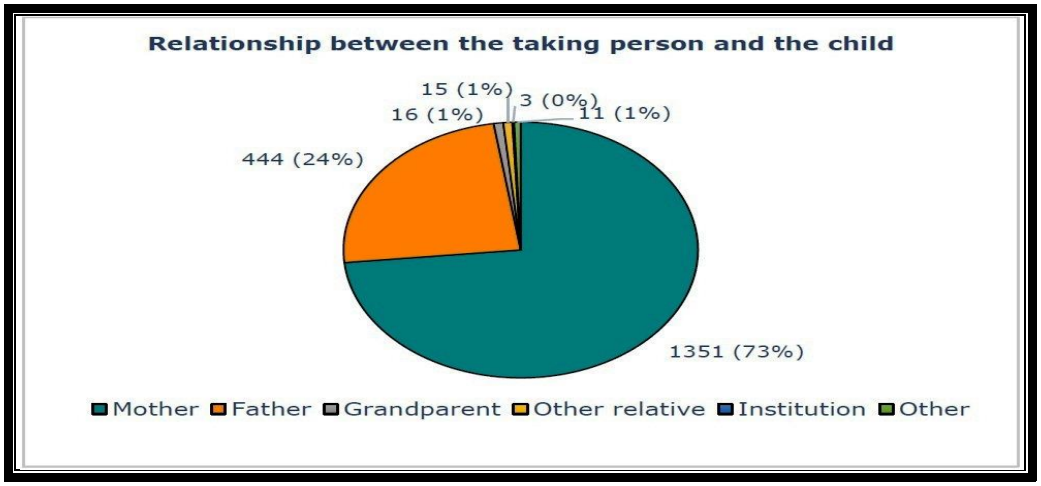

Fig. 1

The proportion of applications involving taking mothers varied between States. Eight States received applications only involving taking mothers. In Thirteen States the number was over 85%. Four States received applications involving taking fathers, but none of these received more than two applications in total. Significantly high proportion of applications involving taking fathers were received by Switzerland (17 applications, 43%), Turkey (31 applications, 39%), and Mexico (28 applications, 34%).

- **Status As Carer Of The Taking Person And the Child**

A specific question on the status as carer of the taking person (whether they were the primary carer of the child, shared caring responsibilities with the applicant or were a secondary carer) was also included in the last three surveys. Not all Central Authorities recorded this information but in the 976 applications for which data is available, 20% of the taking persons were said to be the child's primary carer, 60% joint primary carer and 20% non-primary carer. Overall, 80% of taking parents in 2015 were the primary or joint-

primary carer of the children involved. This can be compared with 72% in 2008 and 68% in 2003.

In 2015, while the number of taking mothers with primary care responsibilities increased to 91%, the proportion of taking fathers who were primary carers also increased to 61% (from 36% in 2008). However, higher proportion of taking mothers were the sole primary carer (24%) compared with taking fathers (9%). Analysing the data further, 67% of the taking mothers were joint primary carers as against 37% in 2008, while 52% of taking fathers were joint primary carers as against 20% in 2008. This finding reflects a growing trend of joint parenting. (Fig. 2)

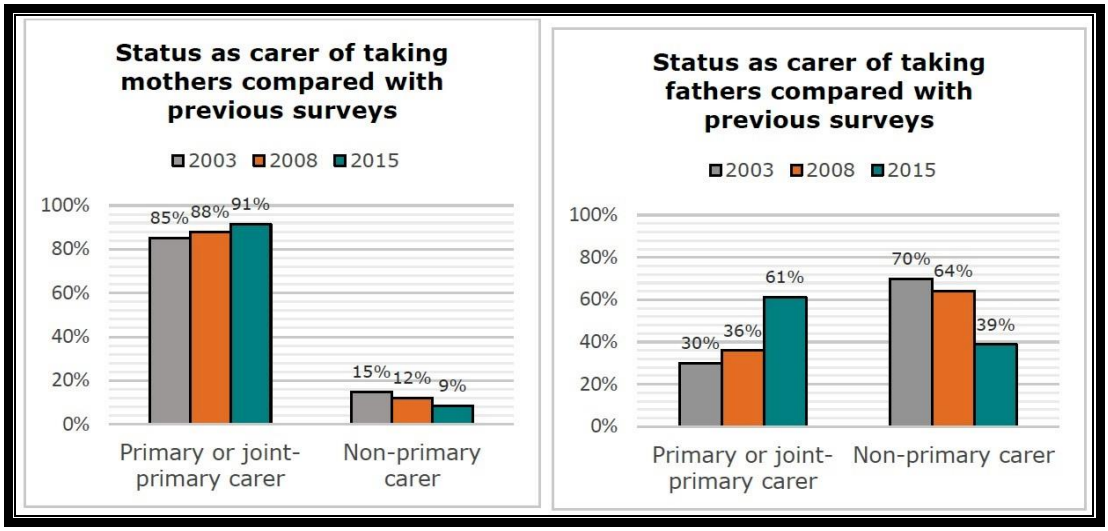

Fig. 2

- **The Nationality Of The Taking Person**

In 2015, 58% of applications involved a taking parent who was ‘going home’. This can be compared with 60% in 2008, 55% in 2003 and 52% in 1999. The survey also considered whether there was a correlation between the nationality of the taking parent and whether they were the mother or the father of the child. The figures

remained consistent compared with previous surveys, with a slightly higher proportion of taking fathers going to a State of which they were a national (64%, 245 out of 383 applications, including 40 applications in which the taking person had dual nationality). 56% of taking mothers also travelled to a State of which they were a national (628 out of 1,126 applications, including 101 applications in which the taking person had dual nationality). Fig. 3 explains about the proportion of taking parents going to a State of which they were a national.

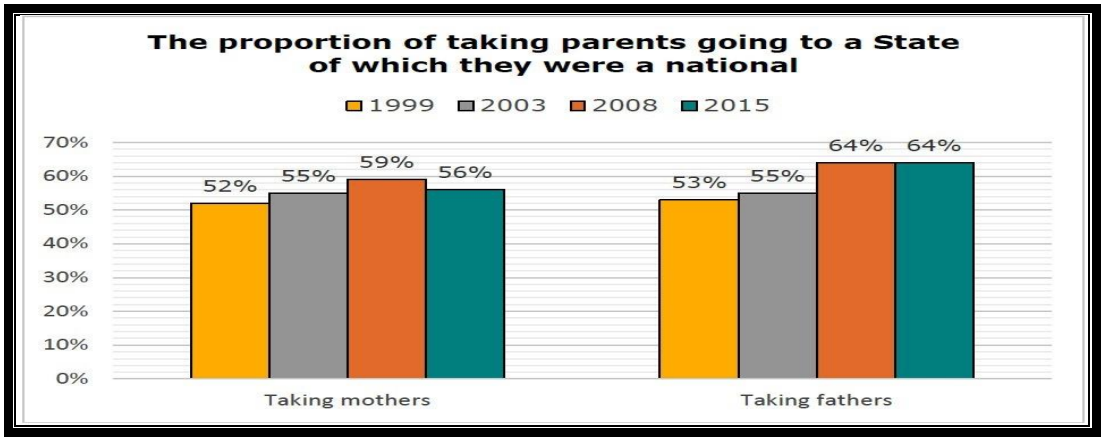

Fig.3

- **The Age and Gender of the Children**

At least 2,997 children were involved in the 2,270 return applications in 2015. An average of 1.3 children per application. This was less than the average of 1.4 children in 2008 and 2003 and 1.5 children in 1999. The majority of applications involved single child. 70% of return applications were for single child in 2008 compared with 69% in 2008, 67% in 2003 and 63% in 1999.

In 2015 average age of a child involved in a return application was 6.8 years. The given Fig. shows the age distribution, with the greatest proportion of children aged 3-7 years. (Fig. 4)

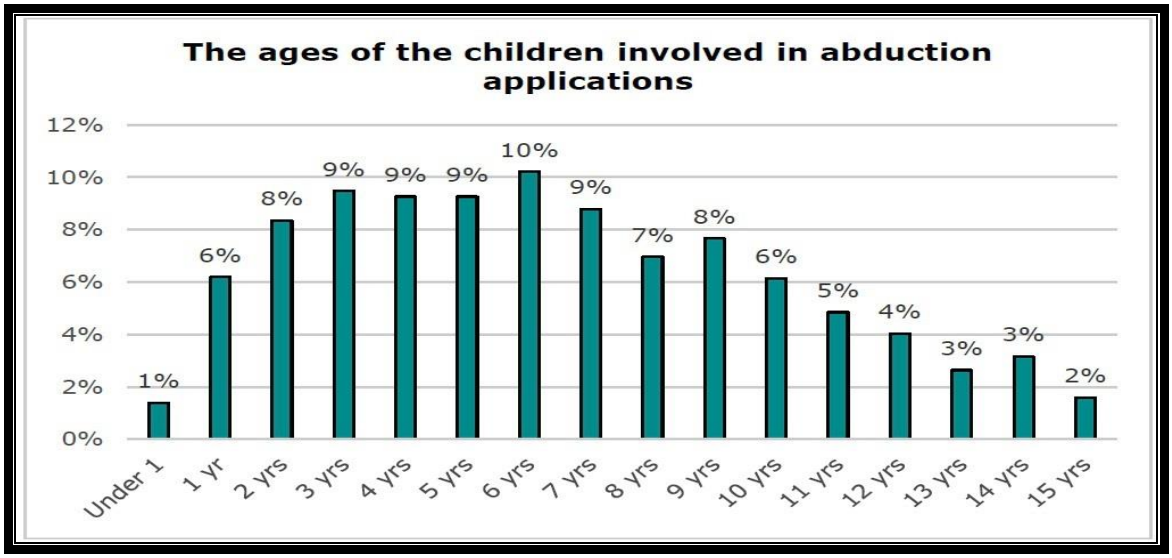

Fig. 4

Average age of the children involved in abduction applications remained relatively constant over past surveys. The average of 6.8 years in 2015 can be compared with 6.4 years in 2008 and 6.3 years in 2003. These findings have relevance with reference to listening to children in child abduction proceedings and having regard to child's objection to return.

- **The Outcomes Of The Return Applications**

The following (Table 5) is analysis of all return applications received in 2015, In the given table the applications which were still pending as on 30th June 2017 has been classified as 'pending'.

The outcomes of the return applications received in 2015		
	Frequency	**Percentage**
Rejection	64	3%
Voluntary return	348	17%
Judicial return	561	28%
Judicial refuse	243	12%

Access agreed or ordered	57	3%
Pending	128	6%
Withdrawn	283	14%
Others	318	16%
Total	**2002**	**(Aprox.) 100%**

Table 5

i. Overall outcomes in general: Detailed information on the outcome was available for 2,002 applications. The overall return rate was 45% comprising 348 voluntary agreements to return and 561 judicial orders for return. Of the cases which ended in a judicial order for return, 21% involved judicial order for return with the consent of the parties, 57% involved order without consent and in the remaining the consent of the parties was unknown. This can be compared with 24%, 55% and 20%, respectively, in 2008.

The overall return rate was 45%, slightly lower than the 46% recorded in 2008. This marks a decrease from the 51% recorded in 2003 and 50% in 1999. Interestingly, the number of judicial refusals has also decreased significantly, reversing the trend of previous surveys of a steady increase in refusals. A similar pattern can be seen with regard to applications withdrawn. (Fig. 6)

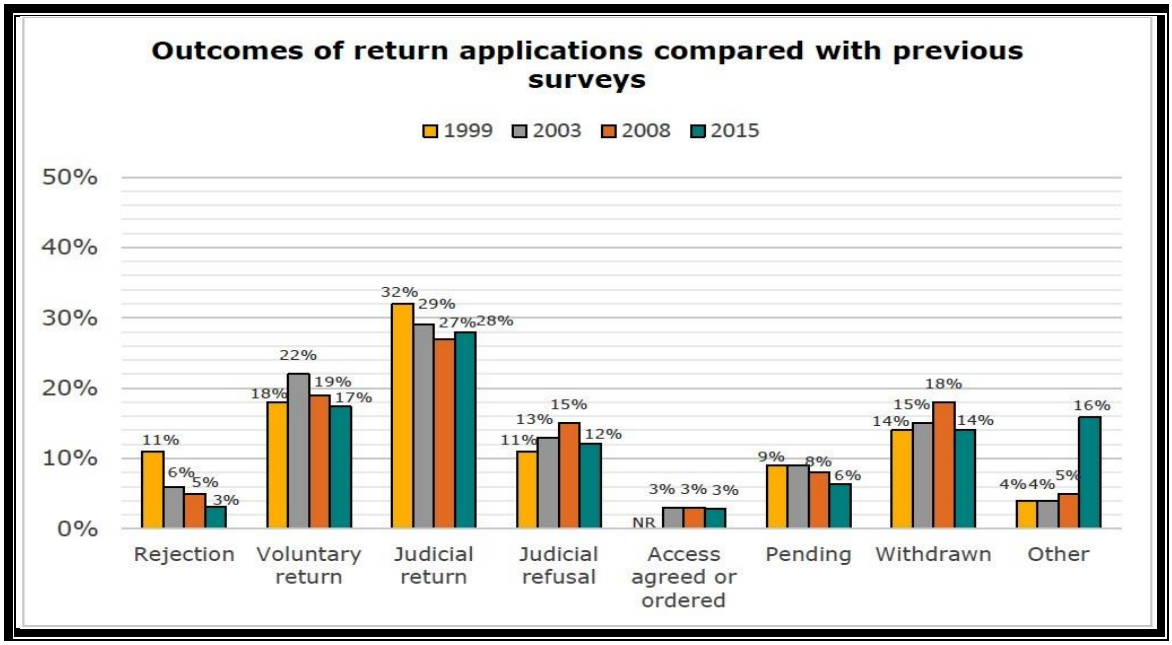

Fig. 6

There was significant increase in the applications disposed of for other miscellaneous reasons classified in the category of 'other'. It was found that the outcome percentage of such applications increased from 4% in the year 1999 to 16% in 2015. Going into details of the reason in respect of outcomes of returned applications received in 2015 the following reasons are observed:

- 84 ended in some other voluntary agreement.
- 84 were closed due to applicant's "inaction".
- The reasons for the remaining "other" outcomes were:
  - Child was not traced
  - Child was traced in another State,
  - the child reaching the age of 16,
  - the child going back to the Requesting State,
  - the abductor being arrested,
  - the death of the applicant or a decision by the court in the Requesting State.

An additional two cases involved different outcomes for different children. One ended in a judicial order for return for one child and for the other judicial refusal to return based on the child's objections. In other case the application for the return of one child was rejected based on Article 27 and the care of the other child was attributed to the taking mother by the Requesting State and they were permitted to remain in the Requested State.

ii. The final outcomes agreed by consent: In 2015, 30% of all applications (593 applications) ended in an outcome with the consent of the parties, including 117 applications in which the court ordered the return of the child with the consent of the taking parent. In reality this figure is probably even higher as some cases may have been withdrawn due to the parties reaching a settlement. Further orders for return may have been made with consent, but the position of the parties was unknown in 125 applications.

iii. Outcomes of the applications which went to the court: In 2015, total of 965 applications were sent to court, amounting to 48% of all those in which outcome is known, 108 were not decided by the court, for the reason as either the case was still pending or the parties arrived at a settlement.

Remaining 857, were finally decided by the court before the cut-off date of 30th June 2017. This equates to 43% of all applications in which the outcomes were known. This has remained constant throughout past surveys compared with 44% of applications being decided in court in 2008, 44% in 2003 and 43% in 1999.

Of the applications decided in court in 2015, 65% ended in return, 28% in a refusal and 6% in orders for access or other voluntary

agreements. This can be compared with a 61% return rate in 2008 and 66% in 2003. These court outcomes were relatively consistent with previous surveys. (Fig. 7)

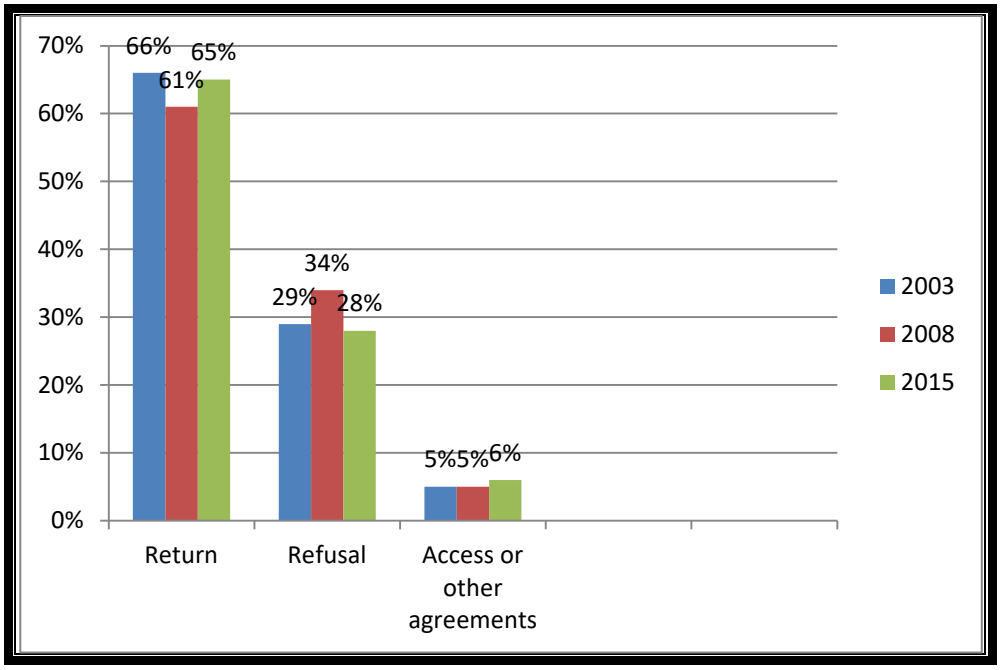

Fig.7

iv. Outcomes by the central authorities which received the applications: Compared with the global 45% return rate, there was a notably high proportion of returns in New Zealand (83%, 25 applications), United Kingdom – Scotland (64%, 16 applications), Turkey (60%, 26 applications) and Australia (58%, 24 applications). By contrast, a low proportion of applications ended in return in Austria (5%, 1 application) and Sweden (24%, 6 applications).

Many applications received by these Central Authorities remained pending. Regarding judicial refusals, a notably high proportion of the applications received by Poland, Russia and France were refused (35%, 17 applications; 23%, 10 applications; and 22%, 18 applications, respectively). This can be compared with the global rate of 12%. By contrast, only 5% of the applications received by

Austria and Ireland were refused (1 and 2 applications, respectively), 7% of those received by England and Wales (17 applications) and 8% of those received by Switzerland (3 applications).

In 57 Central Authorities, all applications had reached a final outcome by the cut-off date of 30th June 2017. However, for others, a high proportion of applications were still pending. In Greece, 8 of the 12 applications received were unresolved at the cutoff date (67%), in Austria 9 out of 20 applications (45%), Colombia 21 out of 48 (44%) and in Sweden 10 out of 25 (40%). (Table- 8)

Annex 4: Outcomes by Central Authority

	Rejected	Voluntary return	Judicial return	Judicial refusal	Access	Pending	Withdrawn	Other	Total
Argentina		2	4				1		7
Armenia							1	1	2
Australia	2	4	24	7		1	3	4	45
Austria	1		1	1		9	5	3	20
Belarus				1	1	2		4	8
Belgium		7	3	2	1		7	3	23
Bosnia and Herzegovina			1	1					2
Brazil	5	4	3	4			7	2	25
Bulgaria		1	3	3			1	3	11
Canada - British Columbia		1	1	2		1	2	1	8
Canada - New Brunswick			1						1
Canada - Ontario	3	2	9	3			4	1	22
Canada - Quebec		4	1				5		10
Canada - Saskatchewan		1				1			2
Chile	1		3	4					8
China (Hong Kong, SAR)			2				1	2	5
China (Macao, SAR)								1	1
Colombia		10		3		21	7	7	48
Costa Rica		1		2			1	3	7
Croatia			2						2
Cyprus		1					1	1	3
Czech Republic		3	13	3			8	1	28
Denmark		1	8	3			2		14
Dominican Republic			10			2		1	13
Estonia			2	3				1	6
Fiji		2		2					4
Finland				1				1	2
France	4	20	18	18	4		6	13	83
Georgia		2		2					4
Germany	3	24	27	21	1	5	22	41	144
Greece					2	8	2		12
Honduras			1	1					2
Hungary		4	6	1			2	1	14
Iceland			2	1					3
Ireland		11	4	2	3	4	2	13	39
Israel	1		8	1			3	1	14
Italy	3	8	10	9			4	13	47
Japan	3	2	8	2			3	3	21

	Rejected	Voluntary return	Judicial return	Judicial refusal	Access	Pending	Withdrawn	Other	Total
Korea, Republic of		1	2			2	1		6
Latvia		2	7	4			2		15
Lithuania		4		7		1	5	1	18
Luxembourg		1	1					2	4
Malta			1						1
Mauritius	1	2			1		1		5
Mexico	10	8	28	11		1	3	7	68
Moldova		1						1	2
Monaco								4	4
Morocco			7					1	8
Netherlands	1	3					5		9
New Zealand	2	3	23	3					31
Nicaragua	3	2			2			5	12
Norway		3	6	5				3	17
Panama								3	3
Paraguay		7	3	6		2	3		21
Peru	1	2	2	1			2	10	18
Poland	1	8	7	17			14	1	48
Portugal	1	6	6	2			2	2	19
Romania	1	17	19	7		7	14	7	72
Russia	1	16		10			8	9	44
Serbia			3	2		2	1	1	9
Singapore		1							1
Slovakia			3	2			2		7
Slovenia		1							1
South Africa		3	3			2	4	1	13
Spain	5	18	24	9	1		20	8	85
Sweden		1	5			10	6	3	25
Switzerland	7	5	9	3			8	8	40
Trinidad and Tobago		1	4						5
Turkey	2	24	1				11	4	42
UK - England and Wales	2	27	121	17	36	4	41	13	261
UK - Isle of Man						1			1
UK - Jersey								1	1
UK - Northern Ireland		1			3		1	1	6
UK - Scotland		6	10	2				7	25
United States		51	81	27	1	42	23	84	309
Ukraine		7	1	4			5	4	21
Uruguay		1	9	1	1				12
Venezuela							1	2	3
Total	**64**	**348**	**561**	**243**	**57**	**128**	**283**	**318**	**2 002**

Table 8

v. Return applications where access was agreed or ordered: Relatively few applications were recorded as ending with an access order or agreement for access. In 2015, 57 applications (3%) of all applications ended this way; the same was the percentage in 2008 and 2003. A notably high proportion of applications received by England and Wales ended in an order or agreement for access (14%, up from 10% in 2008). This amounted to 64% of the 57 return applications ending in access globally. Unlike previous surveys, INCASTAT did not differentiate between court orders for access and access agreements made in return applications.

vi. Withdrawn applications: Percentage of applications that were withdrawn declined to 14% in 2015, compared with 18% in 2008, 15% in 2003 and 14% in 1999. The reasons for withdrawal were not stated as there was no column to record this information in the INCASTAT database. With experience from the previous surveys the reasons recorded were:

- the applicant ended contact with their lawyer or with the Central Authority;
- the taking person had left the Requested State;
- a custody award being made by the Requesting State's domestic court;
- Withdrawal made after early advice regarding the strength of their case.

vii. The reasons for rejection of applications by the Central Authority: Under Article 27 Central Authorities are not bound to accept applications where the requirements of the 1980 Hague Convention are not fulfilled or if the application is otherwise not well founded. For example, if the child involved is over 16 or not located in

the Requested State. In 2015, 64 applications were rejected by the Central Authorities in the Requested State (3% of total applications). This includes one application which was recorded as ‘other’, having different outcomes for different children. This finding confirms the declining trend in the proportion of applications rejected, when compared with 5% in 2008, 6% in 2003 and 11% in 1999. Rejection rates vary between States. As has been highlighted in previous reports, practice regarding rejections may depend on individual Central Authority policy, as well as experience of the 1980 Hague Convention. For example, 21% of applications received by Brazil and Switzerland were rejected (5 and 8 applications, respectively), as were 10 of the 68 received by Mexico (15%).

Data of requesting Central Authorities rejecting applications before even forwarding to the Requested Central Authority is not available.

viii. The reasons for judicial refusal: The 1980 Hague Convention itself provides for certain exceptions or return of the child. In 2015, 243 applications were refused by the courts (12%), compared with 15% in 2008, 13% in 2003 and 11% in 1999. The reasons for refusal were available in 185 of the 243 refused applications.

The most common reason for refusal was because the child was not found to be habitually resident in the Requesting State (19%, 36 applications) followed by Article 13(1)(b) (grave risk of harm) (18%, 33 applications). (Table 9)

The combined reasons for refusal (sole and multiple reasons) in applications received in 2015 and previous Surveys

	1999		2003		2008		2015	
Child not habitually resident in Requesting State	17	17%	27	19%	53	20%	46	25%
Applicant had no rights of custody	13	13%	22	15%	28	10%	13	7%
Art. 12	13	13%	34	24%	46	17%	32	17%
Art. 13(1)(a) not exercising rights of custody	4	4%	15	10%	23	9%	11	6%
Art. 13(1)(a) consent	12	12%	19	13%	16	6%	28	15%
Art. 13(1)(a) acquiescence	6	6%	10	7%	17	6%	16	9%
Art. 13(1)(b)	26	26%	38	26%	91	34%	47	25%
Child's objections	21	21%	26	18%	58	22%	27	15%
Art. 20	0	0%	8	6%	2	1%	2	1%
Other	6	6%	5	3%	8	3%	0	0%
Number of reasons	**118**	**119%**	**204**	**142%**	**342**	**127%**	**222**	**120%**
Number of applications	**99**		**144**		**269**		**185**	

Table- 9

As can be seen from the table above (Table-9), in 2015, 35 children was involved in the 27 applications in which the child's objections were the sole or partial reasons for refusing.

The average age of an 'objecting child' was 11 years with the lowest age being 4 years. (Fig.10)

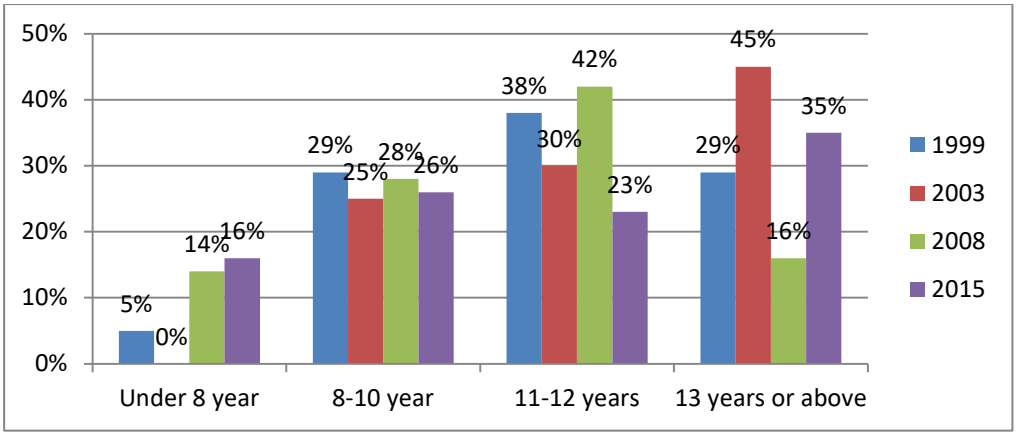

Fig. 10

The refusal of the applications where the taking parent was mother, the most common reason for such refusal was Article 13(b) (27% of applications). Where the taking parent was the father of the child, applications were most commonly refused due to the child not being habitually resident in the requesting state(44% as compared with 23% in applications involving mother as taking parent).

ix. Appeals: In 2015, in 295 applications the matter was taken to Court for appeal, amounting to 31% of the 965 applications which went to court. There is a significant increase compared with 24% in 2008. 240 of these applications involved one level of appeal, 48 availed remedy of second appeal, whereas in 7 cases the matter was taken even in third appeal. Of the 295 applications which were subject matters of appeals, the outcome was known in 267. Of these, 54% ended in a return, 29% in a refusal, 11% were pending and the remaining 6% ended in some other outcome including an order for access or the case being withdrawn by the appellant.

The first instance decision was recorded in 285 appealed applications, of which, 56% ended in a return and 44% in a judicial refusal. In 67% the same outcome was reached on appeal as at first

instance. This can be compared with 80% in 2008. For applications ending in a judicial return, 71% of appeals confirmed this decision, compared with 78% in 2008. Interestingly, where applications ended in a judicial refusal, only 48% of appeals confirmed the first instance decision, a significant decrease from the 82% recorded in 2008.

x. Timing: Time is a key issue when considered in reference to successful operation of the 1980 Hague Convention. Article 1(a) states that the object of the 1980 Hague Convention is to secure the prompt return of children wrongfully removed to or retained in another Contracting State. Article 2 instructs Contracting States to use 'the most expeditious procedures available' to attain the 1980 Hague Convention's objectives. Furthermore, Article 11(2) provides that applicants or Central Authorities of the Requesting State have the right to request the reasons for delay in disposal of their application when decision is taken within six weeks from the date of the commencement of the proceedings.

It is an open question as to whether Article 11(2) can be construed as applying from the time of receipt of the application by the requested Central Authority rather than from the commencement of court proceedings, since the French version of Article 11 refers it to the 'Court proceedings'. Even EU members State is under the stronger obligation to complete the Court Proceedings within the 6 weeks which is the imposed upon them by Article 11 (3) of the Brussels II-a Regulation. However, even it is confined to Court Proceedings, it is still to be determine whether it includes appeals also or not.

The average number of days taken to arrive at a final settlement was 164 days, from the date the application was received, compared with 188 days in 2008. This marks reversal of the trend of previous surveys in which applications were taking more time to conclude. The time taken to reach a final decision varied considerably depending on the outcome. The figure available (Fig. 11) shows that average time taken from the receipt of the application by the Central Authority until the final agreement or court decision, including any appeal.

The average number of days taken to reach certain outcomes in 2015

	Voluntary Return	Judicial return	Judicial refusal
Mean	108	158	245
Minimum	3	4	12
Maximum	693	808	867

Fig. 11

As in previous surveys, voluntary returns were resolved most quickly, followed by judicial returns and then judicial refusals. For applications ending in judicial return, those which were resolved with the consent of the parties took an average of 104 days compared with 150 days for returns which were ordered without consent. Additionally, 128 applications remained pending on the cut-off date of June 30th, 2017. This means that these applications would have taken at least 18 months and up to two and a half years to resolve (547-913 days). Voluntary returns, judicial returns and judicial refusals were generally all resolved more quickly than in 2008 but

more slowly than in 2003 and 1999. In respect of the applications ending in judicial orders for return, those concluded with the consent of the parties took an average of 104 days, compared with 163 days in 2008 and 85 days in 2003. Judicial returns without the consent of the parties took an average of 150 days compared with 204 days in 2008 and 143 days in 2003. Return applications received in 2015 that ended in an order or agreement for access, took an average of 142 days to resolve, compared with 154 days in 2008 and 188 days in 2003.

Of the applications that were decided in court, average time taken to reach a decision was 179 days, compared with 206 days in 2008. (Fig. 12)

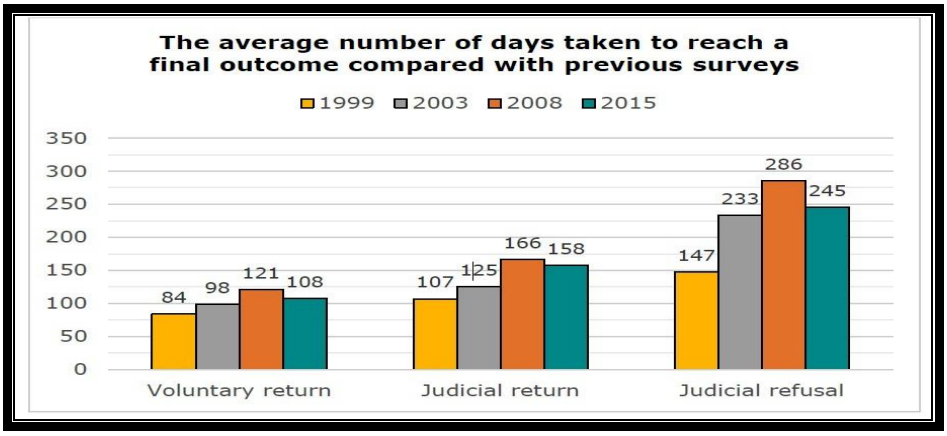

Fig. 12

However significant difference was found amongst Contracting States in the time taken to determine applications.

The Average Time Taken To Resolve Applications And The Central Authorities Which Received Them

State	Average number of days from receipt by Central Authority to final outcome	Number of applications for which information was available
Argentina	75	6
Armenia	55	1
Australia	176	32
Austria	99	2
Belgium	211	7
Bosnia and Herzegovina	70	2
Brazil	297	23
Bulgaria	280	7
Canada - British Columbia	175	7
Canada - New Brunswick	71	1
Canada - Ontario	139	17
Canada - Quebic	96	9
Canada - Saskatchewan	11	1
Chile	318	8
China (Hong Kong, SAR)	85	3
Colombia	231	15
Costa Rica	433	4
Croatia	278	2
Cyprus	303	1
Czech Republic	185	28
Denmark	82	14
Estonia	295	5
Finland	91	1
France	177	55
Georgia	250	3
Germany	163	55
Greece	394	3
Honduras	269	2
Hungary	136	11
Ice Land	138	3
Ire Land	180	25
Israel	144	11
Italy	88	8
Japan	182	18
Latvia	101	14
Lithuania	221	13
Luxembourg	75	3
Malta	410	1

Mexico	170	64
Moldova	18	1
Morocco	357	8
Netherland	157	6
New Zealand	100	31
Nicaragua	28	3
Norway	89	15
Panama	148	1
Paraguay	412	6
Peru	321	10
Poland	151	44
Portugal	143	16
Romania	282	34
Serbia	212	6
Singapore	8	1
Slovakia	380	5
Slovenia	436	1
South africa	77	10
Spain	180	42
Sweden	90	7
Switzerland	134	34
Trinidad and Tobago	118	5
Turkey	153	26
UK - England and Wales	90	228
UK - Northern Ireland	168	6
UK - Scotland	87	20
Ukrain	300	15
United Stated	208	139
Uruguay	129	11
Venezuela	203	3

The Central Authorities of few States (like, Denmark -82 days, 14 applications, England and Wales -90 days, 228 applications, Norway -89 days, 15 applications, Scotland -87 days, 20 applications and South Africa -77 days, 10 applications), quickly resolved the applications received by them where as on the other hand, applications received by the Central Authorities of some States like Brazil, Peru and Ukraine took much longer to conclude (297 days, 23 applications; 321 days, 10 applications, and 300 days, 15 applications, respectively). (Table-13)

The Number of Applications Taking Over 300 Days To Resolve Compared With Previous Surveys

	1999	2003	2008	2015
Voluntary return	8	7	21	17
Judicial return	12	25	77	67
Judicial refusal	6	45	101	54
Total	**26**	**77**	**199**	**138**

Table 14

In 2015 Out of the total applications received, 185 applications (i.e. 15% of total application received) took over 300 days to resolve through voluntary returns(17 applications), judicial returns (67) and judicial refusal(54). The table above comparatively analyses the applications taking over 300 days to be resolve. It shows the number of applications ending in each outcome (i.e as voluntary return, judicial refusal and judicial return). (Table14)

Of all outcomes, voluntary returns were, on average, resolved the more quickly with 61% concluded in 90 days or fewer. This can be compared with 58% in 2008, 60% in 2003 and 67% in 1999. Similarly, looking at applications resolved in fewer than 31 days, in 2015, 31% were resolved in this time compared with 24% in 2008, 34% in 2003 and 42% in 1999. In 2015 only 36% of applications ending in a judicial order for return were resolved in fewer than 90 days compared with 43% in 2008, 51% in 2003 and 59% in 1999.

The Number of Days Taken To Reach a Judicial Order For Return

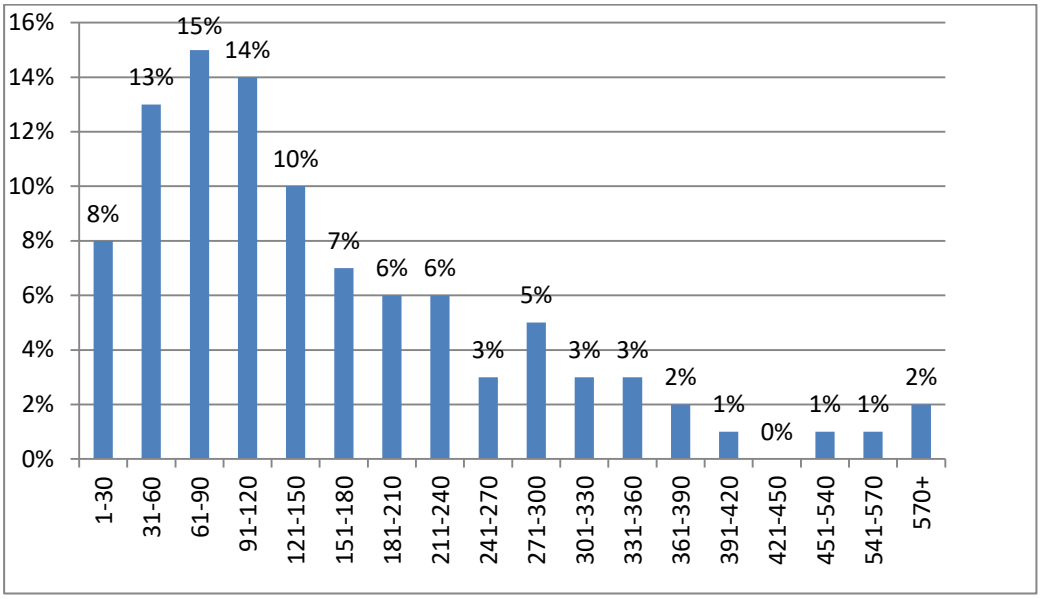

Fig. 15

In 2015, 87% of judicial returns were ordered by the court with in a period of 300 days and the rest 13% of judicial return orders were decide between the period of 300-570 plus days. The given figure is a detailed analysis of the number of days taken to reach a judicial order of return in year 2015. (Fig. 15)

Annex 8: The time taken for the Central Authority to send applications to court and the time the court then took to finalise the application

State	Average number of days taken to send to court	Number of applications	Average number of days taken from receipt by the court to final decision	Number of applications
Argentina	117	5	49	2
Australia	54	35	123	32
Belarus	8	7		
Belgium	126	6	177	3
Bosnia and Herzegovina	2	3	68	2
Brazil	237	33	174	10
Bulgaria	103	12	214	6
Canada - British Columbia	77	5	164	4
Canada - New Brunswick	54	1	17	1
Canada - Ontario	64	6	45	4
Canada - Quebec	9	3	59	5
Canada - Saskatchewan	244	1	451	1
Chile	175	11	168	7
China (Hong Kong, SAR)	7	3	78	3
China (Macao, SAR)			0	1
Colombia	235	13	224	7
Costa Rica	62	9	375	4
Croatia	84	2	194	2
Cyprus	290	1	13	1
Czech Republic	62	23	133	22
Denmark	3	15	79	14
El Salvador			21	1
Estonia	36	6	258	5
Finland	19	1	72	1
France	61	62	125	45
Georgia	19	2	298	2
Germany	93	55	82	49
Greece	175	7	183	3
Honduras	236	2	33	2
Hungary	113	5	90	5
Iceland	30	3	108	3
Ireland	49	34	140	24
Israel	93	6	100	6
Italy			95	7
Japan	132	14	94	14
Latvia	32	15	70	14
Lithuania	118	8	114	7
Luxembourg	65	1	131	1
Malta	50	1	360	1
Mexico	61	68	137	50
Morocco	162	8	195	8
Netherlands	72	5	85	2
New Zealand	18	27	87	28
Nicaragua	234	1		
Norway	19	18	69	15
Panama	65	2	50	1
Paraguay	31	3	268	13
Peru	138	18	225	9
Portugal	44	16	134	12
Romania	119	36	201	30
Serbia	9	9	203	6
Singapore	75	1		
Slovakia			320	1
Slovenia	14	1	422	1
Sweden	140	1		
Switzerland	46	13	87	19
Trinidad and Tobago	70	4	62	4
Turkey	143	36	135	6
UK - England and Wales	13	31	76	28
UK - Northern Ireland	12	5	184	5
UK - Scotland	65	16	43	14
United States	142	143	104	109
Ukraine	261	12	191	7
Uruguay	7	12	123	11
Venezuela	35	6	188	3
Total	**93**	**908**	**125**	**703**

Table 16

Some Central Authorities sent applications to court very quickly, even if they received a large number of applications. Notably, Denmark took an average of 3 days (information available in 15 applications), Uruguay 7 days (12 applications), England and Wales 13 days (31 applications), New Zealand 18 days (27 applications) and Norway 19 days (18 applications). By contrast some Central Authorities took longer to send applications to court. In Ukraine the average was 261 days (information available in 12 applications), in Brazil 237 days (33 applications), in Colombia 235 days (13 applications) and in the USA 142 days (143 applications). The time that the national courts took to conclude applications also varied. Looking at Central Authorities that were able to provide information on more than 10 applications, cases were disposed of quickly by the courts in: United Kingdom – Scotland at an average of 43 days (14 applications), Norway in 69 days (15 applications), Latvia in 70 days (14 applications), England and Wales in 76 days (28 applications), Denmark in 79 days (14 applications) and in Germany 82 days (49 applications). By contrast, the courts in Paraguay took 268 days, on average, to resolve 13 applications and, in Romania, 201 days for 30 applications. (Table 16)

The Average Number Of Days Taken To Conclude An Application Decided On Appeal

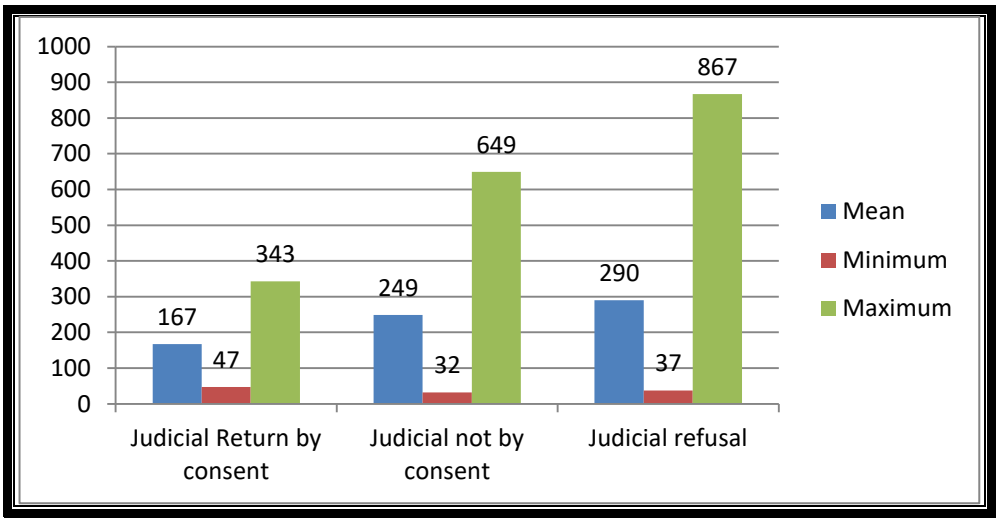

Fig. 17

The Figure above compares the average(mean) time taken to reach different outcomes. The average number of days taken for judicial return by consent was 167, judicial return not by consent were decided in 249 days on an average and judicial refusal took 290 days on an average to be decided upon (Fig. 17).This can be compared with 2008 when it took an average of 280 days to reach a judicial return by consent, 281 days for a judicial return not by consent and 369 days for a judicial refusal.

Appealed cases are likely to have taken longer to conclude, both due to time taken in more than one court and the potential of complexity in the case. These decisions may skew the overall average time taken to reach a final settlement. The average time taken to reach a first instance decision from the date the application was received by the Central Authority was 179 days which is higher than 168 days in 2008. Applications then took further 108 days on an

average to reach a final decision on appeal which is quicker than the 141 days taken, on average, in 2008. Overall, applications decided on appeal took an average of 266 days to conclude, from the date these were received by the Central Authority, compared with 324 days in 2008.

2.10 APPLICATIONS FOR ACCESS TO CHILDREN

The survey of 2015 highlighted that the access application made up 14% of all to 2652 applications under the 1980 Hague Convention (2270 for return and 382 for access). More applications were received by USA followed by England and Wales.

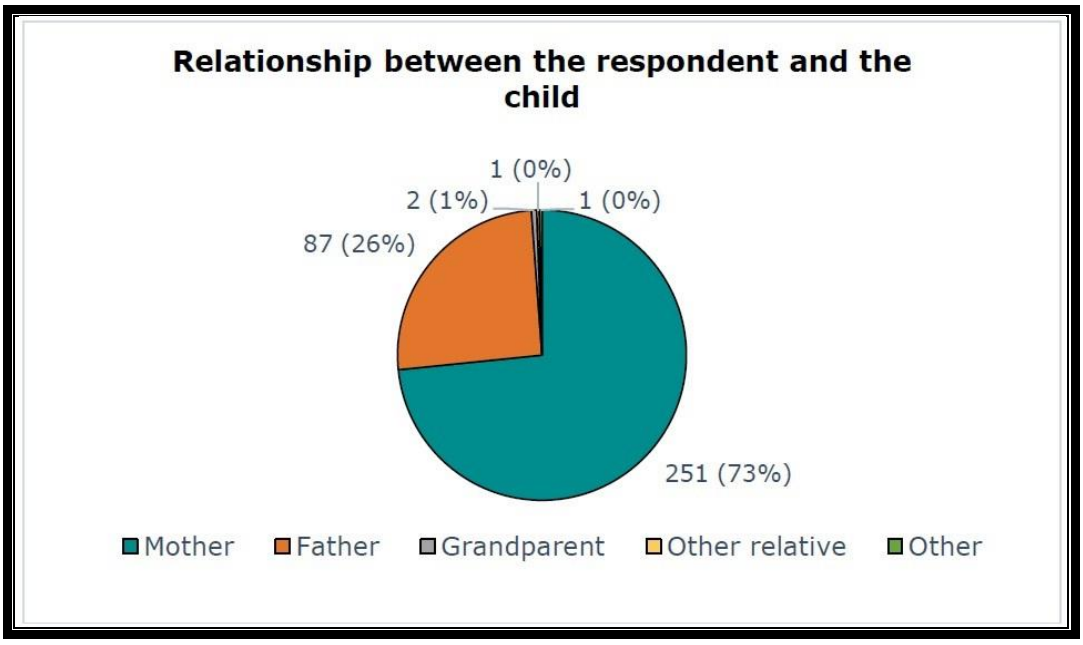

Fig. 18

Through survey looking at States which received over 10 applications, some received a significantly high proportion involving respondent mothers. In Japan, 94% involved respondent mothers (17 out of 18 applications in which outcomes were known), 84% in

England and Wales (46 out of 55 applications), 82% in Switzerland (14 out of 17 applications) and 81% in France (21 out of 26 applications). Conversely, other States received high numbers of applications in which the respondent was the father. 41% of applications received by USA involved respondent fathers (26 out of 63 applications) and 34% in Germany (10 out of 29 applications). (Fig 18)

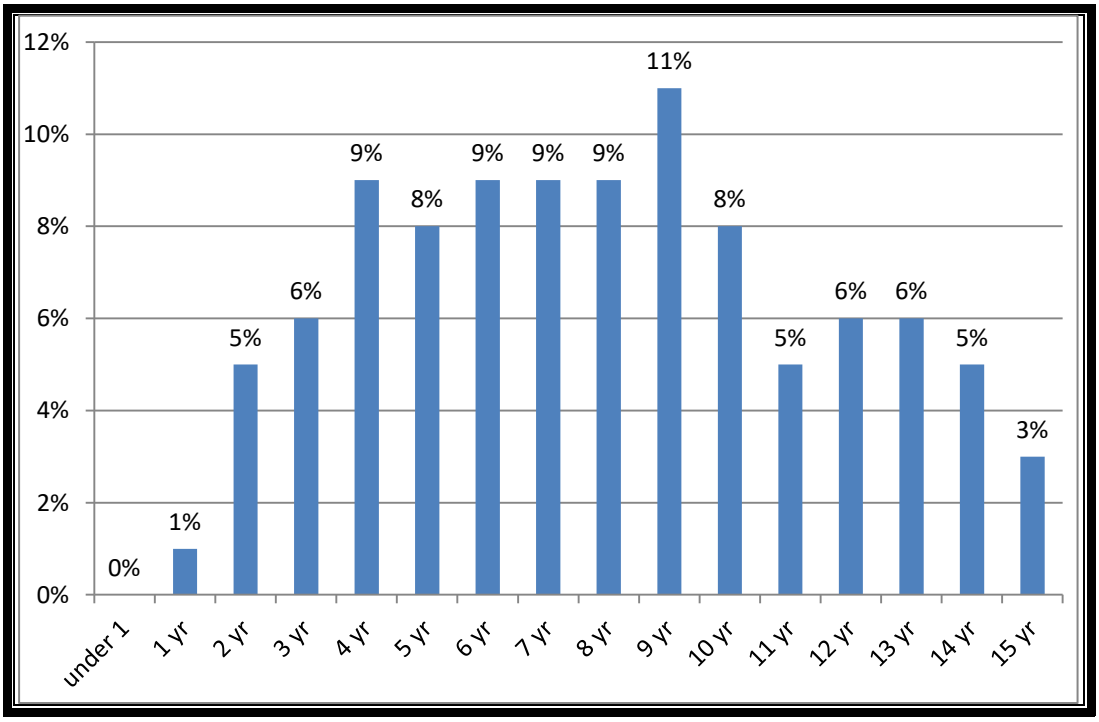

Fig. 19

In 2015 average age of a child involved in an access application was 8.0 years compared with 7.8 years in 2008 and 7.9 years in 2003. As in previous surveys, if the respondent was the mother of the child the average age was lower (7.5 years) whereas in the case of father, average age of child was (9.2 years). In 2008 the average age were almost identical at 7.5 years and 9.1 years, respectively. (Fig. 19)

- **Outcome Of Access Application**

The overall rate at which access was agreed or ordered was 27% in 2015, comprising 11% access agreements and 16% access orders. This can be compared with 21% in 2008 and 33% in 2003. A high proportion of applications was withdrawn (19%) or ended under the reason of 'other' outcomes (31%). (Table. 20).

The outcomes of access applications received in 2015

	Frequency	Percentage
Rejection	13	4%
Access agreed outside of court	34	11%
Access judicially granted	50	16%
Access judicially refused	6	2%
Pending	54	17%
Withdrawn	61	19%
Other	96	31%
Total	**314**	**100%**

Table 20

The reasons for which they ended under heading 'Other' are:

- parent inaction
- the child was not traced
- the child reaching the age of 16
- being traced to another State
- the parent being unable to continue without legal aid. (Table 20)

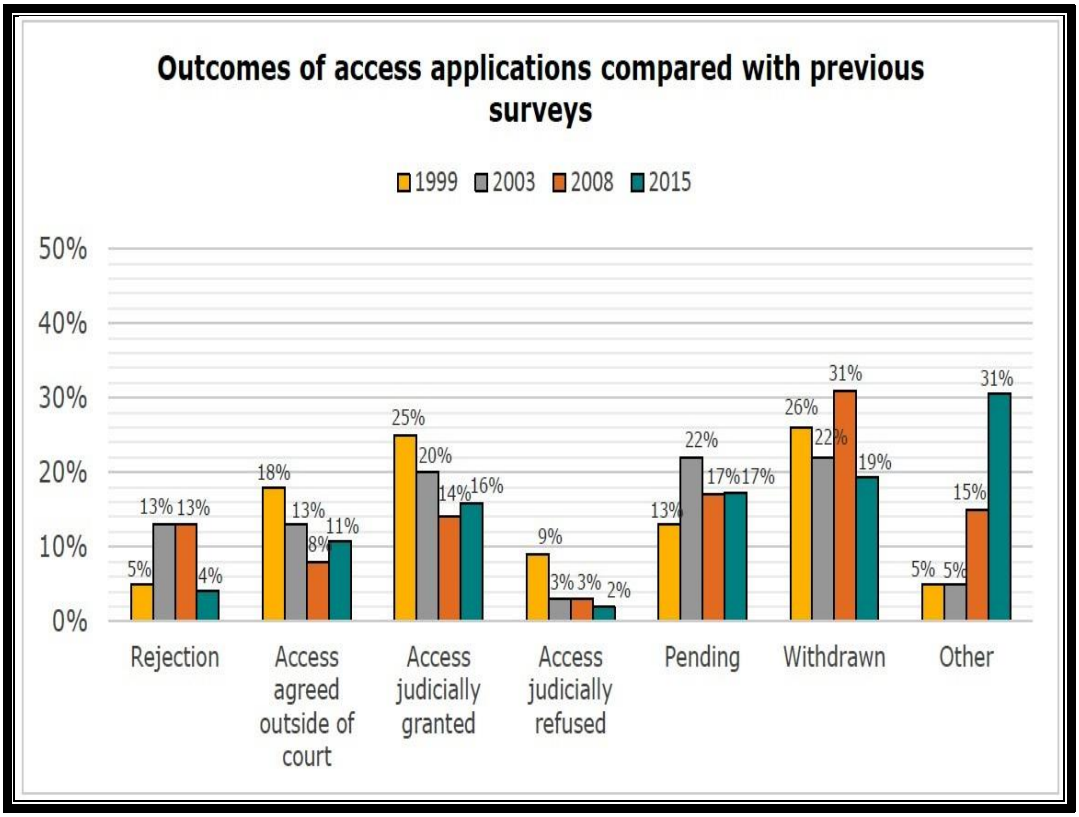

Fig 21

For the first time, percentage of applications ending in order or agreement for access increased in comparison with the previous survey (11% compared with 8% in 2008). However, it is still a decrease on the 13% recorded in 2003 and 18% in 1999. A high proportion of applications ended in 'other' outcomes. However, 49 of applications falling under the head 'Other' (16%) of all applications ended due to the inaction of the applicant. Arguably, these applications could be placed in a similar category to those which were officially withdrawn. If these 'other' applications are added to the 'withdrawn' applications the outcomes are similar to the 2008 survey, with 19% ending in a withdrawal and 31% in other outcomes. In 2015, 16% of applications decided in court ended in an order for access (50 out of 57 applications). This can be compared with 14% in 2008, 20% in 2003 and 25% in 1999. (Fig. 21)

- **Cases decided under the 1980 Hague Convention and under domestic law**

Since there has been different interpretations of Article 21 of 1980 Hague Convention in respect of imposition of any upon the Court, thus reference can be raised that some access applications were judicially resolved as a 1980 Hague Convention cases and others under domestic law. 50 applications ended with a judicial order for access out of which 68% were made under the 1980 Hague Convention and 32% under domestic law.

Access applications decided under the 1980 Hague Convention and domestic law

	Access judicially granted as- Hague application	Access judicially granted as- domestic law	Access judicially refused as- Hague application	Access judicially refused as- domestic law	Total
Belgium	1				1
Bosnia and Herzegovina		1			1
Chile	1				1
France		1			1
Japan	1				1
Lithuania		1			1
Mexico	12			1	13
Serbia	1				1
Switzerland	1				1
Turkey	1				1
Ukraine	1				1
UK- England and Wales		9			9
UK- Scotland			1		1

United States	6				6
Uruguay	1				1
Total	26	12	1	1	40

Table 22

In some States like UK- Scotland, applications were decided only under domestic law, whereas in some countries like Mexico the applications were only resolved as a 1980 Hague Convention case. However, in most of the countries access cases were decided both under domestic law and under the 1980 Hague Convention. (Table 22)

In 2015, 4% of access applications (13 applications) were rejected by Central Authorities. This is considerably less than the 13% rejected both in 2008 and 2003 but broadly in line with the 5% in 1999. Detailed reasons for rejection were not recorded in the INCASTAT database, though each of the 13 applications were rejected on the ground falling under Article 27.

- **Appeals And Timing**

The average number of days taken to reach different outcomes in access applications in 2015

	Access agreed outside court	Access judicially granted	Access judicially refused
Mean	97	291	266
Minimum	21	49	139
Maximum	178	658	393

Table 23

Of the 57 applications decided in court, 5 decisions were appealed (9%). This finding is in line with the 9% recorded in 2008

and 11% in 2003. The average number of days to arrive at a final settlement in access applications was 254 days, compared with 339 days in 2008. The average time taken to reach a final outcome has decreased significantly since the 2008 survey. An agreement for access took an average of 97 days, compared with 309 days in 2008, a judicial decision for access took 291 days compared with 357 days in 2008 and a judicial refusal took 266 days compared with 276 days in 2008. (Table 23)

Average number of days taken to conclude an order for access

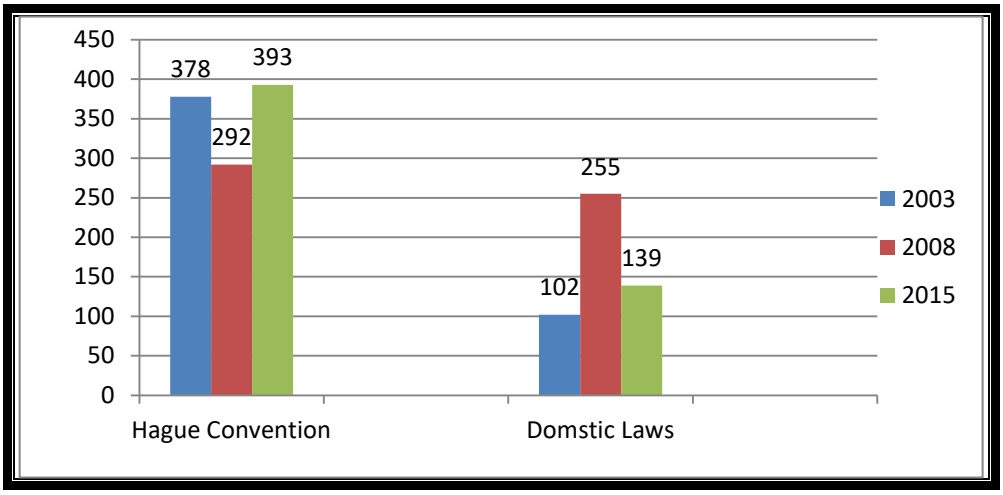

Fig. 24

In 2015 it took an average of 139 days to conclude an order made under domestic law and 393 days to conclude an order under the 1980 Hague Convention. The table given compares these findings with those in 2008 and 2003. (Fig. 24)

Average number of days taken to conclude an order refusing access

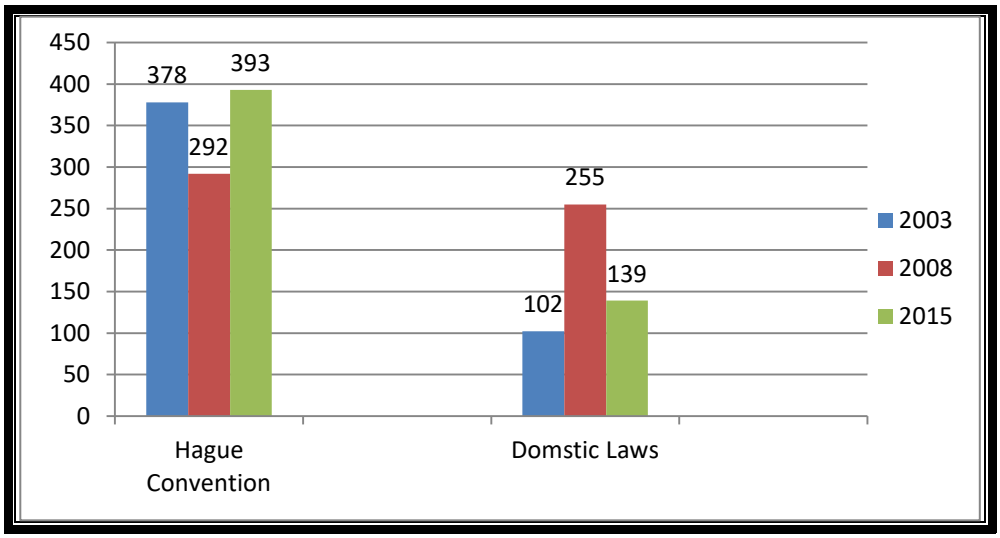

Fig. 25

In 2015, Central Authorities took an average of 119 days to send an access application to court and the courts took further 173 days on average to pass a final order. In the 5 appealed applications, it took an average of 368 days for order at a first instance and 433 days to reach a decision on appeal, from the date application was received by the Central Authority. All of the appeals in 2015 ended in a final order for access. In 2008, three applications ended in this way and these took 255, 582 and 638 days to conclude. The average number of days taken to conclude an order refusing access under domestic laws was 139 as compared with 393 average numbers of days taken to conclude such application under Hague Convention 1980. The figure above is a comparative analysis of average number of days taken to conclude an order refusing access. (Fig. 25)

2.11 CONCLUSIONS AND RECOMMENDATIONS OF SPECIAL COMMISSION (2017):

"The overall findings of the 2015 survey are encouraging. However, it cannot be concluded that the 1980 Convention is working

well in all respects. The access provisions clearly need re-visiting. Although the speedier disposals of return applications as evidenced by the 2015 survey is a positive development, further improvements are required if the goal of prompt disposals of applications is to be truly met.

(1) Prompt Return: The prompt return of removed children is essential to the effective operation of the 1980 Convention. Each day that the child remains abducted from its place of habitual residence has repercussions for the child and contributes to the escalation of the conflict between the parents, the erosion of contact between the child and the left-behind parent (if it has not been severed altogether), and the child's integration into the place to which it has been removed. The passage of time may cause the child to suffer once again and severe emotional instability at the time of return. Besides the harm that delay in the resolution of cases can cause to the child and the parents, it also makes it more difficult for judges to administer the 1980 Convention, as the passing of time complicates the assessment and application of key concepts under the Convention, such as habitual residence, custody, grave risk, and settlement of the child.

(2) To Follow Good practices: Good practices to ensure prompt procedures should be followed to deal with such cases in three stages, which has been summarized in the recommendation of the meeting as here below:

(a) At the Central Authority phase:

- Sufficient resources should be allotted to Central Authorities, with the presence of qualified, and if the volume of cases requires, dedicated Central Authority

staff who deal only with 1980 Convention applications and related issues.

- Acceptance of the requesting State's application form or the Hague Conference Model Application Form.
- Acceptance of return applications sent electronically, allowing the originals (if and when needed) to be sent subsequently by mail.
- Where information in the application is incomplete, beginning to process the application while informing the requesting State of the additional information that is needed.
- To avoid delay where efforts are made to obtain the voluntary return of the child, either:
  (1) Initiating court proceedings at the same time as the voluntary return efforts, or
  (2) Starting court proceedings after a relatively short deadline, if voluntary return efforts are not successful.
- Providing regular training to Central Authority staff, including updates on legal developments related to the 1980 Convention.

(b) At the judicial phase:

- 'Concentration of the jurisdiction' of courts in respect of applications under the 1980 Convention.
- The judges who decide return applications are specialists in family law, and in some cases international child abduction.

- Either requiring or recommending legal representation in return proceedings.
- The availability of reduced rate or free legal assistance, most often based upon eligibility.
- The availability of such legal assistance also for appeals and enforcement proceedings (this can be subject to an assessment of the likelihood of success of an appeal for which the assistance is sought).
- Adopting either legislation or procedural rules to ensure that judicial and administrative authorities act expeditiously in return proceedings.
- Where the child is to be heard, having procedures in place to prevent this from delaying the process unnecessarily, for example: determining whether hearing the child is desirable at an early stage in the proceedings; making such arrangements on an urgent basis; or, scheduling the child's testimony to be given in conjunction with the hearing on the return application.
- Appeal at the first level being available by right, with expedited procedures.
- Designating at least one judge for the International Hauge Network Judge.
- Training of judges including participation in judicial seminars.

(c) At the enforcement phase:

- Not allowing the merits of the proceedings for return to be reviewed in enforcement proceedings.

- The availability of coercive measures (which vary by State) to enforce a return order"

(3) Mediation: Mediation is an important tool in the return process, as it can result in agreement between the taking parent and the left-behind parent on the return of the child to the State of habitual residence without the need for a litigated decision. At the same time, there is a risk that mediation efforts, if not managed carefully, can unnecessarily delay the return process. A balance needs to be found between exploring the possibility of a mediated outcome while ensuring that return is achieved in an expedient manner. The Guide to Good Practice on Mediation underscores that "mediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced". Mediation should be suggested at an early stage, and its suitability should be assessed before attempting it.

(4) Use of the mechanism and consideration of other procedures, such as the use of Articles 8(2)(f) and 14 of the 1980 Convention: Special Commission encourages discretion in the use of the mechanism and consideration of other procedures, such as the use of Articles 8(2)(f) and 14 of the 1980 Convention as well as direct judicial communications, which may make it unnecessary to rely on Article 15."

Thus, the 2017 Special Commission adopted the following Conclusions and Recommendations with regard to addressing delays under the 1980 Convention:

"The Special Commission acknowledges that globally there is still a severe problem of delays that affect the efficient operation of the Convention. The Special Commission acknowledges that some

States have made progress in reducing delays and encourages States to review their procedures (including, where applicable, at the Central Authority, judicial, enforcement and mediation / ADR phases) in order to identify possible sources of delay and implement the adjustments needed to secure shorter time frames consistent with Articles 2 and 11 of the Convention. The Special Commission welcomes Preliminary Documents Nos. 10 A, 10 B and 10 C, which present procedures that have been implemented by States to reduce delays. It invites the Permanent Bureau to complete and amend them in the light of the comments agreed upon at the Meeting. The final version of these documents should be uploaded on the HCCH website and recommended as helpful tools for consultation by State authorities that are reviewing their implementing measures."

Source:

https://www.google.co.in/amp/s/europeanfathers.wordpress.com/2017/10/17/statistical-analysis-of-2015-hague-convention-applications-on-international-child-abduction-summary-provisional-global-report/amp/

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CHAPTER 2D

INTERNATIONAL STUDIES/RESEARCH ON RELATION BETWEEN DOMESTIC VIOLENCE AND INTER-COUNTRY PARENTAL CHILD REMOVAL

2.12 During the course of deliberations and research, two important studies highlighting correlation between inter-country parental child removal and domestic violence, were found which suggest that the phenomena of inter-country parental child removal and domestic violence cannot and should not be seen in isolation from each other.

The first study **'Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases'** has been conducted by the University of Berkeley in association with University of Minnesota and University of Washington Schools of Social Work and staff of the National Institute of Justice. The research project was undertaken in collaboration with National Advisory Board in the recruitment, analysis and dissemination of the research, headed by Hon'ble Barbara Madsen, Chief Justice, Washington State Supreme Court; Hon'ble Ann Schindler, Judge, Washington State Court of Appeals, amongst others.

Transnational relationships have become increasingly common yet complicated over the last decades. Women whose partners are abusive often turn to family members for assistance to cope up with abuse and to seek solace. Sometimes, returning to family means leaving one nation for another, which may invoke international

treaties. As a result, a woman who has fled from abuse may be held responsible for unlawfully removing/abducting her children and potentially being subjected to legal proceedings related to child abduction.

A mother who flees with her child may have few options to ensure her own and her child's safety owing to violence; yet she remains vulnerable to being legally treated as an 'abducting parent'. This report focuses on the situation of women who experienced abuse in another country and came to the United States in an effort to protect themselves and their children, but who, then faced civil actions in U.S. state and federal Courts under international legal agreements.

Battered mothers who fled across borders to the U.S. to receive help from their families were often victims of life threatening violence and their children were frequently, directly or indirectly, exposed to the father's violence. The women sought but received little help from foreign authorities or social service agencies once they came to the U.S. In fact, these mothers, most of whom were U.S. citizens, often faced U.S. Courts that were unsympathetic to their safety concerns and subsequently sent their children back to the custody of the abusive fathers in the other country, creating potential risks for the children and mothers.

2.12.1 Summary of the said report is as under:

1. Mothers and children often experienced severe violence (physical and sexual assaults, coupled with life threatening behaviors) from the left-behind fathers who filed the Hague Convention petitions to have their children returned. The children in these homes were also often assaulted physically or exposed to extensive violence inflicted on their mothers

resulting in child's exposure to violence. The majority of mothers in this study voluntarily resided in the other country but a significant number of mothers (40%) reported that their choice of residence was coerced or result of deception by their husbands.

Such women even after leaving their violent husbands and receiving custody of their children from the other country's Court, continued to face threats from their husbands.

2. Mothers were unable to access resources in the other country, so they left with their children to seek safety and support of family members in the U.S. Most mothers reported multiple attempts to seek informal and formal help in the other country, prior to leaving that country, with little success and sometimes resulting in further reinforcement of their violent husbands' positions by the authorities. The process of leaving for the U.S. was difficult for most women. In almost all cases leaving the other country for the U.S. was a way to obtain the emotional and financial support of family members residing there.
3. U.S. authorities and Courts were not receptive to mothers' safety concerns. Majority of women in this study had their children returned to the other country by U.S. Courts and most of the time this meant return of their children to a life with their violent husbands. This often results in children already exposed to domestic violence, suffering physical and psychological harm by living with a violent father.
4. Mothers and children faced great hardships after a Hague Convention decision. Fathers used U.S. Courts' Hague

decisions to leverage their position in custody cases upon return of their children to their habitual residence. Women and children faced hardship when they returned, with many women unable to work in the other country because of their immigration status. Most of them subsequently became victims of renewed violence or threats by the fathers on their return. Neither a Court order effecting return of child nor a voluntary undertaking aimed at protecting them and/or their children upon return to the other country were implemented.

5. Legal fees and representation were major barriers for women responding to the Hague Convention petitions. Mothers did not have access to the same recourses to afford legal representation as did left-behind fathers. Fathers were more often represented by Attorneys in the U.S. Department of State's Attorney Network who were likely to have access to larger firm resources. Fathers could receive additional U.S. government assistance in locating their child, travelling to the U.S. for Court appearances and in preparation of their attorneys.
6. The Hague Convention decisions have not considered two decades of research on child's exposure to domestic violence when deciding on grave risk. Analyses of published judicial decisions reinforce both mothers' and Attorneys' views that children exposed to extensive domestic violence by fathers against their mothers are seldom considered by U.S. Courts as at grave risk of physical or psychological harm.
7. Safety for battered mothers and their children facing the Hague petitions requires training for Attorneys and Judges on both domestic violence and the law surrounding the

Hague Convention cases. There is need for greater awareness among and training of Attorneys and Judges in three primary areas:

(i) the meaning of all Articles in the Convention, including exceptions;

(ii) the social science literature on domestic violence and the effects of child exposure to abuse in the family; and

(iii) the experiences of mothers and children before they leave for the U.S. and then after Hague case decisions are made .

It is pertinent to mention here that this research report has been submitted to the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. This report has not been published by the Department. Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

2.12.2 The United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law circulated a Draft Guide for Article 13(b) and related draft documents circulated for comments prior to the October 2017 meeting of the Seventh Special Commission on the 1980 Hague Child Abduction Convention at The Hague. Eight Letters were submitted to the United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law by the following :

1. Dr. Adrienne Barnett, Lecturer in Law, Director of Undergraduate Admissions, Brunel Law School ,
2. Pamela Brown, Director, Bi-National Project on Family Violence, Texas RioGrande Legal Aid, Inc. and Joan Meier,

Esq., Founder and Legal Director, Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) ,

3. Carol S. Bruch, Esq., Distinguished Professor Emerita, University of California Davis School of Law ,
4. Jacquelyn Graham (Abbott), the taking (protective) parent in Abbott v. Abbott, in which the United States Supreme Court held that a ne exeat order establishes rights of custody ,
5. Paula Lucas, Founder and Executive Director, Americans Overseas Domestic Violence Crisis Center ,
6. Lynn Hecht Schafran, Esq., Director, National Judicial Education Program, Legal Momentum ,
7. Sudha Shetty, Esq., Assistant Dean for International Partnerships, Director, Hague DV Project, Goldman School of Public Policy, University of California Berkeley
8. Jeffrey L. Edleson, Ph.D., Dean and Harry & Riva Specht Chair in Publicly Supported Social Services, School of Social Welfare, University of California Berkeley , Merle H. Weiner, Esq., Philip H. Knight Professor of Law, University of Oregon School of Law

2.12.3 The comments offered in these letters have been summarized below:

- The entrapment and fear generated by coercive control are the cumulative effects of an ongoing course of conduct, experienced as chronic rather than episodic. The psychological, emotional and verbal abuse can have even more detrimental effects on women and children than physical violence.

- Living with domestic abuse can be extremely harmful to children leading to the devastating physical, psychological, emotional and developmental harm upon children living with domestic violence.
- The repeated invocation in the draft Guide to ‘interpret and apply the Article 13(b) exception in a restrictive manner’ could cause untold harm to children and victims. Emphasizing the ‘exceptional’ nature of the defense encourages Courts, to minimise, normalise and ignore allegations of domestic violence, thereby colluding with the abuser.
- Promoting a restrictive approach can encourage member States to downgrade or ignore domestic violence allegations, thereby undermining the increased awareness of the nature and effects of domestic violence that the draft Guide ostensibly encourages.
- The draft Guide suggests, by way of good practice, ‘the need to balance the objectives of the Convention by ensuring the prompt return of the child to the State of habitual residence. However it also recognizes that, there may be circumstances where returning a child to it’s State of habitual residence could pose a grave risk’. Speed should not take priority over the proper assessment of risk and consideration of the safety and well-being of the child and the taking parent. The emphasis throughout the draft Guide on speed and limiting the Court’s enquiry may well encourage an automatic and mechanical approach.
- Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children

and on the long-term general objective of preventing international child abduction, but also in the short-term best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done by taking in consideration the entirety of each individual tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or 'effective' evaluation of the child's situation in the specific context of the return application can provide such justice.

- Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on increase as litigation or delay tactic on the part of taking parents are due to the limited exceptions available under the Convention. Such an assertion, based on 'anecdotes' from unnamed officials and caseworkers, with no evidence base, should have no place in a Guide of such importance and should be removed. It also works directly against the interests of children by encouraging a culture of suspicion against mothers who raise allegations of domestic violence.
- States parties to the Hague Convention adopt different procedures and standards of proof when it comes to adjudicating on disputed allegations raised as a basis for an Article 13(b) defense. This area is likely to be where the greatest inconsistencies lie. It is, therefore, disappointing that the draft Guide has left it to individual member States to determine their own procedures and burden of proof, thereby failing to achieve its stated primary objective.

- It is difficult enough for victims of domestic violence to prove the abuse on the ordinary civil standard. A higher standard of proof raises an almost insurmountable burden for victims of domestic violence and should be strongly discouraged by the draft Guide, which should suggest the general civil standard as good practice.
- In a Guide to the interpretation and application of the ‘grave risk’ defense, very little guidance is given on the assessment of risk. It is encouraging that the draft Guide approves the use of expert opinion/evidence to assess whether there is a grave risk of harm or an intolerable situation. However, the assessment of risk should be reflected in the entirety of the Guide and should take precedence, both sequentially and substantively, over the continuous promotion of ‘protective measures’.
- In order to respond appropriately and protectively to the experiences of victims and children, we need to place risk at the forefront and heart of the proceedings by focusing on the totality of the abuse and on the strategies and patterns of behaviour of abusers. It first needs to be recognized that, far from the abuse diminishing when partners separate, women are at an increased risk, particularly from controlling abusers, when they leave the family home or have recourse to the legal system. Coercive control can persist and even escalate after victim and perpetrator have separated, because a primary aim of coercively controlling men is to keep the relationship going at all costs, and children are frequently the nexus to enable them to do so.

- If member States want to avoid sending the message that flight from domestic violence is more objectionable than the domestic violence itself, **then Courts must not expeditiously return children in the face of serious allegations of domestic violence**. A first step to ensure that 'the Hague Convention, which was designed to protect children from harm, should not become an instrument for causing them harm' is to promote a better understanding amongst Courts and professionals of the nature, dynamics and effects of domestic violence, including coercive control.
- Continuous and compulsory training on domestic abuse for Judges involved in the Hague Convention proceedings delivered by specialist domestic violence services should go some way to enable them to understand, identify and respond appropriately to domestic violence.
- The concept of undertaking to be given by a petitioner before a Court to exercise its discretion to return a child to the habitual residence, under English law promotes a naïve belief that a parent, who the Convention says is not entitled to a return order usually because of a history of abuse, should receive it anyway because he promises that the child (and often its caregiver parent as well) will be safe and adequately provided for pending a custody determination on the merits. There is often ample reason available in the facts of the case to predict that he will not honor his promises, even in the unlikely event that he is under an obligation to keep them.
- There should be an endeavor to encourage expansion of the International Hague Network of Judges and maintain an

inventory of domestic legal bases relating to direct judicial communications.

- With lack of relevant expertise at the Permanent Bureau and Working Group of unknown composition, excellent substantive content certainly cannot be assumed. Worse, the recommendation makes no mention of the usual vetting, followed by discussion and approval at a Special Commission. Indeed, if the Guide does bring uniformity into what is now unsettled judicial interpretation and application of Article 13(b) (its stated goal), but in a manner that deviates from the treaty that was negotiated, the consequence could be a binding interpretation that amends the Convention.
- There is gender disparity in some relocation rules and in the application of others. The Convention's rule is that relocation by a custodial parent, even if wrongful under domestic law, does not authorize a return order upon the request of a visiting parent. Thus, there should be an articulation of the reasons for this rule and the implications of restrictive relocation rules for the poor and for the victims of domestic violence and their children.
- What has become known as ‘The Malta Process’ has sought to develop a legal framework for matters of child protection, child abduction, access, child support and mediation between certain Hague Convention and non-Convention (Islamic) States.
- Increasingly, the Hague Convention has become a tool used by the perpetrators of domestic violence to continue abusing their victims and asserting control over the lives of those

who have fled in fear. Abuse is about control, and abusers are using the wide breadth of the Hague Convention and the lack of knowledge of the judiciary to continue to abuse spouses who have dared to simply say “No more.”

- Interviewing children is a skill. Understanding the child’s developmental stage is essential. In addition to noting that the Convention permits interviewing children, the Guide should offer guidance on where to find information about how these interviews should be conducted.
- The justice system’s efforts to address domestic violence have been hampered by a schema that defines domestic violence as fist-in-the-face physical assault and harm to children as possible only if they see it. But domestic violence has many dimensions that together create an ongoing climate of tension and fear. Exposure to domestic violence can lead to behaviors ‘such as substance abuse, suicide attempts, and depressive disorders.’
- Growing up in an abusive home can critically jeopardize the developmental progress and personal ability of children, the cumulative effect of which may be carried into adulthood and can contribute significantly to the cycle of adversity and violence.
- Sometimes mothers seeking an order of protection are themselves charged with ‘failure to protect’ and lose their children to foster care for ‘allowing’ their children to be exposed to domestic violence.
- There is lack of implementation of protective strategies once a child is returned to a country of habitual residence. Sadly, the Permanent Bureau and Central Authorities have not

engaged in consistent follow-up after the Convention decisions to gauge the consequences for children on either their return or retention.

- There is something terribly wrong with the Convention if children end up in foster care when they have loving caregivers who, in fact, have already protected them by removing them from the grave risks that exist in the habitual residence.
- Return is not always the best outcome for children subject to the Convention.
- Establishing a grave risk exception under 13(b) is unreasonably difficult. Domestic abuse between parents has a significant psychological impact on children and poses grave risk.
- Once a 13(b) defense has been established there should be no return. Relying on ostensible safeguards to protect victims should be a last resort.
- Children's voices should be given paramount consideration in 13(b) petitions.
- Tenor of the Hague Convention is to emphasize upon expeditious return, whereas it should be focused around 'an adequate hearing' so as to ascertain the best interest of the child minimizing the risk of abuse upon return.

2.12.4 "Report on the Experts' Meeting on Issues of Domestic/ Family Violence and the 1980 Hague Child Abduction Convention

On 12 June 2017, 57 participants attended a meeting, at the invitation of the conference organisers, Professor Marilyn Freeman of the University of Westminster and the Hague Conference on Private International Law (HCCH), on the topic of Domestic / Family Violence and the *1980 Child Abduction* ('1980 Convention'). Participating experts included Judges, government officials, Central Authority officials under the 1980 Convention, lawyers, mediators, psychologists, academics, researchers and members of non-governmental organisations from the following 19 jurisdictions:

Australia, Belgium, Brazil, Canada, England and Wales, Finland, France, Germany, India, Italy, Japan, New Zealand, Northern Ireland, Norway, Scotland, South Africa, Switzerland, the Netherlands and the United States of America, as well as European Union officials and members of the Permanent Bureau of the HCCH.

The meeting was opened with remarks by Mr. Justice A. K. Sikri, Supreme Court of India, and Ms. Salla Saastamoinen, Director for Civil and Commercial Justice, Directorate A Civil and Commercial Justice, Directorate General Justice and Consumers, European Commission, followed by 4-hour-long presentations and facilitated sessions on particular topics, engaging participants in discussion and debate. A questionnaire was circulated in advance of the meeting in order to provide background information on the topic from various jurisdiction in order to inform conference discussion.

1st Thematic Session

Retrospective views on the 1980 Convention and the issue of domestic/ family violence and the evolution of national domestic violence regimes (1980 to 2017)

Chair: Professor Nicholas Bala, Queen's University, Ontario, Canada

It was noted that through modern research and experience, more is known about the effects on a child of both direct abuse and exposure to intimate partner violence. Researchers have found, for example, that psychological harm to the child due to exposure to intimate partner violence may be as harmful as direct abuse. Research also establishes that there is a range of conduct that is characterized as abusive and could affect the child.

A large number of jurisdictions around the world are addressing issues of domestic and family violence as a matter of priority, including through awareness raising and training. More and more States recognise and address the impacts of domestic / family violence and provide programmes and services to support victims. In cases where domestic violence is raised it is important to consider, as required, the availability and efficacy of protective measures in the jurisdiction of the child's habitual residence to protect the child and the taking parent if return is ordered.

The meeting welcomed the signing by the European Union on 13 June 2017, of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

2nd Thematic Session

Evolution of Central Authority and judicial good practices related to the 1980 Convention and domestic / family violence

Co-Chairs: Lord Justice Moylan, Court of Appeal, London, and Member of the International Hague Network of Judges Joelle Schickel, Central Authority, Switzerland

Central Authority practice

The size and resourcing of a Central Authority can be a challenge. For example, staffing a small Central Authority with a more limited caseload may only be a part-time job, even though special procedures to deal with these cases may be required.

Co-operation is key – between Judges, between Central Authorities, and between or among authorities within a given country.

Education and information to assist Central Authorities to develop requisite skills and practices are of paramount importance.

It is important that Central Authorities consider how they may assist in situations involving domestic and family violence.

There is currently insufficient data about, for example, what happens after the return or non-return of the child in the context of such circumstances; such information would be helpful for both researchers and relevant actors (i.e., Central Authorities and Judges).

Judicial practice

The importance of implementing legislation for the 1980 Convention was highlighted. New Contracting States might look to other States' implementing legislation for examples as to how to craft their own.

The need to develop further means to assist Courts in understanding and determining what protective measures are available in the requesting State and their effectiveness, in responding to any grave risk that is established, was underlined.

The importance of direct judicial communications in specific cases was emphasised."

(Copy of the above report was made available by Mr. Anil Malhotra, Advocate)

2.12.5 In October 2017, Global ARRK, a UK registered charity organization invited interested parties of Hague Network- Judges, lawyers, parents, politicians to reflect upon the working of Hague Convention 1980.There was a proposal laid down before 'The special Commission on the practical operation of the 1980 Child Abduction and 1996 Child Protection Conventions, where the Judges and government representatives from around the world met to discuss the working of 'The Hague Convention on the Civil Aspects of International Child Abduction'. The proposal focused on three key Issues surrounding 'Habitual Residence' i.e.

- How can we make sure that the Habitual Residence is easy for all to understand, makes common sense and is used, as intended, to best define the place where the child feels settled?
- How can we define Habitual Residence more simply so that law professionals and parents better understand it?
- How can we standardise Habitual Residence across the world?

It was observed that, The Hague Convention already considers one year as the period of time for the child to settle in a new country: Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year, also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Thus it was proposed before the special commission that the Habitual Residence of a child updates 12 months after they move to a different country. This length of time is surely the minimum to allow the child to become integrated as well as learn some of the customs and language of the new country. After the 12 months, there should be a clear checklist available to parents and law professionals to give guidance on indicators of Habitual Residence

2.12.6 THE HAGUE CONVENTION – ORDER OR CHAOS?

AN UPDATE ON A PAPER FIRST DELIVERED TO A FAMILY LAW CONFERENCE IN ADELAIDE IN 1994 (By Hon'ble Justice Kay, a Judge of the Appeal Division Family Court of Australia Melbourne)

The paper looks at the diverse results and sees whether the Convention is fulfilling its purpose. The paper delves into various ambiguous provisions of the Hague Convention which act as hurdle in achieving the main objective of the convention i.e. 'Best Interest Of

the Child'**.** Some of the important issues raised in the paper are summarized as follows:

- In some States the Convention is directly incorporated into local law whereas in others, it is enacted via its own statute. These diverse methods of introducing the Convention into local law leave several opportunities for significant differences to emerge and provide fuel for chaos.
- The judicial function is to determine whether or not the Convention applies and, if so, whether the limited exceptions that give rise to a discretion not to order the return of the child are made out. Implicit, it gives rise to the assumption that the child's best interests are best determined by the jurisdiction in which the child was habitually resident prior to the wrongful removal or retention.
- Despite of the fact that habitual residence has been given central importance within the Convention, it is somewhat surprising that the term 'habitual residence' is undefined.
- The law appears unclear as to exactly how habitual residence is determined.
- The Courts are not in agreement over whether a child can have dual habitual residence.
- There exists unclear view about the issue, if a parent could create habitual residence for the child, while in hiding or not.
- The novel issue of the habitual residence of children born and/or residing on a foreign military base arising in a number of cases is also not clear.

- The issue that a child living on embassy soil may be regarded as habitually resident in the embassy country for purpose of the Convention is yet to be tested.
- 'Wrongful retention' has uniformly been accepted as an initial single event and not a continuing event.
- Whether wrongful retention can be converted into rightful retention still remains controversial.
- The position of non-custodial parents who retain a right to determine the child's place of residence is not uniform.
- Rights of unmarried fathers with regard to the custody rights are also not clear.
- The Convention focuses too much on the general evil of international child abduction and not enough on the individual needs of the particular child.
- The Hague Convention and its dedication to the automatic return of children are open to abuse. The parent whose children were abducted may bargain with an abductor, using the return or retention of the children as an inducement to secure a more favorable financial settlement.
- The extremely limited defenses require such strong evidence against the return of the child, and such clear evidence of unacceptable behaviour by the custodial parent, that the likelihood of an amicable resolution is greatly reduced.

2.12.7 SOME MOOT POINTS ON THE 1980 HAGUE ABDUCTION CONVENTION (NIGEL LOWE)

This article discusses the Hague Convention on the Civil Aspects of International Child Abduction which, despite having been in existence for over 30 years, continues to present a number of

uncertainties for Contracting States. The article focuses on the issues around appealing return orders after a child has been taken out of the jurisdiction, the concept of 'habitual residence', and the non-enforcement of return orders with reference to recent case law from the United States, United Kingdom, New Zealand and the European Union. The summary of the Article is as below:

- **The problem of appealing a return order after the child has been taken out of the jurisdiction:** While there seems to be general agreement that appeals should normally be expedited, not all agree on the desirability of introduction of a leave requirement. It has been suggested that the better solution would be for the Court making a return order to make a routine temporary stay so as to permit the respondent to obtain an expedited hearing from an appellate Court or Judge, who could then determine whether to continue the stay or to permit the immediate execution of the return order. If a stay is granted, an expedited appeal should then follow.

  There is no commonality of position and, indeed it may be noted that civil law jurisdictions have no equivalent inherent powers and consequently no independent powers to order return. The overall global lack of uniformity raises the question of whether Art. 18 might, after all, have been better interpreted as conferring a general Convention discretion to make return orders.

  The three decisions (laid down in Chafin v Chafin 568 US 1 (2013)., Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)

[2013] UKSC 75, [2014] AC 1017. and C v M (Case C-376/14) [2015] 1 FLR 1), establish the following:

- That an appeal against a return order is not rendered academic/ ‘moot’, as the parent took the child out of jurisdiction in conformity with the original ruling.
- That removal is not retrospectively rendered ‘wrongful’ by the subsequent reversal of that order permitting such a removal.
- That not returning the child in conformity with the appellate ruling will be considered as ‘wrongful retention’ for purposes of the Convention provided the child remains habitually resident in the State in which the appellate ruling is made.
- That, it is for the Court in the requested State to determine where the child is habitually resident at the time of the appellate judgment. In determining thisquestion, the Court is required to examine all the circumstances in the period between the first instance and appellate order but not afterwards.
- That, if the child's habitual residence is not found to have changed then, as failure to return will amount to a wrongful retention, the requested Court should make a return order unless one of the exceptions provided for by the Convention has been successfully established.
- That, if the child's habitual residence is found to have changed, there is no Convention obligation to order a return but a Court could still do so under its domestic powers, if it has any, as preserved by Article18 of the Convention. But in cases governed by the Regulation,

Courts will still be bound, subject to the establishment of any defences, to recognise and enforce any order considered to concern parental responsibility

- **The meaning of habitual residence:** The test of habitual residence, which is basically designed to identify where the child lives or has his home, was envisaged to be a factual one and, as such, required no definition. However, in reality, the concept is elusive, not least because of its subjective nature concerning the required quality and duration of residence, which makes the reality of regarding it as having an autonomous and consistently applied meaning exceedingly difficult.
- **The non-enforcement of a return order:** Another important question which needs consideration is that whether it is possible to discharge a Convention return order. In the leading case of **Butler v Craig** [2008] NZCA 198, (2008) 28 FRNZ 112., the New Zealand Court of Appeal decision, protracted litigation lasting two years ended in a return order being made under the Convention.

It was common ground that there was no express power to discharge a return order, either under the Convention nor under the then - New Zealand implementing legislation. Furthermore, as all available appellate processes had been exhausted, it was not possible to revisit the finding made in the Convention proceedings. It was equally common ground that there was no scope for invoking the parens patriae jurisdiction, as that "would invite a merits based approach, contrary to the objects of the Convention". Instead argument centred on the application of the inherent jurisdiction based on the

High Court's supervisory role over inferior Courts which, it was argued, gave the High Court jurisdiction to "resolve any unexpected problems arising from the post-return order delay". The Court of Appeal held, however, that in the abduction context, "the High Court's inherent jurisdiction is not available to assist a Family Court when the latter is given express jurisdiction by a statute to exercise originating jurisdiction over all Convention issues". The Court considered whether jurisdiction to discharge a return order could be implied from the power under the Care of Children Act 2004, s 119(1) dealing with enforcement (it accepted that in exceptional cases enforcement could be declined as, for example, whether the applicant had died), but concluded that, tempting though it was to do so, it would "amount to an inappropriate usurpation of the Legislature's functions".

Thus it is observed that there is a clear need for an express power to discharge a return order to be added to the Convention. In this respect, the Australian and New Zealand implementing legislation provide possible models. In one way or another English Court regard themselves as having power to set aside a Convention return order. However, whether failure to take steps to enforce it would in itself justify setting it aside and, if so, at what point, has still to be decided.

A number of international studies/research papers were analysed in course of its deliberations by the Committee. Most of such papers/studies unequivocally point out the impact domestic violence on inter-country parental child removal. In numerous research papers and empirical data suggest that more often domestic violence is the cause behind international child removal by the battered parent. Given this scenario, the studies suggest that the concept of habitual residence seems to have been over emphasized. The prompt return of child to

place of habitual residence essentially needs to be harmonized with the ‘best interest of child’ keeping in view domestic violence. The aforesaid studies/papers apparently lead towards the view that the Hague Convention 1980 requires to be re-visited.

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CHAPTER 3

THE CENTRAL AUTHORITY

(As envisaged under Hague Convention)

To discharge the duties as envisaged under the Hague Convention 1980, Article 6 thereof provides for designation of Central Authority. The duties assigned to Central Authority are provided in Article 7 thereof. Articles 6 and 7 read as under:

"Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;
b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

3.1 CENTRAL AUTHORITIES IN VARIOUS COUNTRIES

Information relating to Central Authorities designated in States, which are signatory to the Hague Convention is available on the following URL:

https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24.

(Annexed at p.267 in Vol.II)

Central Authority in most of the Hague signatory countries is different from the authority which adjudicates any request for return of child. Power to adjudicate applications has been conferred on the Family Courts or other designated Courts. Orders passed in the first instance are appealable.

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CHAPTER 4

INTERNATIONAL CONVENTIONS FOR PROTECTION OF CHILDREN AND WOMEN

India is signatory to various international bi-lateral and multi lateral treaties in respect of women and children. Being a signatory to these conventions/treaties/pacts, the same steers the domestic state policy in such a way that these policies are in sync with the provisions under the said convention/treaties/pacts.

4.1 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC) (came into force on 2nd September, 1990): A BRIEF OVERVIEW

Preamble (Clause)

a) To ensure inherent dignity and of equal and inalienable rights to the children who need special care and assistance.
b) Family, being fundamental group of society, should be afforded necessary protection and assistance so that the child grows up in the atmosphere of happiness, love and understanding.
c) It is based on Geneva Declaration, Declaration of the Rights of the Child, UDHR, ICCPR, ICESCR and other relevant statutes.
d) It also recognizes the importance of the traditions and cultural values of all for the protection and harmonious development of the child.

- (Age of the Child): below 18 years; subject to applicable laws. (Article 1)
- States to ensure no discrimination on the basis of race, sex, colour, religion, language, political, national, ethnic or social origin, property, disability, birth or other status. (Article 2)
- **'Best interest of the child'** is the primary consideration. (Article 3)
- To recognise rights and duties of extended family or community, provided by local customs, legal guardians or other persons legally responsible for the child. (Article 5)
- State to recognise inherent right of the child to life, and to extend all possible help for his survival and development. (Article 6)
- Immediate registration of child after birth, right to a name, acquire a nationality and be cared by his or her parents. (Article 7)
- To preserve his or her identity, including nationality, name and family relations without unlawful interference, including the right to re-establish identity. (Article 8)
- To ensure that a child is not separated from his parents against their will except, only by an order of the competent authority subject to judicial review, when such separation is necessary for his/her best interest. Such determination may be necessary and the decision must be taken keeping in view his opinion and level of maturity. (Article 9)

- Families whose members live in different countries should be allowed to move between those countries so that parents and children can stay in contact or get back together. (Article 10)
- States Parties shall take measure to combat illicit transfer and non-return of children abroad. (Article 11)
- States shall assure to the child, who is capable of forming his opinion, the right to express his/her views freely in all matters affecting him/her at any stage. (Article 12)
- No child should be subjected to unlawful interference with his/her privacy, family, home nor to unlawful attacks on his/her honour and reputation. (Article 16)
- Children have the right to be protected from being hurt and maltreated, physically or mentally. (Article 19)
- Children who cannot be looked after by their own family either temporarily or permanently, have a right to special care and must be looked after properly, by people who respect their ethnic group, religion, culture and language including foster placement, kafalah or adoption in continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. (Article 20)
- State to take appropriate measures to protect children from use of narcotic drugs and psychotropic substances. (Article 33)
- Governments should protect children from all forms of sexual exploitation and abuse. (Article 34)

- Children should be protected from any activity that takes advantage of them or could harm their welfare and development. (Article 36)
- State shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment and shall not be deprived of his/her liberty. (Article 37)

(Copy annexed at p. 321 in Vol.II)

Source: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf

The process of creating binding obligations on Governments with respect to 'Convention on the Rights of Child' can be done in two ways: by signature and ratification or by accession. It must be noted that 'signing' and 'ratifying/accessing' to the Convention are different connotations.

Signature: Signature constitutes a preliminary endorsement of the Convention or Protocol. Signing the instrument does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.

Ratification or Accession: Ratification or accession signifies an agreement to be legally bound by the terms of the Convention. Though accession has the same legal effect as ratification, the procedures differ. In the case of ratification, the State first signs and then ratifies the treaty. The procedure for accession has only one step—it is not preceded by an act of signature.

Source: https://www.unicef.org/crc/index_30207.html

As of today there are 140 Signatories and 196 Parties to UNCRC. The United States of America has not yet ratified the UNCRC.

4.2 THE REVISED BRUSSELS II REGULATION AND CHILD ABDUCTION (Council Regulation (EC) No. 2201/2003 of 27th November 2003)

The revised Brussels II Regulation provides that The Hague Convention on International Child Abduction will continue to be applicable as complemented by certain provisions of this Regulation. The Regulation provides that where a child was habitually resident in a Member State immediately before a wrongful removal or retention, the courts of that Member State will continue to have jurisdiction over the child until the child has acquired a habitual residence in another Member State.

Source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML

4.3 CONVENTION ON THE ELIMINATION OF ALL KINDS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on Elimination of all Forms of Discrimination Against Women is an international treaty, which is now a part of peremptory norm of international law, was adopted in 1979 by the United Nations General Assembly. It is also referred to as 'International Bill of Rights for Women', instituted on 3rd September 1981. It has been ratified by 189 States with over fifty countries ratifying it with certain declarations, reservations and objections. The Convention recognizes the special contribution of women to the welfare of the family and the development of society (so far not fully recognized), the social significance of maternity and the role of both parents in the family and in the upbringing of children. It lays stress on the role of women in procreation. It suggests and asserts that

motherhood should not be a basis for discrimination against women. The Convention emphasises that the upbringing of children requires a sharing of responsibility between men and women and the society as a whole**.**

Salient features:

- "Discrimination against women"- means distinction/ exclusion/restriction made on the basis of sex which has the effect/purpose of impairing/nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil /any other field. (Article 1)
- State Parties shall take concrete steps to eliminate discrimination against women. (Article 2)
- State Parties shall take all appropriate measures to ensure that women enjoy basic human rights and fundamental freedoms.(Article 3)
- State Parties can adopt temporary special measures to accelerate equality for women but shall not entail maintenance of unequal or separate standards; Special measures to discontinue upon achievement of equality of opportunity and treatment. (Article 4)
- State Parties to take appropriate measures to modify the social and cultural patterns of conduct of men and women, to achieve elimination of prejudices and customary and all other practices, irrespective of gender stereotypes, ensuring family education for proper understanding of maternity as a social function and the recognition of

common responsibility of men and women in the upbringing and development of their children by considering the 'best interest of the children'. (Article 5)

- State Parties shall take all measures to stop trafficking and exploitation of women for prostitution. (Article 6)
- State Parties to ensure to women opportunity to represent the country at international level. (Article 8)
- State Parties to ensure women equal rights with men to acquire/change/retain their nationality, ensuring that the marriage to a foreign national would not automatically change the nationality of wife and to ensure women equal rights with men with respect to the nationality of their children. (Article 9)
- State Parties shall accord to women equality with men before law in matters of residence and domicile. (Article 15)
- Government shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. (Article 16)
- Constitution of the Committee on the Elimination of Discrimination against Women (hereinafter referred to as 'the Committee'). (Article 17)
- State Parties to submit a report to the Secretary-General of the United Nations for consideration by the Committee on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect at periodic intervals. (Article 18)

- Any dispute between two or more State Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court. (Article 29)

(Copy annexed at p. 336 in Vol.II)

Source: http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) is an international treaty that establishes complaint and inquiry mechanisms for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Parties to the Protocol allow the Committee on the Elimination of Discrimination against Women to hear complaints from individuals or inquire into "grave or systematic violations" of the Convention. The Protocol has led to a number of decisions against member states on issues such as domestic violence, parental leave and forced sterilization, as well as investigation into systematic killing of women in the Mexican city of Ciudad Juárez, Chihuahua. The Protocol was adopted by the United Nations General Assembly on 6th October 1999, and came in force from 22nd December 2000. As of September 2017, the Protocol has 80 signatories and 109 parties.

Source:
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

India has ratified the CEDAW convention. Honouring her obligation under CEDAW, India has enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the Protection of Women from Domestic Violence Act, 2005, Victim Compensation Scheme etc. which have been directly invoked in numerous cases before the Supreme Court and the High Court in different States.

USA has signed this Convention but not ratified the same.

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CHAPTER 5

AN OVERVIEW OF THE JAPANESE IMPLEMENTATION ACT

Japan was the 93rd country to sign Hague Convention. Before doing so Japan had enacted 'Act for Implementation of the Convention on the Civil Aspects of International Child Abduction' on June 19th, 2013. Some of the salient features of the Act are as under:

- The Central Authority designated in Japan is the Minister for Foreign Affairs. (Article 3)
- If a child pertaining to the application is located in Japan and the Central authority has reasonable grounds to believe that the child might be subjected to abuse, information of such abuse is to be notified to the municipality/welfare office, a child guidance center established for the purpose. (Article 10)
- A person whose rights of custody with respect to a child are breached due to removal to or retention in Japan, may file a petition against the person who takes care of the child with a Family Court to seek an order for return of the child to the state of habitual residence. (Article 26)
- The application can be declined by the authority if there exists grave risk that his/her return to the state of habitual residence would expose the child to physical or psychological harm or otherwise places the child in an intolerable situation. Application for return of the child can also be refused if the child objects to being returned, in a

case where it is appropriate to take account of the child's views in light of his/her age and degree of development. (Article 28)

- Any person establishing his locus can become party to the proceeding or may intervene in any case, seeking return of the child, on permission granted by the Authority. (Article 47)
- A child who is sought to be returned, in the case seeking his return, may intervene in the proceedings. (Article 48)
- Proceedings of the case seeking return of child shall not be open to the public. However, the court may permit observation by a person whom it considers to be appropriate. (Article 60)
- When a party lives at a remote place or the Family Court finds it appropriate for any other reasons, it may conduct proceedings using IT tools. (Article 75)
- The Family Court may have a physician, who may examine physical and psychological conditions of the persons concerned in the case. (Article 81)
- The Family Court may request a school, nursery center, or any other person to submit report relating to physical and psychological conditions and living circumstances of the child. (Article 83)
- In the proceedings of the case seeking return of child, the family court shall endeavor to understand the intention of the child through appropriate means such as hearing of his/her

statements and examination by a family court probation officer and shall take into account his/her intention according to his/her age and degree of development before making a final order. (Article 88)

- A petition for the return of child may be withdrawn in whole or part before an order becomes final and binding, however, withdrawal of the petition after a final order is made shall not become effective without the consent of the respondent. (Article 99)
- Any order passed by the Family Court is subject to appeal to the High Court within a period of two weeks. (Article 101)
- An appeal against order passed by High Court can be filed before Supreme Court. (Article 108)
- When the court which made the final order for return of child (after such order becomes final and binding), finds that it is no longer appropriate to maintain said order due to change in circumstances, the said court, upon petition of a party, may modify said order. However, such an application is not maintainable after the child has been returned to the state of habitual residence. (Article 117)
- The Family Court which made a final order for return of child, when requested by the right holder, may examine the status of the performance of the obligations towards the returned child and recommend the obligor to perform such obligations.(Article 121)

- If any person fails to comply with judicial decision, he can be punished by a non-penal fine of not more than 200,000 yen. (Article 132)

Translated text of the Japanese Implementation Act is available on following URL:

http://www.moj.go.jp/content/000121368.pdf

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CHAPTER 6

THE JOINT FAMILY SYSTEM IN INDIA

A CLASSICAL INSTITUTION OF STABILITY AND SOCIAL SECURITY

The term 'Family' is spacio-temporal in nature and has acquired different dimensions and connotations during the course of history. Laws governing any society largely depend upon the fabric of the society and the expectations of the citizenry with the state where Indian family law is no exception to it. Indian society today comprises of diversified citizenry manifesting their different religious practices and customs, be it Hindus, Christians, Muslims, Parsis, Sikhs and the same is reflected in Lex Fori. However, earlier in the Vedic times when there was no such diversity and a religion, the society was practicing a homogeneous belief or faith altogether as such and the inhabitants were subject to same social rules and obligations.

But in context of family, it would be apt to say that the thrust of society has been towards 'collectivism' and not 'hedonism'. Individual finds his/her place at the last ladder of the society, whereas the interest of family as a unit vis-a-vis its social responsibilities and expectations is given the foremost preference. The joint family in India is considered to be "the most characteristic and the fundamental part of the life of Hindus, as known to law; so much so that even marriage must be considered subordinate to it in some degree." This is how one of the most respected modern writers in Hindu law, Professor J.D.M. Derrett, has very perceptively summed up the relevance of the joint family in the Indian social set up. In fact, the genesis of joint family system in India could be traced to the

traditional ‘Hindu Law’, which “has the oldest pedigree of any known system of jurisprudence.” The foundation of joint family, which is otherwise seemingly earthly and secular in character, is indeed rested on religious principles. Nevertheless, an erudite scholar of Family Law could not help stating that the value of the ‘religious’ legal systems such as Hindu law should not be perceived as ‘irrelevant’ in today’s modernist society.

Commenting upon the continuing significance of the joint family system in India about fifty years ago (in 1970), Professor Derrett vehemently stated that the people had been objecting that the joint family was breaking down for at least half a century, “but it has not broken down.”

This is true indeed that the impingement of forces of industrialization, urbanization and consequent mobilization has significantly impacted the Hindu Joint Family system in India by opening unprecedented opportunities for individuals with intelligence and initiative. Profits made by individual initiative and enterprise, for instance, would seem to be, as happened in western society, amongst the earliest and strongest influence which weakens the foundation of the traditional Hindu joint family system.

In the pre-independence era, the passage of the Hindu Gains of Learning Act, 1930 gave full scope to that tendency by providing that, notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by the reason of his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the funds of any

member thereof, or himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of any members thereof.

Prior to this Act of 1930, it was an established proposition in Hindu Law that income earned by a member of a joint family by the practice of a profession or occupation requiring special training was joint family property, if such training was imparted at the joint family expense.

Since the Hindu Joint Family is essentially based upon the principle of "altruism", as Derrett pithily states, it will last "in some form, as long as Hindus are Hindus." However, it would be interesting to examine, how the changes in structure and relationships in joint family brought about by modernization are met through various legislative enactments along with the attendant problems of support and maintenance of the dependent members.

India has sketched her major child welfare and child centric legislations around the principle of the 'best interest of child'. In matters concerning children, the Indian courts take into account, all the attending circumstances and totality of the situation varying from case to case basis with **best interest of the child as paramount consideration**. The Law Commission of India in its 257th Report on "Reforms in Guardianship and Custody Laws in India" submitted to the Union Minister for Law and Justice, also emphasised on "welfare of child" in custody and guardianship matters. Concept of joint custody was also suggested. The Report notices that children are the worst affected in proceedings of divorce and family breakdowns. Often, parents use their children as pawns to strike their own bargains,

without considering the emotional, social and mental upheavals that the children may face. Object of the changes suggested was to ensure that child's future remains safe and protected, regardless of changing familial circumstances. The amendments were suggested to bring the laws in tune with the law laid down by the courts. In the press release issued by the Ministry of Law and Justice on May 22, 2015, key aspects of the Legislative recommendations were summed up as follows :

1. **"Welfare principle:** The draft law strengthens the welfare principle in the Guardians and Wards Act, 1890, with a continuous emphasis on its relevance in each aspect of guardianship and custody related decision-making.
2. **Abolition of preference**: The draft law removes the preference for the father as the natural guardian under Hindu law; and both parents are granted equal legal status with respect to guardianship and custody.
3. **Joint custody:** The draft law empowers courts to award joint custody to both parents in circumstances conducive to the welfare of the child, or award sole custody to one parent with visitation rights to the other.
4. **Mediation**: Parties to a custody matter must ordinarily consider expert-led and time-bound mediation, which cannot only promote better outcomes for parents and children, but also reduce the strain on the overburdened court system.
5. **Child support:** The draft law empowers courts to fix an amount specifically for child support, to meet basic living expenses of the child. Financial resources of parents, and the standard of living of the child must be considered when

fixing such amounts. Child support must continue till the child turns 18, but may be extended till 25; or longer, in the case of a child with mental or physical disability.

6. **Guidelines:** The draft law includes detailed guidelines to help courts, parents and other stakeholders arrive at the best arrangement to serve the welfare of the child. The guidelines introduce several new concepts in this regard, including parenting plans, grandparent time, visitation rights, and relocation of parents. They also elaborate the position on related aspects such as determining the intelligent preference of a child, access to records of the child, and mediation."

The principle of 'best interest of child' also finds strong acceptance and recognition in the Indian family system. With the older generation women folk being home-makers, the households have great care givers in terms of grand-parents, uncles, aunts, cousins etc. on either sides. A child, even if he may have stayed in some other country, would never be completely uprooted from the country of his parents' origin, who have families back home in India. Relatives keep coming and parents keep visiting. With the expanse of IT Revolution and web based services, world has become a global village. Using these tools even if the children live abroad and are not able to visit India frequently, but they still remain in touch with their roots.

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CHAPTER 7

THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN

Violence is an invasive force in the lives of children and children who grow up witnessing violence in their homes are at risk for psychological, behavioural and social maladjustment. Violence is an act of aggression, usually in interpersonal interaction or relations.

Domestic violence refers to violence, intimidation and harm perpetrated by one person against another with whom the person is in a relationship. Domestic violence occurs within the home and poses a threat to the sanctity of familial relationships. Domestic violence involves a sequence of frequent acts that escalate so that the perpetrator maintains authority and control over the victim. Victims of domestic violence may be trapped in violent situations through isolation, power and control, insufficient financial resources, fear, shame or to protect children.

Forms of domestic violence

Domestic violence can take number of forms including physical, sexual, economic, emotional and verbal.

- Acts of physical violence by the husband against his wife includes pushing, shaking, slapping, arm twisting, hair pulling, punching, kicking, dragging, beating, trying to choke or burn her on and threatening her or attacking her with a weapon.
- Acts of sexual violence by the husband include physically forcing the wife against her will to have sex or perform other sexual acts that she did not want to perform.

- Acts of economic abuse includes controlling access to money and other resources.
- Acts of emotional violence by the husband against the wife includes jealously, anger, intimidation, controlling, neglect, humiliation, threats, isolation and verbal abuse.
- Verbal abuse might involve threats, name-calling, blaming, ridicule, disrespect and criticism.

The impact of domestic violence on children

Children who live in homes where there is domestic violence grow up in an environment that is unpredictable, filled with tension and anxiety and dominated by fear. This can lead to significant physical, emotional and psychological trauma, similar to that experienced by children who are victims of child abuse.

Physical

- Physical health: restricting the parent/carer's ability to engage in activities with their children.
- Children may be caught in the middle of an assault by accident or because the abuser intends it.
- Infants can be injured if being held by their mothers when the abuser strikes out.
- Children may be hurt if struck by a weapon or a thrown object and older children are frequently assaulted when they intervene to defend or protect their mothers.
- Tiredness and fatigue, headaches.
- Eating difficulties.

Cognitive

- Emotional stress can harm the development of their brains and impair cognitive and sensory growth.
- Children may have difficulty in attention and concentration because they are distracted by intrusive thoughts.
- Difficulty in learning and problem solving.

Psychological

- The emotional responses of children who witness domestic violence may include fear, shame and embarrassment.
- Guilt and feeling responsible for the abuse.
- Internalizing symptoms such as depression, anxiety.
- Post traumatic symptoms or disorder- e.g. repetitive dreams, nightmares and flashbacks etc
- Worry, tension and feeling of helplessness.
- Episodes of numbness and unresponsiveness.
- Children often become isolated. They are always worried for themselves, their mother and their siblings.
- They may feel insignificant and defence less.
- Separation anxiety and clinging behaviour and reluctant to separate from parents/carers

Behavioural

Their developmentally limited ability to verbalize the powerful emotions they are experiencing may manifest itself as behaviour problems as follows:

- Temper tantrums and crying
- Aggression
- Excessive irritability
- Regressed behaviour around language and toilet-training

- Sleep disturbances
- Less likely to explore and play freely and to show motivation to master their environment
- Poor school performance
- Exhibit violent, risky or delinquent behaviour
- Greater risk for substance abuse, juvenile pregnancy and criminal behaviour
- Deliberate self-harm or attempt to suicide

Social

Social development is also compromised.

- Some children lose ability to feel empathy for others.
- Poorly developed communication skills and low self-esteem.
- Difficulty in developing and maintaining friendships.
- Difficulty in trusting adults in position of authority.
- Disturbed relationship with parents.

Conclusion:

Children who are exposed to violence at home may suffer range of severe and lasting effects. Children who grow up in a violent home are more likely to be victims of child abuse. Those who are not direct victims have some of the same behavioural and psychological problems as children who are themselves physically abused. Children who are exposed to violence at home may have difficulty in learning and limited social skills, exhibit violent, risky or delinquent behaviour, or suffer from depression or severe anxiety. Children in the earliest years of life are particularly vulnerable; studies show that domestic violence is more prevalent in homes with younger children than those with older children. More traumas a child was exposed to, the greater

risk for disabilities, social problems and adverse health outcomes. It is crucial to recognize that when experiencing trauma, a parent's ability to play a stable role in the child's life and therefore, support the child's resilience, may be compromised.

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CHAPTER 8

MEDIATION

Across the globe, the importance of mediation as an alternative dispute resolution tool has found widespread acceptance over a period of time. The relevance of mediation has been summed up by Father of the Nation, late Mahatama Gandhi as under:

> "*I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's heart. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my life, during the twenty years of my practice, was occupied in bringing about private compromises of hundreds of cases. I lot nothing, thereby not even money, certainly not my soul.*"

Another internationally revered dignity- late Mr. Abraham Lincoln also highlighted the importance of Mediation by saying:

> "*Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expences, costs and time*."

Mediation is not something new which has evolved now. If we go back to history, during ancient times also this method of resolution of disputes was prevalent. In Ramayana, we read that Angadha, son of Vali approached Rawana and delivered message of Lord Rama to opt path of peaceful settlement to avoid war. In Mahabharata, Lord Sri Krishna endeavoured to mediate between the

Pandavas and Kauravas before they fought historical battle at Kurukshetra.

Mediation as an alternate mode for settlement of International Family Disputes had drawn attention of the authorities under Hague Convention for a long time. The work to draft a Guide to Good Practice on Mediation under the Hague Convention commenced in 2009. Independent experts from different contracting States were requested to assist. Draft guidelines were prepared after incorporating the suggestions made therein. In the convention held in May, 2012, final 'Guide to Good Practices' was circulated.

The topic had been explored at a series of meetings of the Special Commission to review the practical operation of the 1980 Convention. In October 2006, the Permanent Bureau published a comparative study which focused on mediation schemes in the context of the 1980 Convention for discussion at the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the implementation of the 1996 Hague Child Protection Convention (October / November 2006).

1. The 2006 Special Commission meeting reaffirmed Recommendations Nos 1.10 and 1.11 of the 2001 meeting of the Special Commission:

    "1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7(2)(c) of the (1980) Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of

parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.

1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings."

2. As regards mediation itself, the 2006 Special Commission concluded:

"1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5 (Note on the development of mediation, conciliation and similar means).

1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006."

3. Work on the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention commenced in 2009. A group of independent experts from different Contracting States was invited to assist with the preparation of the Guide. A draft Guide

was circulated to the Contracting States to the 1980 Convention and the Hague Conference Members in advance of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. The Special Commission and requested that the Permanent Bureau 'make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts' and to circulate a revised version to Members and Contracting States for final consultations. A revised version of the Guide to Good Practice was circulated to the Hague Conference Members and Contracting States to the 1980 Convention in May 2012 for last comments, which were implemented subsequently.

4. Following a Recommendation of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, which had in some detail discussed the problem of cross-border enforceability of mediated agreements, the 2012 Council mandated the Hague Conference to

> "establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention",

indicating that

> "(s)uch work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the

benefit of a new instrument, whether binding or non-binding, in this area."

5. Furthermore, attention needs to be drawn to the Hague Conference's activity in promoting mediation and the development of mediation structures in cross-border family disputes in the context of the Malta Process.
6. The Malta Process, a dialogue between judges and senior government officials from certain 'Hague Convention States' and certain 'non-Convention States', whose laws are based on or have been influenced by Shariah law, focuses on seeking solutions to cross-border disputes concerning child custody, contact and abduction that are particularly difficult due to the non-applicability of relevant international legal frameworks. Three conferences were held in Malta, in 2004, 2006 and 2009, to make progress on the issue.
7. Following a recommendation from the Third Malta Conference, the 2009 Council mandated, in the context of the Malta Process, the establishment of

   "a Working Party to promote the development of mediation structures to help resolve crossborder disputes concerning custody of or contact with children. The Working Party would comprise experts from a number of States involved in the Malta Process, including both States Parties to the 1980 Child Abduction Convention and non-States Parties."
8. The Working Party was set up in June 2009 and consisted of a small number of independent mediation experts as well as experts from Australia, Canada, Egypt, France, Germany,

India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. The latter list comprises both Contracting and non-Contracting States to the 1980 Hague Child Abduction Convention. The Working Party held two conference call meetings, on 30 July and 29 October 2009, as well as one in-person meeting from 11 to 13 May 2010 in Ottawa (Canada). Two Questionnaires, one on existing mediation structures and one on the enforceability of mediated agreements, were circulated in preparation of the Working Party conference calls, responses to which are published on the Hague Conference website. Following the second conference call meeting, Draft Principles for the establishment of mediation structures were established, then discussed and further elaborated by the Working Party at the in-person meeting in Ottawa. The Principles were finalised in autumn 2010 together with an Explanatory Memorandum, both of which are available on the Hague Conference website, in English, French and Arabic.

9. In early 2011, some States commenced implementation of the Principles in their jurisdictions and designated a Central Contact Point for international family mediation. In April 2011 the Council 'welcomed the Principles for the establishment of mediation structures in the context of the Malta Process (…) and agreed that the Principles should be presented for discussion at the Sixth Meeting of the Special Commission'. At the same time, the Council mandated the Working Party to continue work on the implementation of mediation structures in the context of the Malta Process.

10. At its meeting in June 2011, the Special Commission on the practical operation of the 1980 and the 1996 Hague Conventions noted ‘the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles’ and encouraged States ‘to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point’.
11. Further steps towards implementation of the Principles for an effective establishment of mediation structures for cross-border family disputes were discussed by the Working Party at an in-person meeting in The Hague on 16 April 2012 and reported to the 2012 Council. The Council welcomed the report and ‘direction for future work outlined’ and ‘agreed that the Working Party will continue its work on the implementation of mediation structures, with the expectation of a further report on progress to the Council in 2013.”

The Guide defines different terms relevant for the purpose, such as mediation; mediator; conciliation; arbitration; early neutral evaluation; collaborative law; co-operative law; direct or indirect mediation; court based and court annexed mediation; out of court mediation; mediated agreement; parental responsibility; left behind parent and taking parent; domestic violence and child abuse. The object behind issuing the Guide to Good Practices, which is non-binding in character was to promote mediation and bring about agreed resolution of international family disputes concerning children. The Guide contains advantages and risk involved in use of mediation for resolution of international family disputes; challenges; specific

qualifications required to mediate international child abduction cases and how the process should be taken forward. It also elaborates on the use of mediation to prevent child abduction regarding use of mediation in non-convention cases.

Usefulness of mediation in international family disputes concerning children was illustrated as under:

"a) In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

b) Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.

c) In the course of Hague return proceedings, mediation may be used to establish a more congenial framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.

d) Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.

e) At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction. Where the relationship of the parents breaks down and one

of the parents wishes to leave the country with the child, mediation can assist the parents in considering relocation and its alternatives, and help them to find an agreed solution."

The Guide further enumerates in detail advantages of agreed solution, limits; risks and safeguards to prevent any party from any advantage/disadvantage of the process. Main suggestions/ observations pertaining to the same, in the Good Practices Guide are as follows:

"→ Mediation and other processes to bring about agreed solutions of family disputes should generally be seen as a complement to legal procedures, not as a substitute.

→ Access to judicial proceedings should not be restricted.

→ Mediation in international family disputes needs to take account of relevant national and international laws, to prepare the ground for a mediated agreement that is compatible with the relevant laws.

→ Legal procedures should be available to give legal effect to the mediated agreement."

The Guide further emphasis on specific timeframe lest the relief sought by either of the party is rendered infructuous. The Guide suggests as follows:

"→ Mediation in international child abduction cases has to be dealt with expeditiously.

→ Mediation should not lead to delay in Hague return proceedings.

→ The parties should be informed about the availability of mediation as early as possible.

- → The suitability of mediation should be assessed on case to case basis.
- → Mediation services used in international child abduction cases need to provide for the scheduling of mediation sessions on short notice.
- → Initiating return proceedings before commencing mediation should be re-considered."

The Guide further provides that mediators and bodies offering mediation in international child abduction cases should co-operate closely with Central Authorities and Courts.

Various precautions need to be taken by the mediator, the dispute being between two parties located in two different countries with different legal framework, culture, religion and language, have also been enumerated.

The Guide also takes care of the fact that parties to the dispute may be located far off from each other and in that eventuality how the meetings for mediation can be arranged. Visa and immigration issues have been touched. The Guide also takes care of the situation where criminal proceedings have been initiated by either of the parties to the dispute.

Specialised training required for mediation in international child abduction cases and the safeguards regarding quality have been detailed out. Some specialist mediators can be identified, the details of which should be available.

The Guide, which is quite exhaustive, even provides how a party to the litigation can have excess to mediation, which is briefly summarized as under:

"→ Information on available mediation services for international child abduction cases as well as other related information, such as mediation costs, should be provided through the Central Authority or a Central Contact Point for international family mediation.

→ Contracting States to the 1980 Hague Child Abduction Convention and other relevant Hague Conventions are encouraged to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities."

Importance of the role of Judges dealing with international child abduction cases has been emphasized for referring the cases to mediation and so is the role of lawyers and other professionals involved. Cost of mediation is another important area, which has been dealt with in the guide including provisions for legal-aid for the purpose. Guidance for place of mediation is also available as both the parties may be apprehensive of going to each other's country for various reasons.

Confidentiality of the proceedings is another important area covered under the guide.

Most important area, on which the Guide focuses is the consideration of **'interest and welfare of the child'**, which has been highlighted as under:

"→ Mediation in international child abduction cases needs to take the interests and welfare of the child concerned into consideration.

→ The mediator should encourage parents to focus on the needs of the children and remind them of their prime responsibility for their children's welfare, and of the need for them to inform and consult their children."

In the process, even involvement of the children is also opined to be relevant for determination of the dispute again keeping in view the principle of **'child's best interest'**. For the purpose, reference has been made to UNCRC and Hague Convention on Protection of Children, 1996 and several other regional instruments and initiatives.

Involvement of third party is also permitted, if the mediator considers it appropriate for assistance, to find an agreed solution. Safeguards to be taken during the process have been enumerated.

The Guide recognizes that domestic violence is a widespread phenomenon, which takes place in many forms. It can either be physical, mental, verbal, emotional and so on. It can be directly towards the child and/or spouse. It can range from an isolated incident or can be a continued one.

Another important area, which has been touched in the guide is use of mediation and similar process to bring about agreed resolution in non-Hague Convention cases. The same has been highlighted as under:

"→ The use of mediation and similar processes to bring about agreed solutions should also be encouraged in international family disputes concerning children, and especially cases of child abduction to which the 1980 Hague Child Abduction Convention or other equivalent instruments do not apply.

→ States should promote the establishment of mediation structures for such cases, as set out in the Principles for the Establishment of Mediation Structures in the context of the Malta Process. In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation and other related services, on the promotion of good practices regarding specialized training for international family mediation, and on the process of international mediation. At the same time, assistance with rendering mediated agreements binding in the legal systems concerned should be provided.

→ Where needed, countries should 'examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements'."

(*Copy of the Guide to Good Practice Child Abduction Convention-Mediation (2012) annexed at p. 124 Vol. II)*

Available on URL:
https://assets.hcch.net/upload/guide28mediation_en.pdf

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CHAPTER 9

PROCEEDINGS OF THE COMMITTEE

9.1 INTRODUCTION

The Law Commission of India examined the issues involved in the transnational marital discords especially with reference to custody disputes and submitted its 218th Report titled as, 'Need to accede to The Hague Convention on the Civil Aspects of International Child Abduction (1980)' on 30th March 2009 *(annexed at p. 10 in Vol. II)*, advising the Government of India to sign the Hague Convention. Thereafter the Ministry of Women and Child Development, Government of India drafted a Bill titled as 'The Civil Aspects of International Child Abduction Bill, 2016' *(annexed at p. 31 in Vol. II)*

Issue regarding international child removal also came up for consideration before Punjab and Haryana High Court. Vide order dated 24-02-2016 passed in CM No. 14931-CII of 2015 in Civil Revision No. 6449 of 2006-- Seema Kapoor and another vs. Deepak Kapoor & others ***(2016 SCC OnLine P&H 1225),*** *(annexed at p.43 in Vol. II)* the matter was referred for consideration by the Law Commission of India, with the following observation:

> "to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether the recommendations should be made for enacting a suitable law for signing The Hague Convention on Child Abduction".

Consequently, the Law Commission of India submitted its 263rd Report containing the draft Bill titled as 'The Protection of

Children (Inter-Country Removal and Retention) Bill, 2016' *(annexed at p. 54 in Vol. II)*

Thereafter, the Ministry of Women and Child Development held a national consultation to deliberate upon the issue relating to India's accession to the Hague Convention on the Civil Aspects of International Child Abduction, at New Delhi on 3rd February, 2017. The consultation was chaired by Smt. Maneka Sanjay Gandhi, Hon'ble Union Minister of Women and Child Development. The consultation was attended by Hon'ble Ms. Justice Mukta Gupta (Delhi High Court), Hon'ble Mr. Justice Inderjit Singh, Hon'ble Mrs. Justice Anita Chaudhry (Punjab & Haryana High Court), Hon'ble Mr. Justice (Retd.) Rakesh Kumar Garg Chairman, NRI Commission, Punjab, including the representatives from Ministries of External Affairs, Home Affairs and Law and Justice, and National Commission of Human Rights, National Commission for Protection of Child Rights, National Institute of Public Cooperation and Child Development, besides affected parties and Non-Governmental Organisations.

Addressing the participants, Smt. Maneka Sanjay Gandhi shared that large number of Indian married women living abroad are compelled to return to India with their children when they undergo violence in their marriage. Concern was raised about the difficulties being faced by the affected parents, whether men or women, and their children, as a result of breakdown of such marriages abroad.

After considering viewpoints expressed by various stakeholders, Smt. Maneka Sanjay Gandhi, Minister of Women and Child Development, Government of India, opined that the problems being faced by the parents need to be addressed and an effective mechanism for the same must be created. A model legislation to

safeguard not only the interest of the child as also of the parents, especially women, must be drafted.

Based on the deliberations, it was decided that the Chandigarh Judicial Academy, attached with the Punjab and Haryana High Court, Chandigarh, the Law Commission of India along with the NRI Commission, Punjab be assigned the job to examine the legal issues involved by taking all viewpoints into account including those of suffering parents. *(Minutes of the meeting are annexed at p. 113 in Vol. II)*

Thereafter, vide Memo No. F.No.CW-I-31/59/2016-CW-I, dated 18.05.2017 (*(annexed at p. 118 in Vol.II)* the Ministry of Women and Child Development, Union of India, constituting the Committee to examine the Civil Aspects of International Child Abduction Bill, 2016 under the Chairmanship of Hon'ble Mr. Justice Rajesh Bindal, Judge, Punjab and Haryana High Court, Chandigarh .

9.1.1 <u>The terms of reference of the Committee are as under</u>:

"1. The Committee will examine in detail the legal issues involved by taking all viewpoints into account, including those of the suffering women as several cases were highlighted during the consultation.

2. The Committee report will also provide recommendations as to how the problems of parents and children involved in such situations can be addressed.

3. The Committee will also study the draft of the aspects of International Child Abduction Bill, 2016 prepared by the Ministry and Law Commission.

4. The Committee shall also develop a mechanism required to address the difficulties being faced by the affected parent, as a large number of women married to Indians abroad are compelled to return to India with their children when they undergo violence in their marriage.

5. A model legislation to safeguard the interests of parents and children will be drafted by the Committee and the same will be put for public comments before being finalized."

9.1.2 <u>The constitution of the committee is as follows</u>:

<u>Chairperson</u>

Hon'ble Mr. Justice Rajesh Bindal
Judge, Punjab and Haryana High Court

<u>Members</u>

m) Hon'ble Ms. Justice Mukta Gupta
Judge, Delhi High Court

n) Hon'ble Mrs. Justice Anita Chaudhry
Judge, Punjab and Haryana High Court

o) Hon'ble Mr. Justice Rakesh Kumar Garg (Retd.)
Chairman, Punjab State NRI Commission

p) Ms. Rekha Sharma
Chairperson, National Commission for Women

q) Ms Astha Saxena, ICAS
Joint Secretary, Ministry of Women and Child Development, Government of India

r) Ms. Uma Sekhar, ILS
Joint Secretary (Law & Treaty), Ministry of External Affairs, North Block, New Delhi

s) Sh. A.K. Upadhya
Addl. Law Officer to Chairman of Law Commission, Law Commission of India

t) Mr. P.K. Behera
Deputy Legal Advisor, Department of Legal Affairs, Ministry of Law and Justice, Government of India

u) Sh. Sudhir Kumar Gupta
Deputy Secretary, Ministry of Home Affairs

The following three members were co-opted by the Hon'ble Chairperson to assist the Committee, as permitted :

v) Ms. Meenaxee Raj, HCS (Member Secretary)
Joint Director (Admn.), Urban Local Bodies, Haryana

w) Dr. Balram K. Gupta
Director (Academics), Chandigarh Judicial Academy Chandigarh

x) Shri Anil Malhotra, Advocate
Punjab & Haryana High Court, Chandigarh

In the issues referred to the Committee, opinion has not been sought as to whether India should sign the Hague Convention or not, hence, no opinion is being expressed on that.

9.2 PROCEEDINGS

First meeting of Committee was held on 03.06.2017 at Chandigarh Judicial Academy, Chandigarh which was attended by some of the members in person, whereas some members from Delhi participated in the proceedings through video-conferencing.

After a brief introduction, the Chair suggested that before going ahead with deliberations, reference must be made to the main points discussed in the meeting held at New Delhi on 03.02.2017. The Chairperson apprised the members about the purpose for which Committee was constituted. In the light of the discussions, the Chairperson said that the Committee needs to take a call on as to whether the existing Bills drafted by the Law Commission and/or the Ministry are sufficient to take care of all the issues involved in the trans-national child removal; or certain amendments are required keeping in view peculiar situation in our country. He further suggested that issues need to be shortlisted for discussion with various parties likely to be affected; may be by holding meetings/seminars at different places, as required. *(minutes of the meeting annexed at p. 344 in Vol. II).*

After due deliberations, it was resolved that a concept note be prepared and circulated to all concerned for their views on the subject. Needful was done and the concept note *(annexed at p. 349 in Vol. II)* was finalized.

The concept note was uploaded on the following websites inviting comments/suggestions from various stakeholders:

1. Ministry of Women and Child Development, Govt. of India
2. Ministry of External Affairs, Govt. of India
3. National Commission for Women
4. National Commission for Protection of Child Rights
5. Punjab State NRI Commission
6. Chandigarh Judicial Academy
7. National Judicial Academy

In response, the Committee received various suggestions. Thereafter, it was decided to have personal interaction with various stakeholders including individuals/NGOs irrespective of the fact whether they had submitted any suggestion or not.

First such meeting was held at New Delhi on September 16-17, 2017 *(minutes annexed at p. 354 in Vol. II)*. The meeting was attended by various affected persons, lawyers, and representatives of NGOs. Some of the stakeholders from foreign countries joined through skype/video conferencing etc.

From the inputs received in the first meeting, it was noticed that there are large number of affected parties living in south India, hence, it was decided to hold one such meeting at Bengaluru (Karnataka) on 31st October, 2017, which was held as scheduled *(minutes annexed at p. 357 in Vol. II)*.

9.3 CRUX OF COMMENTS RECEIVED IN RESPONSE TO THE CONCEPT NOTE AND IN MEETINGS

Following is the crux of comments received from individuals as well as stakeholder organisations in response to the concept note uploaded by the Committee on various websites. It includes the suggestions and comments offered by the parties during personal interaction as well. Identity of the persons is being kept confidential, as requested by them:

1. The United States has not ratified the major Human Rights Convention. The Hague Convention on Civil Aspects of International Child Abduction, 1980 is a procedural Convention offering a mechanism to assure prompt return of child to the country of habitual residence. USA,

however, has not ratified the International Convention on Civil and Political Rights (ICCPR) and Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) and United Nations Convention on the Rights of the Child.

2. The Hague Convention 1980 was designed to take care of Caucasian mothers to get back their children forcibly taken away from these women mostly by Middle Eastern fathers. Mothers in USA were subjected to domestic violence. But implementation of the Hague Convention now in the present times means separating Indian mothers i.e. primary care-givers from their children. The Hague Convention as it exists today is clearly out-dated and it has out-lived its utility and the same needs to be scrapped.
3. The Hague Convention may not be relevant now considering the present situation, where both men and women are economically and educationally capable to support the child as a primary care-giver. The presumption under Article 3 of the Hague Convention is contrary to the principles of natural justice.
4. Indian society is primarily a joint family system and thus, there is no necessity of independent foster care system. Foster care system in the form of grandparents, extended family is already in-built, where the children are taken care of well. Accordingly, there is need to examine the institution of Child Protection Services and Foster care system in the US vis-a-vis domestic violence, that are based on system of financial incentives.

5. The Hague Convention talks about civil aspects of International Parental Child Removal, but USA made the same a criminal offence. Accordingly, there is a need to analyse the current remedy available in USA in such a scenario, with reference to the laws applicable in the cases of Hague Signatories and non-Hague Signatory States.
6. The participants were concerned with ex-parte custody orders, where foreign courts granted custody to the alleged abuser without giving an opportunity to be heard to the taking parent. In this context, it is important to examine ex-parte custody orders passed by the foreign courts and the relevant factors considered by them, particularly if it was a mechanical exercise without even looking into the basic material facts of each case or an order in default.
7. There is a need to evaluate the provisions of legal aid, sustainability, security and VISA issues, if the 'taking parent' plans to return back to the foreign country with the child.
8. Indian women in foreign countries are subjected to domestic violence and abuse. However, the same is not reported to the concerned authority, as their legal status is not independent. Therefore, there is a need to evaluate the existing system in foreign countries (especially the USA) with regard to policy employed and relevant laws applicable in such cases (especially regarding Violence Against Women Act of the USA).
9. The Hague Convention only talks about the return of the child and nothing about the welfare thereafter. It is pertinent

to mention that Article 13(b) doesn't define the 'grave risk' properly.

10. The concept of habitual residence overlaps with idea of primary care giver. Merely if the parties have reasonably shifted or taken the passport, that country would not become the place of 'habitual residence'. Accordingly, there is a need to evaluate the concept of 'Habitual residence' visa-a-vis the concept of 'Ordinary Residence' as mentioned in the Guardians and Wards Act, 1890 of India.
11. In the context of Indian laws, the child being in the custody of a legal guardian, no offence of kidnapping or abduction is made out, hence, the Act cannot use the terminology 'abduction' and should not have any penal consequences.
12. Where the parties re-locate pursuant to a mutual agreement and decide to come back to India, such an agreement should be binding provided that the mutual consent is not under coercion, fraud or deception.
13. The Draft Bill prepared by the Ministry is extremely dangerous for Indian women and their children who face domestic violence abroad and who continue to be persecuted by their abusive spouse who manipulatively and strategically files cases alleging child abduction abroad, only with an intention to avoid their duties and responsibilities as fathers and husbands under Indian laws, and with an aim to get quick and uncontested divorce abroad.
14. Signing the Hague convention in any form would result in India further victimizing already victimized, traumatized

and completely vulnerable and defenseless women and children. Sending a child back to its abusive parent abroad certainly does not take care of welfare of the child.

15. Signing of the said Convention is dangerous for Indian women and children who are subjected to domestic violence and abuse abroad. No women would leave a promising career and comfortable living abroad unless there is grave threat to her life and trauma faced by children. No mother would kidnap her own child, unless it is considered in best interest of the child.
16. Indian women and children who face domestic violence and spousal torture abroad come to India helpless relying on her motherland to safeguard herself and her child. So in the interest of such victimized mothers and children the government should not sign the Convention.
17. An Indian mother caught in a domestic violence situation has very limited options. She can either continue to suffer abuse in a bid to try and save her marriage and not expose herself and her child to social stigma or she can report the abuse and face the almost unacceptable consequences associated with it i.e. losing her children to Child Protective Services and foster care or she can simply leave her children at the mercy of abusive parent, an option which is entirely unthinkable for any mother. Thus signing of Hague Convention is completely undesirable.
18. In any eventuality the child to be restored to one of the parents in India is absolutely rare. 99% cases are where the mother has fled to India to escape the domestic violence.

The father out of malice files a case of child abduction in foreign land and easily gets a decree in his favor, along with warrant of arrest. For India to sign the Hague Convention would amount to forsaking the welfare and well being of our many young children and women.

19. We can't handover our daughters as well as mothers, who come back home abused and heartbroken seeking solace and shelter right back unless they are willing to give up their children who are India's children/grandchildren regardless of where he/she was born. The child can decide at 18, but before that the decision should be based on what is in the best interest of the child and mother honouring the obligations of India being signatory to CEDAW and UNCRC.
20. There's a new fashion now of getting warrants of arrest issued on educated, capable, law-abiding mothers, who can't turn their back to their own babies and run away from their abusers saving their own skin. Our culture and heritage do not teach us that. It does not teach us to leave our child in a situation that we already know is too dangerous for us. Mothers are sacred. Not to leave one's child behind is not a crime but is commendable.
21. The American court says we are forum shopping if we come to India and file case under Hindu Marriage Act, 1956 or any other law. Their insistence on our joining the abusers, may result in criminal action there. They are pressing upon Indian Government to sign the Convention. "Lets' join together to support the mothers who didn't turn

their back on their babies and came back to their motherland for safety"

22. We are a sovereign nation with our own culture, religion and values. USA must respect our laws and court orders as well. And under no circumstances it is in the best interest of the child for either of his parents to be treated as a criminal and their career destroyed. All the offers they make to us for returning to USA where they will drop all charges are contingent on handing over sole custody of our children to the abusers who have sworn revenge against us and think nothing else but using the children as pawns. Easiest way to control and punish a mother is through her children.
23. The framers of the Bill have forgotten a simple fact that laws for the protection and overall welfare of women such as, laws against dowry harassment, domestic violence and other such stringent laws in force in India, are not applicable abroad, as a result of which an abused immigrant Indian woman faces insurmountable hurdles and agony in an alien country including physical, emotional, economic, legal threats from abusive spouse. In a bid to safeguard herself and her child, she returns to the safety of her motherland and extended family but the abusive spouse misuses the legal machinery abroad to hunt her down. The Hague Convention would enable him to legally do this.
24. Another worrisome aspect of the said Convention is that it deems the decision made by the Central Authority as final. This undermines the judicial power of the Supreme Court of India, which is the Highest Court. This would create several smaller power centres within the country and would

defeat the reliefs already legitimately obtained by women after years of litigation in India.

25. US courts have a different approach. Can Indian courts ignore a situation where the mother of a child was not represented in the US court and was incapable of doing so on account of many reasons including paucity of funds? In such situation welfare of the child would be compromised. The Indian courts should not be guided by Hague Convention that provides for expeditious return of the child abducted by a parent to another country.

26. In effect, signing the Hague Convention would mean bowing down to foreign pressure and accepting a foreign interpretation of law which is contrary to law as interpreted in India. This would also amount to an attack on the sovereignty of India as an independent democratic nation. It would even nullify Section 13 of the Code of Civil Procedure, in so far as foreign decrees/orders in child abduction cases from Contracting Parties are concerned. It would defeat the Hindu Minority and Guardianship Act and also Section 361, IPC.

27. If a woman faces marital problems abroad, which in many instances takes the form of extreme abuse and domestic violence and decides to come back to the safety and security of her own family and extended family in India, it is but natural that she would bring her children along with her. In such a scenario our Indian laws would certainly not consider her guilty of kidnapping/abducting her own children. The Hague Convention seeks to criminalize this innocent and natural act on the part of the woman.

28. For us, child is a consequence of marriage, unlike West (USA, UK, Europe). They don't understand dowry or in-laws living together. They don't understand Indian abuse, Indian marriage, and Indian patriarchy. Hague Convention will alienate the child from his/her roots, grandparents and all assets. Calling police abroad is of no use as husband's family living abroad can act as witness - the only thing their court needs. They are not even allowed to record abuse.
29. The Hague Convention is a completely outdated. It does not, in any way, addresses some of the key issues Indian and other women are facing in their marriages abroad pertaining to domestic violence and its serious consequences on them and their children. In the current context, it is the women who are the primary care providers and are opting out of abusive marriages and returning home to India in the best interest of their children.
30. Removing a child from a highly detrimental abusive environment abroad cannot be termed as ‘wrongful removal’; nor can the residence of a child in his/her own home in India without flouting any prior existing foreign court orders and under the legal protection of Indian Court orders, be termed as illegal retention.
31. Mere birth in a foreign country does not make the foreign country child’s ‘habitual residence’. The country that is home to the child’s permanent home, and not a transitory or temporary home as in the foreign country, is that hosts the child’s immediate and extended family and the child’s ancestral home. It is where the child has spent extended periods of time since birth and where the child is perfectly

well versed and familiar with the local culture, language, food, social norms, etc. Such country becomes the child's habitual residence. Besides, a child can have more than one habitual residence.

32. The Hague Convention with its objective of securing prompt return protects the rights of the left behind parents at the cost of interest of victims of violence. Three areas – Foreign Penal, Revenue and public policy – are excluded from Private International Law.
33. Universal acceptance of the Convention is not always possible. Cultural deviations are not unique to the Child Abduction Convention. Countries with Islamic influence do not conceive the family as unit constituted by two equal parents with equal rights of access to or influence over their children. These countries accept a theological absolute of the male as unchallenged monarch over the family. Consequently, the 'best interest of the child' are defined synonymously with the decisions of the father and it is difficult to conceive of an Islamic Court ordering a father to return the child when mother objects to moving to an Islamic country.
34. Neither the Law Commission observations nor the recommended Bill shows awareness of the ground realities of the plight of the child or its primary caretaker in parental removals due to domestic violence. It is important to know that India's accession to the Hague Convention as recommended by the Law Commission would only favour the abuser NRI father by rewarding him with prompt return of the child, whereas penalizing the domestic violence

victim with a jail term. The State is duty-bound to protect NRIs-- the father, the mother and the child – all victims of marital discord. Accession to Hague Convention is not the panacea. It is the judiciary which upholds the interests of all the parties. The approach thus has not been imbalanced. Under these circumstances, accession is not needed.

35. The Hague Convention seems to have outlived its actual purpose wherein the main objective ‘to protect child’ affected by the domestic violence seems to have lost its steam and the Private Family Law is being used to settle scores in bitter marital discord between husband and wife and even the property disputes in the guise of custody of child, thus treating a child as an object or property to be owned. This is more of an ethical issue.
36. The word ‘abduction’ is actually a misnomer. For a biological parent to actually 'abduct' its own blood and flesh or even an adopted child would be unthinkable for a normal human unless one of such ‘abducting’ parent is passing through difficult phase of physical, mental or economic stress, which in itself is impacting the child directly and would be depriving him/her-the central figure in the Convention, of his/her due entitlements and thus placing him/her in a vulnerable situation.
37. India should bat for considerable amendments in the Hague Convention on the Civil Aspects of International Child Abduction and come up with its own Jurisprudence on the Protection of Children's Removal and Retention only on the basic premise of what is in ‘best interest of the child’.

38. The fact remains that even the Law Commission of India has very clearly noted that 68% of the taking parents were mothers and 85% of these mothers were primary caregivers of their children. Nobody in their right mind would take such a drastic decision to flee for safety to India unless there is good reason for doing so. Thus there can be no blanket assumption that each and every such removal or retention is wrongful.
39. Under the Hague Convention, such taking parents would be left at the mercy of the legal systems and procedures of the individual Contracting States, such as U.S.A, U.K. etc., who have extremely harsh and inhuman laws to deal with such taking parents, wherein they would be criminalised. Thus the Hague Convention is a complete antithesis to our Indian judicial principles, one of which states that he who comes with a case is the one who has to prove it.
40. The proponents of the Hague Convention would argue that the issue of child welfare will be considered by the court in the country from which the child has been removed, once the child is returned. This is absolutely bad in law, because each and every decision pertaining to the child, including the decision whether to send the child back or not, has to be taken only after considering the immediate as well as ultimate welfare of the child. And if at the relevant time, the child in question is in India, the Indian courts should have the right to decide this question. The principle of welfare of child cannot be so postponed and relegated for decision-making after sending back the child.

41. The Hague Convention is violative of fundamental right to life. Right to life also includes within its ambit, the right of every person to a safe, secure, happy and decent life. This fundamental right is guaranteed not just to Indian citizens but also to all those on Indian soil, for the simple reason that it is a normal human instinct to protect one's own life as well as that of one's children and to seek safety and security.
42. Indian Judiciary is competent to handle each case of child custody independently, keeping the child's welfare as paramount consideration. As per Indian laws a child who is in the custody of either of his/her parents, is said to be in the lawful custody of his/her natural guardian. Indian Courts grant access to the non-custodial parents in deserving cases. They also honour the principle of comity of courts whenever there is a reasonable cause to do so. In deserving cases, upon interaction with children, Indian courts have even ordered their return.
43. People married in consonance with Indian law have right to seek all matrimonial and consequential reliefs including reliefs related to child access and custody under the provisions of that law. No other law can be made applicable to them. No alien entity has the right to interfere in these personal matters. Why should Indian laws be made subservient to the laws of other countries? Why should India bend its own laws and compromise its own sovereignty only in order to adhere to the Hague Convention? Can the Hague Convention make it compulsory for the USA or the UK to amend their own

internal laws regarding child custody so as to make them humane? If the Hague Convention is not empowered to do so, then India should also not accede to the Hague Convention as by doing so, we will be travelling backwards making mockery of our own laws and humane manner of interpreting the same.

9.4 VARIOUS GROUNDS SUBMITTED BY THE STAKEHOLDERS PROPOGATING NOT TO SIGN THE HAGUE CONVENTION

It has been requested not to sign the Hague Convention on Civil Aspects of International Child Abduction on the following grounds:

- Fleeing parent is not an "abductor".
- The Convention ignores the principle of 'best interest of the child'.
- It is biased against awarding custody to Indian parents.
- The Convention allows custodial claims without any judicial order.
- Existing laws for implementation of foreign custody judgments already exist.
- It leads to policing and invasion of privacy of the child.
- The two conventions i.e. United Nations Convention for Rights of Children and Convention on the Elimination of all Forms of Discrimination Against Women, to which India is signatory, are in conflict with the Hague Convention and cannot stand in parallel. The Hague Convention is a procedural Convention describing the procedure in relation to the child who has been removed from the custody of a parent and is in realm of Private

International Law. USA, which is advocating the Hague Convention is not the signatory to International Covenant on Civil and Political Rights (ICCPR), UNCRC and CEDAW.

- Hague Convention is not relevant convention in today's time where both men and women are economically and educationally capable to support the child as a primary care-giver.
- Removal of child by one parent to another jurisdiction is a socio-legal issue and cannot be sorted out by a straight-jacket formula as defined under law. Though Hague Convention deals with civil aspects of child removal but it has made it a penal and criminal offence and in Private International Law, criminal and family laws are not covered.
- The age of the child whose custody is sought to be returned is very material and for a child of a tender age, the primary care-giver has to be given importance rather than the place of habitual residence.
- Many a times default judgments are given, that too without giving the person opportunity of being heard, to submit to the jurisdiction of the other court.

9.5 VARIOUS GROUNDS SUBMITTED BY THE STAKEHOLDER IN FAVOUR OF SIGNING THE HAGUE CONVENTION

On the other hand there were responses approving of the part of Hague Convention on the following grounds:

- Delay in Indian Courts: - The participant highlighted the ordeal faced by the left behind parents, especially the

procedural delay in Indian Courts system, which renders the entire remedy infructuous. In fact, there were instances where the other spouse took the child to remote sub-divisions/tehsils and no lawyers were available there to handle such complicated cases.

- There is no effective legal remedy available in case of parental child retention and the existing family courts system is not suitable in such cases. Orders passed by these courts are subject to appeal in the concerned High Court and thereafter to Supreme Court of India. In fact, the Law Commission of India in its report lamented the adverse effects on children caught in the fire of shattered relationships and cautioned that non-accession to Convention may have a negative influence on Foreign Judge decision on custody-related matters.
- The Hague Convention only deals with the issue of jurisdiction applicable in such cases and not the substantive rights of the parties. The main motive of the Convention is to prevent forum shopping undertaken by the taking parent.
- When both parties are living in a foreign country for a substantial period, the foreign country's court being the 'closest concern' should have jurisdiction.
- Sometimes the parties have already signed the pre-nuptial agreement/other arrangement with respect to custody and other matters. The same should be considered provided that there was no threat, fear, deception, duress and other adverse factors.

- The participants highlighted that the Hague Convention is actually an extension of the Guardian and Wards Act, 1890 particularly the Sections 9 and 25 of the said Act. Accordingly, there is a need to analyse the relation between the two.
- The age of child whose custody is sought to be returned is very important. Therefore, there is a requirement of a suitable law in line with the Hague Convention to be enacted by the policymakers in India.
- The Hague Convention deals with the welfare of the child and not rights of the parties. Even if the spouse has suffered 'domestic violence', the same should be dealt with as per the applicable law of the foreign country. The welfare of child in such a scenario lies at the place where the child 'habitually resided'.
- The Hague Convention has an inherent safeguard by providing the provision of 'grave-risk exception' where the alleged abductor can establish the 'grave risk' and a child will not be returned if it is not conducive to his best interest. The courts across the globe have defined the grave risk taking into account the facts and circumstances of each case. In fact, judges presiding over return cases are authorised to take wide variety of factors into account in evaluating whether exception is applicable, including the risk of violence (psychological or verbal or both) to the taking parent or the child after return.
- Close to hundred countries which include all the modern democratic countries have signed Hague Convention. So

much deliberations on an issue where there is almost consensus across the world, does not reflect well on India's commitment to children rights.

- Domestic violence, though abhorrent, is not unique to Indian marriages only. Often cited reason of domestic violence is just an excuse. If the said Convention has already served the needs of so many countries and they have not raised any issue with it, India should also not object to be part of the said Convention unless we subscribe to a theory that children of Indian parents are different species than the rest.
- India to become a signatory to the Hague Convention is need of the hour. Indian laws need to accept it to provide quick justice to left behind parents and children. Most of the abducting parents are mothers who are well educated and fully capable of knowing their rights in the country they are fleeing from, yet resort to abduction because India provides protection for their illegal action and take advantage of gender biased family laws to arm-twist, extort money and do legal terrorism. Thus, India should become signatory to it and get along with the rest of the world for child development.
- Child abduction is not the solution for the domestic abuse. The cure for domestic abuse is to use the legal system in the country. The countries from where the women are fleeing have some of the strongest domestic abuse prevention measures and legal frame works in place. India, especially the framers of legislations, should never side with people who break the laws of the

countries they reside in; just as India discourages breaking of laws on its own soil. By ratifying the Hague Convention, India will send a message to people in marital discord to seek civil legal remedies like shared custody instead of resorting to criminal acts like abducting their own children.

- Parental abduction is child abuse as it leads to parental alienation. India should recognize it as such and do right things by denouncing use of children to settle marital disputes.
- The criminal prosecution in case of international child abduction was highlighted. Hague remedy is a determining factor in lot of jurisdictions in US when faced with the question of opting between civil and criminal remedy. The best practices of most of the States suggest that a civil remedy should be the first option. A country not being a Hague signatory makes them opt for the only other option available i.e. the criminal one. Being a Hague signatory is what makes prosecutors consider civil remedies, hence, India should ratify the Hague Convention so that threat of a criminal charge is not resorted to.
- Not being a signatory and taking advantage of Indian law many a time, the taking away parent resorts to extortion. The terms of extortion are not only unreasonable but cruel, to the extent that it leaves the NRI spouse literally on the streets and saddled with debt for the whole of life. The insane amounts also demonstrate that these are used to feed the pockets of the

lawyers of the abducting parents, as they derive a percentage cut from the settlement deal. The lawyers show no care for the child's relationship with both parents and instead of aiding families to reconcile, indulge in greed at the expense of families and child's precious childhood.

- It was submitted by one of the commentators that the abducting mother claimed domestic violence after coming to India while no report or even a single complaint was filed in the country where she alleged the cause of action arose. In her complaint, she recorded domestic violence that accrued in the foreign country and claimed compensation under Section 22 of Domestic Violence Act in India.
- Parental abduction is a grave injustice to the child. Many couples do not have the maturity to understand that child will grow up hating the other parent which may not be just. It is important to educate the discorded couple that they have to be good parents to understand the sensitivity of the child. Therefore, being a signatory to this Convention, it will assist our country to understand the concept of 'best interest of the child'.
- The parental child abduction or wrongful removal and retention of child by the parent, whatever term is used, there is no change ultimately in the net result, which is abuse and misuse of parenthood by father/mother and cruelty to the child and the left behind parent by deprivation of access, care, comfort, company and communication between the child and left behind

parent. In this context, the abducting parent, abducted child and the left behind parent, all three are losers or victims due to physical, mental, emotional and psychological stresses and strains they undergo. It will impact them for rest of their lives immaterial of the fact where they live across the world. The wife and husband with strained relationship can settle their issues right in the country where they live utilizing local authorities, be the bureaucratic and/or judiciary or other voluntary bodies which serve as counsels to bring in reconciliation, instead of using innocent children as instruments to avenge their marital discord, by wrongful removal and retention.

- The crux of the issue lies in the fact that successive governments in India have been soft pedaling the issue of parental child abduction due to misplaced soft corner for parental child abductors, particularly the women of Indian origin by birth, by providing safe shelter to the abductors and not even insisting renewal of the Passport of the abducted children of foreign origin by birth, thus making them illegal immigrants in India for no fault of them. Failure to take serious note of the issue to act swiftly at its stage of infancy has caused enormous damage to the country's image and reputation across the world.
- Enacting a civil law to prevent and control parental child abductions in India is quite imperative and emergent as it serves a deterrent to the erring parents who in a spur of moment take self destructive decision to fall apart,

besides causing enormous damage to the innocent children endangering their balanced growth and quality of life forever.

- The Hague Convention on Civil Aspects of Child Abduction gives various tools to member countries and their judiciary to deal with this problem. Its primary objective is to protect the rights of the vulnerable & voiceless children and keeping them over and above the rights of the parents. The custody of children in case of a marital dispute should be decided in the country of habitual residence, not where one of the parent illegally abducts the child to. Indian courts have this habit of not disrupting the status quo of parental custody and on top of that they take decades to decide custody issues. Therefore, once a parent abducts the child to India and retains him/her there, it is almost impossible for the other parent to fight cases in India (because of job & immigration reasons).
- Protective measures play a vital role in the effective operation of the Convention by facilitating expeditious return of children to the country of habitual residence in a manner which minimises the risk, a parent alleged to be victim of domestic abuse, might otherwise face.
- The wrongful removal and retention of children from country of their habitual residence can have significant negative consequences on victimized children and parents. Just because a child is abducted by a parent, doesn’t mean they are safe. IPCA is a form of child abuse, which is designed to alienate the child from their

left behind parent. Wrongful and prolonged separation of children from their left behind mothers or fathers, can be traumatic for children, many suffer long term emotional or psychological effects. Left behind parents, regardless of gender, are forced to fight an uphill battle in a foreign jurisdiction, in this case India, to reunite with their children. Most children abducted to India don't return to the United States.

- Most NRI women flock to India along with children only because of extreme gender biased laws to drag and harass husbands and his extended family members by lodging false criminal cases. The Hague convention in its original form is for safeguarding and protecting the rights of children.
- In case of outbound abduction, it was highlighted that for issuance of passport of a minor child consent of both the parents is required. However, the same is not followed or fraud being committed at the level of RPO office is quite common. In cases of non compliance of court orders, especially visitation rights of the other parent, no action is taken by the courts.
- Absence of father leads to parental alienation, which could have adverse psychological effect on the child like drug and alcohol abuse, physical and emotional deterioration of health, poor educational achievement, more inclination towards criminal activities, early sexual activity and teen pregnancy etc.
- There are many women who with mala-fide intention claim that they are unemployed but it is just an eyewash

in order to claim maintenance, to linger on the litigation and misuse Indian legal provisions like Section 498-A IPC, POSCO and Domestic Violence Act.

- Some of the abducting mothers have committed severe crimes in foreign countries but they fly to safety in India where they are de-facto protected by the Indian systems. Courts don't make any decision for as long as fifteen years which is not in the best interest of the child.
- In India, there is reward to the abducting parent by courts in the name of welfare of the child. Current law does not recognize the same as an offence. It leads to immense hardship to the left behind parent particularly when discretionary powers of the courts are involved. In such a situation, the left behind mothers lose biological rights over the child, while the left behind fathers get relegated to just ATM for abducting mothers and their lawyers, along with the hardships involved in cross jurisdictional litigation.
- It has been highlighted by one of the commentator that misinformation and misrepresentation is being spread by the vested groups in India influencing the decision not to sign the Hague Convention.
- It was brought to notice of the Committee that extended stay of foreign born children in India with expired passports & invalid OCI/PIO/visa documentation is not only illegal but unlawful. It's even more devastating fact that in-spite of having several rules and regulations by Foreigner Regional Registration Offices, that are applicable to foreign nationals, none of these measures

are enforced in IPCA cases, which leads to children being retained in India with undocumented immigration status. Some taking away parents also resort to foul means of producing counterfeit documentation only to jeopardize true identity of the children. The Indian government recognizes the fact that the foreign child might be habitually residing in India and may be illegally taken to foreign country without the consent of other spouse. The system in India is dysfunctional and is abetting easy displacement of children.

- A parent who has adverse court custody orders in foreign countries is fleeing to India for forum shopping, thereby denying chance to exercise parental rights to other spouse. In the situation of wrongful removal the Hague ratification will provide a streamlined process which will:
  - Make a determination of the child's habitual home
  - Determine there is no demonstrable grave risk to the child/mother
  - With that being done, the child is quickly returned within a stipulated timeframe to the competent court for adjudication of his custody issue
  - This allows both parents access to the child
  - Thus meeting the need of both, speedy return and access to the left behind parent
- What the child experiences, can never be fully understood by any of us. Children do not understand, why, what was always a home is no longer a home? Why, one who was a loving parent is no longer to be

loved, why they cannot see that person again who was an integral part of their lives. They experience confusion, sadness, sorrow, loss and bereavement and fairly soon, rejection of the left behind parent. Since they do not have the ability to process all this and no language to express their confusion nor a sympathetic person around them who relates to their loss, it leads to enormous internalized stress. The harm accrues to the entire family. More-over, it is enormous on the children who have their whole life ahead of them. Left behind parents also suffer great emotional harm, and financial and emotional deprivation of an extreme degree. This is the highest form of torture, to be rejected by your own child, one you have loved deeply and loved above yourself. An interim solution is to give immediate and liberal access to the left behind parent. The Hague Convention focuses on the child, providing a shared civil remedy among partner countries by providing a framework for countries to work together in specific ways to resolve international abduction cases. Each country that has ratified or acceded to the Convention is required to have a Central Authority. The Central Authority is the main point of contact for parents and other governments involved in abduction cases. The fundamental thrust of the Convention is to prevent removal of a child from the place of his or her environment.

- Many people make false narratives that children will be forced to join foster homes at the very first incidence of

reporting but such people purposefully do not provide the intricate details as to how Child Protection Services actually function varying from case to case. These are very meticulous in dealing with the domestic violence perpetrators; there are several tools from training to mediation available if the litigants are cooperative for behavioral corrections. There are several procedural steps that a Child Protection Services personnel will have to follow with due diligence, right from the case opening till the case is closed. Removal of children from the home is usually unnecessary; it is contemplated only when all other means of child safety have been considered and offered.

- As a responsible member of the global community, India has signed several International treaties on a range of issues. India's accession to the Hague Convention would be in line with this. International cross border treaties are essential for cross border issues and do not imply subservience in any manner. The Hague Convention applies in both directions. It is not like 'bowing to a foreign authority' or becoming subservient to a foreign master but in fact more like acknowledging the issues, which are international. Private International Law helps in making speedy resolution.
- It was also brought to the attention of the Committee that currently there is no mechanism in place between countries India and USA, whereby wrongfully removed child from India to USA can be sent back. The voluntary agreement and other remedies are applicable in cases of

the Hague Convention countries. Before taking any decision on this policy matter, kindly take into account the fact there are many cases where the child from India has been wrongfully removed to USA.

- There have been many cases where the child's international travel has been curbed by the intervention of Courts purely based on the fact that India is a non-signatory member to the Hague Convention. Please be considerate to the fact that Courts do not normally impose travel restrictions on children travelling internationally to the Hague compliant countries but it is a complete deterrent and disadvantage even to the genuine litigants or DV victims when the destination country happens to be non-Hague nation like India.
- An expert opinion on Indian law submitted by a senior Indian counsel to the Family Courts in England made recommendations against applicant father to refuse his application to take his daughter to India for purpose of holidays, seeing her grandparents who live in New Delhi and exploring her Indian cultural roots. After reading such experts evidence from India on Indian law, the UK judges have become very skeptic in allowing any Indian origin child to travel to India and are refusing applications as India is not a signatory to the Hague Convention. This has led to immense suffering to children and parents of Indian origins.
- A fact was highlighted that the abducting mothers pressurize the left behind parents to sign a consent form to take the child to India. Thereafter, the child is

illegally retained in India with no legal status. Immediately on entering India, a petition for divorce and child custody is filed in the Indian family courts along with barrage of petitions like domestic violence and Section 498-A IPC to harass the left behind parent and his extended family. The case thereafter is referred for mediation where unreasonable and extortionist demands are made including the consent that the child is allowed to take Indian citizenship. The most surprising fact is this that though the cases of domestic violence are filed in India successfully but there is no sustaining/ corresponding case in foreign country where they alleged the domestic violence had taken place. Some of the abducting parents have got support from certain feminist organizations thrive by maintaining the status quo.

9.6 THE BENEFITS OF SIGNING THE HAGUE CONVENTION AS PROJECTED BY SOME OF THE PARTICIPANTS ARE SUMMARIZED AS UNDER:

- It will provide a streamlined civil remedy for expeditious return of the child to its habitual home where the child ordinarily resided, to the competent court where child custody determination can be made based on the principle of best interest of the child
- It will obviate the need for criminal proceedings (which are the only route available in non-Hague countries as of now).

- It will protect children by minimizing the duration of the trauma.
- It will raise India’s stature in the International community as the stigma of India as a safe haven for abductors will be removed by India’s accession to the Hague Convention.
- This will also act as a deterrent to such acts of abduction in future saving India’s already clogged courts from vexatious litigation and saving precious judicial resources for citizens.
- It will allow parents who are divorced to have shared custody and if living in another country, to visit India with their children, enabling them to stay in touch with their precious and rich heritage.
- If India accedes to the Hague Convention, it will allow Indian parents to recover children abducted from India to another country.
- It will protect all children wherever they reside and their precious parental bond which is threatened by abduction (abducted to India or out of India).
- India's existing laws specifically the Guardians and Wards Act (GWA) is already in alignment with Hague Convention.
- India otherwise is seeking it’s deserved place on the International stage and cannot ignore that it is one of the outliers in not having signed the convention yet. Signing it will restore India’s place on the world stage.

- India gains mutual respect for its legal jurisdiction- in foreign courts.
- India will not be facing a whole generation of kids brought up believing that cheating and deceiving are legally and morally acceptable ways of dealing with disagreement.
- Foremost issue is welfare of a child. When one decides to become a parent, one is making an implicit agreement to put one's child first. Until India accedes to the Hague Convention, children are going to be put last by selfish abductors (both men and women) who insist on selfishly putting themselves before their own children. Children need the love and care of both parents in order to be successful and need stability of the surroundings and environment to which they are used to in order to feel safe and secure. Abducting parents unilaterally, without any reason but their own selfishness, destroy their childrens' lives by pulling them away from their homes.
- The constitution of the Central Authority would fast-track the decision as one of the complaints of all left behind parents was delay in taking the decision. One such example is that by the time the order from the Supreme Court came, the child had attained the age of majority and custody petition became infructuous.

9.7 SOME GENERAL SUGGESTIONS GIVEN BY THE PARTICIPANTS:

- To have strict provisions to register marriages as it can help tackle the problem. When the marriage takes place

between persons of different nationalities, it should be registered in both the countries. If the Indian partner chooses to come back to the native home along with the child, they should be protected and be allowed to have dignified life keeping in mind the best interest of the child.

- There are certain provisions in the Implementation Act enacted by Japan which effectively deal with some of the issues. Article 28(2)(ii) of Japan's Act addresses Domestic Violence issues, corresponding to Article 13(b) of the 1980 Hague Convention, although it does not use the word 'domestic violence', one can find that actually this clause addresses the situation where the taking parent was facing violence from the left behind parent in the country of habitual residence of the child. This situation, if alleged, has to be taken into consideration when the judge decides whether Article 13(b) as ground for refusal is established. With a view to protect personal information of the child and the taking parent, the relevant provisions in the Implementation Act (Art.5 (IV), Art 20 and Art. 62(IV)) stipulate non-disclosure of the location of the child to the left behind parent and may disclose the information only in the following exceptional cases:
    - To disclose the information to the court where the return or access case is pending in response to the court's request to confirm the domicile or residence of the child and the taking parent.

- To notify the protective institutions such as a welfare office or a child guidance center that there are reasonable grounds to believe that the child might be subjected to abuse.

It is not allowed for the court to grant permission to see or copy the case records which contain information of the domicile or residence of the child and the taking parent except in the following cases:

- Where the respondent has given consent.
- Where the information is necessary in order to carry out compulsory execution in relation to a final and binding return order.

- To make a law to deliver judgments in the child custody related cases within a year and within 30 days enforce visitation rights for left behind parent.
- The language of the legislation should be gender neutral since domestic abuse is not gender specific. The legislation should be framed for the children and not for parents.
- Strict requirement should be set for cases where abducting parents claim abuse. Only those cases where there are criminal indictments should be considered for the purpose of Article 13 (Hague Convention). All the other cases should be treated as not adjudicated and should be sent back to the country where the allegations are being made for further adjudication. This ensures that

proper legal methods are followed and justice meted out in the jurisdiction where the abuse allegedly occurred.

- Provide lawful path to NRI women, when they wish to come back to India with child. When married in India under Hindu Marriage Act (HMA), divorce petition can be filed only in Indian courts unless both parties agree for out of country divorce. Monitor and press criminal charges for extended family, when they aid in domestic abuse overseas. Take measures to prevent extended family from aiding to hide finances in India. Make sure, if married in India, people don't submit to foreign laws to keep lucrative jobs. Financial security will empower battered women.
- Extend e-governance app Kaizala available for safety of women within India and NRI women. Use MHRD programs such as spoken tutorial from IIT- Bombay, to educate women students at college level on the resources available for welfare, safety and security. There should be no need for consent from spouse for an Indian woman to board a flight back with child. Indian Embassy should assist them. If confiscation of passport of child/mother is reported to Indian Embassy, they should expedite issuance of travel passport to get mother/child out of that country. Time limit of 10 years term in Section 498A IPC needs to be extended as it should include events occurring out of India.
- Shift the focus of the Hague Convention from child custody to child welfare. Prioritize healthy development of a child instead of rights of parents.

- Residing with the mother (if not otherwise contraindicated) and its family and imbibing its mother's culture as a State priority during a child's early developmental years, at least till 8 – 12 years of age will benefit all countries.
- Incentivize estranged parents to stay close to each other and do cooperative co-parenting (a 'good divorce') till the child is at least eight years old or till 3 years after divorce, whichever is longer; to provide the child, healthy psychosocial and behavioral development to adjust naturally to the new family dynamic. Support parents through incentives for stability and child rearing.
- Empower women with permanent residence, jobs and extended visas for their immediate family of birth to help with child rearing.
- Despite incentivisation, if one parent still wants to keep the child in another country where he/she feels the child can comfortably be brought up, then such a child should be allowed to stay upto 12 years of age.
- Addressing concerns regarding loss of potentially productive future citizens of foreign countries- let us first make such healthy and productive future citizens, before repatriating them to their countries of birth if such an eventuality arises.
- It is not abduction and it should not be treated so. It would be appropriate to completely remove the word 'abduction' with all its negative connotations from the

treaty. A simple replacement with the word 'removal' may ensure more positive outlook.

- Implementation of the said Policy should be supported by a comprehensive and reliable knowledge base on all aspects of the status and condition of children. Establishing such a knowledge base should be enabled through child focused research and documentation, both quantitative as well as qualitative. A continuous process of indicator-based child impact assessment and evaluation should be developed; assessment and evaluation should be carried out on the situation of children in the country, which would help in forming policies and programmes for children.
- As per Indian laws, under Hindu Marriage Act, the registration of marriage is not compulsory which many a time is not recognized as a valid marriage in foreign countries e.g. Peru. Thus provisions to be imbibed for registration of marriage.

9.8 SOME CONCERNS AND SAFEGUARDS TO BE CONSIDERED

i) **Concerns:**

a. All laws even the best need vigilance for abuse and there should be safeguards.

b. Concerns about domestic abuse victims are overstated as at least in USA, where many NRIs live, has many protections in place for women.

ii) **Safeguards:** Safeguards for parents as well as children in statutory legislation, in the event of India signing the

Hague Convention on International Child Abduction Bill 2016;

a. Offer pre-marriage and pre-immigration counseling about
   - available resources in the new country
   - access to assigned consular officer in that country in case of emergency
   - a list of local NRI contacts

b. Expedite resolution of cases as each day's delay causes injustice to children and left behind parent. This responsibility falls squarely on judicial system. However, as divorce and custody issues are rather specialized, a dedicated judicial team can best do this with speed.

9.9 SOME IMPORTANT MEASURES IN ADDITION TO ABOVE, TO SAFEGUARD INTERESTS OF CHILDREN

- Children should not be dragged into courts. Children cannot be expected to give a fair opinion. They are at the mercy of the abducting parent, manipulated and brainwashed by them and separated wrongfully from the left behind parent with minimal contact. Children always want to please the abducting parent as that is the only parent they now know. How can their 'opinion' be treated as uninfluenced?

- Ensure understanding that every day of separation and return to their usual home, is a day when the child suffers emotionally.
- Swift decision making is very important as ‘justice delayed is justice denied’. Each day of separation means alienation and harm to the child and the left behind parent.
- The left behind parent from day one of abduction should be allowed generous and frequent access to the child, to minimize the effects of alienation.

9.10 OTHER SUGGESTIONS BY THE STAKEHOLDERS

- The enactment has to be prepared keeping in view best interest of the child at the core and not with perspective of the parents or habitual residence.
- If we bring an independent enactment on child removal, a distinction should be made between matters where both parties are residents of USA or western country and hold visa, and where parties are married in India and have migrated to other country.
- Even if the child is in custody of one parent, access either through electronic media or physical visit should be permitted to the other parent unless the same is not in the best interest of the child.
- Pending mediation or conciliatory process, no perceptive action should be permitted to be taken by either of the party and in case criminal action is taken, the Central Authority should ensure that they are restored with all

their personal documents including passport, visa, employment documents, safe passage and temporary visit documents, and to vacate all criminal orders against them which are punitive in nature including look-out notice and Interpol notice.

- In case the primary care-giver is directed to go back and submit to the jurisdiction of habitual residence of the child, it should be the duty of other spouse seeking return of parent and the child to give legal/counselor fee, boarding, lodging and maintenance expenses and support to both which should be commensurate to the status of the parties during the existence of marriage.
- Mediation/counselling/joint parental meeting at the very first stage is important before passing any interim order.
- The fact that the complaint is delayed should be an important factor while deciding the issue.
- When any party agrees to return back to submit to the jurisdiction of the court, all ex-parte orders or interim orders should stand vacated and expunged so that those do not adversely affect the party.
- The parameters of the child welfare should be in consonance with cultural environment the child is adapted to and not of the align system and they should not be based only on economic or educational factor.
- Provision should be made that if a person is adversely affected by a default judgment of the other country, the Central Authority before passing an order would look into the circumstances resulting in default of the person

who is alleged to be defaulting in appearing before the concerned jurisdiction.

- Composition of the Central Authority should be quasi-judicial because of the powers enjoined, including CPC and should be headed by a person who is at least a retired High Court Judge, so as to obviate any delay in decisions and prevent forum shopping.
- The 'habitual residence' term should include immediate residence and not a residence maintained by the parties distant in time.
- To consider the idea that if a complaint is filed before the Central Authority, whether other remedies are being taken by the other spouse, are to be clubbed before the Central Authority so as to avoid multiplicity of litigation and conflicting decisions.
- Provisions should be imbibed for effective mechanism in respect of service of immediate summons and also to follow the expeditious process as per Commercial Courts Act, 2015.
- Where the parties re-locate pursuant to mutual agreement it should be made binding upon them unless it is proved that mutual consent is under coercion, fraud or deception.
- Endeavour should be made by the Central Authority to immediately secure the passport of each person, which is valuable and fundamental right.
- Central Authority should ensure that the people who do not have close connect with India and are living in another country for a long period of time, say

approximately 10 years, their complaints should not be encouraged in this jurisdiction.

- If the parents have already been divorced and custody issues between the parties already settled, no further adjudication of the same should be resorted by means of either Hague Convention or under any special enactment.
- Some participants raised serious concern about the mechanical manner in which ex-parte orders of emergency custody are passed without giving an opportunity to the other party of meaningful participation in the process and without looking into basic material, which is documentary in nature in some foreign countries. The concern was raised that it is a post-box exercise. The same should be taken care of.
- Distinction should be made between the parties where marriage was performed in India as per Indian law and where marriage is performed in another country as per law existing there.
- Visiting rights or rights of access to the child should be meaningful and not in the presence of police or other authorities keeping in view the dignity of the parents and the child except in cases where there is possibility of physical harm.
- Central Authority should take into consideration the orders passed in respect of any other proceedings pending between the parties.

- The Central Authority should be repository of the data base of Indian citizens/NRIs /PIOs/OCIs living abroad (Indian diaspora).
- Emphasis should be on balancing the rights of the parties.
- Training of Judges to deal with such issues should be ensured.
- If a person taking child to India files case in a remote village/sub division where lawyers are not available to deal with such complicated issue, the jurisdiction should be at the High Court level.
- The said matter should be preferred to be settled by Mediation Centers first.
- Penalty under the Hague Convention should be monetary.

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CHAPTER 10

MECHANISM TO ADDRESS THE DIFFICULTIES BEING FACED BY THE AFFECTED PARENTS

Consequent upon its constitution, the Committee has elaborately deliberated over the issue of inter-country parental child removal. In the process, available literature on the issue and case law were taken into consideration. Meetings were held with the affected individuals across the world, in person, as well through video-conferencing, Skype, etc. The Committee feels that the phenomenon indeed is an unfortunate one, where the basic unit of society, i.e., the family, breaks and the ramifications are so intense that the disputes proliferate to encompass the lives of individuals involved, wherein litigation overwhelms their lives thereafter.

The Committee is mindful of the fact that after the Hague Convention 1980 came into being, the physical boundaries between the nations have become more and more amorphous in terms of transnational cultural exchange and relationships, including marriages. The IT interventions have further revolutionised the phenomena where people remain connected overseas like they may be with their next door neighbors and many transitions have taken place ever since.

Admittedly, the Hague Convention 1980 does not decide the issue of custody of the children but it is a mechanism to ensure speedy and prompt return of the child to the place of its 'habitual residence'. However, the Committee feels that concept of habitual residence is not synchronous with the best interest of the child. There is no denying the fact that uprooting of a child from its habitual environs and socio-cultural milieu may impact it negatively, but this is just one side of this polygonal problem.

Often, when a marriage hits a rough patch, the possibility of domestic violence cannot be ruled out. In any family with hostile relationships, the child is an active or passive victim of emotional trauma. Effects thereof on the child are part of Chapter 7.

The Committee has no misgivings about the noble intent of the Hague Convention of 1980, which seeks to reintegrate a child with the place of its habitual residence but weighing the other issues involved, habitual residence as sole criterion to determine the best interest of the child, does not seem just and fair. The left-behind parents (LBPs) have raised the issue of complete isolation from the child and thus demand return of the child, even as old as two years. On the other hand, the flight-to-safety parents exhibit apprehension of continued violence and harassment upon going back.

If returned to place of its habitual residence, the child and/or the flight to safety parent may face problems such as:

1. Child will return to the same inharmonious set-up, which his parent had to leave;
2. The Convention talks of prompt return of the child - should a toddler be returned to its habitual residence, completely ignoring the fact that in most of the cases, the mother is the primary care-giver of the child, for whom the circumstances may not be that congenial;
3. Child being used by most couples, as a tool to settle scores;
4. In case the flight to safety parent returns with the child to the county of habitual residence, issue of its Visa, Permanent Resident Status is clouded. Because of any criminal proceedings initiated by the left-behind parent,

he/she may get arrested as soon as he/she lands back in the country of habitual residence;

5. The problem of residence and maintenance of the child and the accompanying parent, as well as issue of their mental well-being;

Honouring her obligations under UNCRC, India has sketched her major child-welfare and child-centric legislations around the principle of the 'best interest of child' (Article 3). In matters concerning children, Indian Courts take into account, all the attending circumstances with **'best interest of the child'** as paramount consideration.

To deal with the cases involving inter-country parental child removal, there must be a robust mechanism provided under the domestic laws in India, which give all possible assistance to left-behind/flight-to-safety parents.

For children removed/retained wrongfully and people with like issues, the Committee proposes that there should be a **'Inter-Country Parental Child Removal Disputes Resolution Authority**'. The recommendations of the Committee are as follows:

1) Process of decision making regarding custody of children is not a mechanical exercise rather has to be dealt with by application of mind. We cannot compromise with best interest of child for speedy return.
2) The proposed Authority should maintain complete data of Indian citizens going abroad as well as of the NRIs/PRIs/OCIs/Other category of Indian diaspora, including their addresses, phone numbers and e-mail

ids. Updation of any change therein should be their responsibility.

3) The Indian diaspora living abroad should mandatorily get any additions in their families, by way of marriage/birth/adoption, registered with the Indian Embassy in the country where they reside. On-line solution therefor, should also be provided.

4) Indian Embassies across the world should educate the Indian diaspora abroad that the Embassies or Consulate offices abroad shall be the first point of contact in cases of international parental child removal or any dispute, wherever any guidance or assistance is required. Complete information about the person to be contacted should be available on website, including answers to FAQs. . The Embassies should educate the persons living abroad about the proposed Authority, after it is constituted.

5) Mediation often proves a successful technique to resolve disputes amongst couples at odds. In most of the cases where one of the spouses removes the child from joint custody/custody of other spouse, the root cause is lack of harmony in the spousal relationship. Sometimes, if made to sit across the table with a mediator, the likelihood of better sense prevailing upon the couple increases, therefore, the Authority should promote mediation as the first resort. Even Hague Conference on Private International Law has issued 'Guide to Good Practice on Mediation' in 2012 and is promoting mediation at the very first stage, not only for resolution

of disputes pertaining to parties belonging to Contracting States but even non-Contracting States to the Hague Convention.

6) A list of trained mediators should be available on the website of the Central Authority. The parties should be given liberty to select mediator through consensus even beyond the list available on the website of the Authority. In cases of inter-country parental child removal, where the parties are not able to sit across the table because of unavoidable reasons, IT solutions should be used to conduct mediation proceedings to ensure rights of access as well as visitation rights, to the other parent besides choosing a neutral place for meeting.
7) It is medically proved that separation of a child from either of the parents, or the child being a witness to domestic violence, has a negative effect on its growth. Further, to remove any allegation of tutoring of the child by the taking-parent, the left-behind parent should be given immediate access to the child. This can be either on mutually agreed terms or by an order passed by the proposed Authority or the Court. The proposed Authority should arrange for immediate access and/or visitation rights on an application filed before it.
8) The proposed Authority, while dealing with the cases involving inter-country parental child removal, must be mindful of the fact that the child should not be reduced to the status of a commodity in such litigation.

9) The proposed Authority should offer prompt legal aid to the parties involved in inter-country parental child removal dispute, if requested or otherwise felt necessary. A list of advocates who offer to act pro bono should be available on the website of the proposed Authority along with their contact details. National Legal Services Authority and State Legal Services Authorities may be associated for the purpose.

10) Aid in the form of behavioral counselling and other assistance should be provided by the proposed Authority to the children/applicants, for which State Commission for Protection of Child Rights, as constituted in different States under the Commission for Child Rights Act, 2005 (Regional Units), may be associated.

11) The parties should be given liberty to file applications even before the regional unit, which shall be transmitted to the proposed Authority. Video conferencing facilities should be made available in the office of the Commission to be used by the parties concerned, for hearings or exercise of rights of access.

12) Before allowing the child to be taken to another country, the proposed Authority shall ensure the well-being of the child in the other country through diplomatic channels or otherwise. Concept of mirror order from country of origin can be explore to ensure compliance of any order passed by the Proposed Authority or the Court.

13) When a parent comes to India along with his/her child as a case of inter-country parental child removal, he/she shall immediately report such return to the proposed Authority, along with a statement of reasons. The said information shall have to be kept confidential by the proposed Authority. The process will reduce time taken in locating a child in case any request is received by the proposed Authority for return of the child. Such information can be furnished through some Attorney, may not be mentioning address of the party concerned, so as to ensure his/her safety, if considered appropriate.

14) The proposed Authority shall encourage the couples to adopt healthy joint parenting plan and keep welfare of the child as the sole paramount consideration in such cases. The couples should be encouraged to overlook their differences and to adopt a balanced stance qua each other in case they fail to reconcile their differences. Foster care is not being encouraged as the same alienates the child from both the parents.

15) When the proposed Authority has reasonable ground to believe that the child in respect of whom an application has been made might be subjected to abuse, it may get a report from the Regional Unit/local authority (District Magistrate) regarding the same and direct them to take effective steps to protect the child's interests.

16) The proposed Authority shall endeavor to understand the intention of the child through appropriate means and shall take into account its intention according to its age and degree of development while passing final order.

17) Any action of either of the parent in removal of child from one country to another should not ex-facie be taken to be a criminal offence. Each case should be examined on its own merits.

18) Under the Japanese Implementation Act and in other countries as well, Central Authority is different than the Court which adjudicates application for return of child. Central Authority in different countries is administrative body. However, keeping in view the workload and highly specialized issues involved in inter-country parental child removal in the area of Private International Law, Family Courts may not be able to take up the cases expeditiously, hence, it is proposed to have a single authority named as 'Inter-Country Parental Child Removal Disputes Resolution Authority' at the national level with expert members and ex-officio members from the Ministries concerned for better co-ordination.

19) To monitor working under the Act, the State Legal Services Authorities and District Legal Services Authorities may be involved.

20) In inter-country parental child removal, though parents fight for custody of the child or for taking back the child to the place of its habitual residence, keeping in view the law laid down by Hon'ble the Supreme Court in Nithya Anand Raghavan vs. State of NCT of Delhi & Anr. (*AIR 2017 SC 3137, copy annexed at p.360 in Vol. II)* and the best interest of the child, ensuring that he/she is not merely treated as a pawn, in the exception clause

'best interest of child' needs to be added as one of the exceptions for refusing return of child.

In Nithya Anand Raghavan's case (supra), Hon'ble the Supreme Court has done away with the principle of comity of courts and the principle of 'first strike' in matters relating to inter-country parental child custody disputes and have laid down the following principles to be followed:

- Concept of *Forum Conveniens* has no place in wardship jurisdiction.
- Principle of Comity of Courts not to be given primacy in child custody matters.
- Child removal cases to be decided on merits on welfare of child principle.
- Foreign Court order to be one factor to be taken into consideration.
- Courts free to decline relief of return of child within its jurisdiction.
- Courts may conduct summary or elaborate enquiry on question of custody.
- High Court exercises *parens patriae* jurisdiction in cases of custody of minors.
- Remedy of Habeas Corpus cannot be used for enforcement of foreign Court directions.
- Parties can avail other substantive remedy permissible in law for enforcement of foreign Court order.
- High Court can examine return of minor without being 'fixated' on foreign Court order.

- ‘First strike’ principle disagreed as being in conflict with the welfare of the child.
- Summary jurisdiction to return child be exercised in interest and welfare of child.

Further, Prateek Gupta Vs. Shilpi Gupta & Ors. 2017 SCC OnLine SC 1421 *(annexed at p. 400 in Vol. II),* it has been held by Hon’ble the Supreme Court as follows: -

- It has been reiterated that the notion of ‘first strike principle’ is not subscribed to and the judgment of the Supreme Court in Nithya Anand Raghavan has been subscribed to.
- Notwithstanding the principles of comity of courts, and the doctrines of ‘intimate contact and closest concern’, issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of the overall well-being of the child.
- In the process of adjudication on the issue of repatriation, a Court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant parent is prompt and alert in the initiative to do so. Overwhelming exigency of the welfare of the child will be the determining factor for such process. With hurry we cannot burry justice.
- Doctrines of ‘intimate contact and closest concern’ are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language custom etc.

with focus on process of overall growth and grooming.

- There is no forum convenience in wardship jurisdiction and the welfare of the child as the paramount consideration will be the mandate.
- Considering that the child in question was barely 2-$^{1}/_{2}$ years old when he came to India and is now over 5 years old, the child of tender years, he ought not to be dislodged from the custody of his father whilst proceedings are pending before the Guardian Judge, Delhi.

21) It is proposed that the Authority should be headed by a sitting or retired Supreme Court Judge, sitting or retired Chief Justice or Judge of the High Court, with at least five years experience as such in total and expert members with at least 20 years experience in the field.

22) Normally, the mothers are the primary carers of child, either individually or jointly with the fathers, especially young children, hence, it is recommended that at least one of the three appointed members, including the Chairperson of the proposed Authority, shall always be a woman so that the issue of best interest of child and the risk of exposure to domestic violence can be examined properly.

23) Though it is being recommended that any vacancy in the office of Chairperson is to be filled up within 60 days, however, to take care of the urgent nature of work, where delay of even few days may be crucial to either of

the parties to the dispute or may compromise the best interest of the child, the Government may give additional charge of the Chairperson, to the Chairperson/President or the member of any already constituted Tribunal or Commissions who are otherwise eligible to be appointed as Chairperson and found to be the best-suited, in case the vacancy is for a period of more than two weeks. Under no circumstances, the arrangement should continue for more than 60 days.

24) The Secretary or the Registrar of the proposed Authority should be an officer of such a level and department, who is able to co-ordinate amongst different Ministries and interact with the Central Authority or the Governments in different countries.

25) The confidentiality of all the proceedings and entire record of the hearing of the proposed Authority should be maintained, keeping in view the best interest of the child and parties to the litigation.

26) Provision should be made in the Rules to supply copy of the order to the parties concerned free of cost, immediately after passing of the order. The order should mention specifically about the remedy available to the party against the order, period of limitation and the forum.

27) The hearings before the proposed Authority should be held in-camera as far as practicable.

28) In order to ensure that day-to-day working of the proposed Authority does not suffer on account of non-availability of two ex-officio members, the Government

may consider that the proposed Authority may function with three appointed members for the purpose of adjudication of the applications. However, wherever considered necessary, the proposed Authority may require their presence keeping in view special facts/circumstances of the case or the issues involved.

29) District Magistrates have been assigned important role in the process, which is to be discharged expeditiously, hence, they need to be sensitized. Standard Operating Procedure should be prepared for the duties to be discharged by different authorities and officers under the Act, to expedite the process.

30) Formats of the applications should contain entire information required for adjudication of the dispute expeditiously. Facility of on-line filing of applications should also be provided.

31) Possible information required in an application can be:

(a) the name and date of birth of the child alongwith his parentage;

(b) particulars of the applicant – name, address, occupation, email id, phone number etc.

(c) date of alleged removal of the child from the place of habitual residence;

(d) period since when the child was residing with the parties and the address thereof;

(e) if the child was residing with one of the parents, before alleged removal, the details thereof;

(f) place from where the child has been removed;

(g) the whereabouts or suspected whereabouts of the child;

(h) the details of the person who has allegedly removed the child or with whom the child is assumed to be;

(i) the interest of the applicant in the matter (e.g. mother, father, or person with whom the child lives and details of any order giving custody of the child to that person);

(j) the grounds on which return of the child has been sought; and

(k) details of any interim or final order passed by any court or authority in any proceedings, relating to the child;

32) The stake-holders, members of the proposed Authority and the Judges, who are to conduct cases of inter-country parental child removal, should be regularly updated by way of conferences, seminars and trainings, for which National Judicial Academy, Bhopal or any State Judicial Academy should be requested to prepare a module.

33) It should be made mandatory for the parties to furnish their e-mail ids and mobile phone numbers for communication with the proposed Authority.

34) Website of the proposed Authority should contain complete details of laws applicable along with the authorities to be contacted for different purposes and the process to be followed.

35) The proposed Authority should give parties before it, password protected access to information available relating

to the cases. Other static information on the website should be open for all

36) In the final order passed by the proposed Authority names of the parties shall not be mentioned for the purpose of uploading on its website. Even in the body of the order names of the parties or the child should not be mentioned. For uploading of orders on the website instructions issued by the e-Committee of the Hon'ble Supreme Court of India, from time to time, be followed.

37) If the Bill as suggested is not to be enacted independently, the same can be added as an additional Chapter in the Juvenile Justice (Care and Protection of Children) Act, 2015, -with required modifications.

38) Reasons for delay in disposal of the applications should be furnished to the Government.

39) All pleadings and language of communication before the proposed Authority shall be such, as may be prescribed by the Central Government. Any document in a language other than prescribed that should accompany its authorized translation in that language.

40) The proposed Authority can take security, as it deems fit, to ensure execution of order later.

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CHAPTER 11

THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2018

A Bill to ensure prompt return of children wrongfully removed to, or retained in any other country, to ensure rights of custody and access to the parties and to establish an Authority, *inter alia*, for the purposes of providing assistance to locate such children, encourage amicable solutions and to process requests for return of children and for the matters connected therewith or incidental thereto.

WHEREAS the best interest of the children is of paramount importance in the matters relating to their custody in view of the United Nations Convention on the Rights of the Child, 1989.

Be it enacted by the Parliament in the ------ year of the Republic of India as follows:-

1. Short title, extent, application and commencement.— (1) This Bill may be called 'The Protection of Children (Inter-Country Parental Removal and Retention) Bill, 2018'.

(2) It extends to the whole of India except the State of Jammu & Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint and different dates may be appointed for different States.

(4) The provisions of this Bill shall apply to every child who has not completed eighteen years of age and has either been

wrongfully removed to, or retained in India, or in any other country after having been wrongfully removed from India.

2. **Definitions.—** In this Act, unless the context otherwise requires,—

(a) "applicant" means any person who files an application with the Authority for tracing a child alleged to have been wrongfully removed or retained, or for arrangements for organising or securing effective exercise of rights of access to the said child;

(b) "Appropriate Government" means the government in any country other than India;

(c) "Authority" means the 'Inter-Country Parental Child Removal Disputes Resolution Authority', as constituted under Section 4;

(d) "Chairperson" means the Chairperson of the Authority;

(e) "commencement of proceedings" means the date on which either the opposite party puts in appearance after service of notice or refuses to accept notice;

(f) "habitual residence" of a child is the place where the child resided with both parents; or if the parents are living separately and apart, with one of the parent under a separation agreement or with an implied consent of the other parent or under a court order; or with a person other than a parent for a significant period of time, whichever occurred last;

(g) "local authority" means 'District Magistrate' of the district concerned, as defined in Code of Criminal Procedure 1973;

(h) "member" means a member of the Authority and includes its Chairperson;

(i) "prescribed" means as prescribed by Rules made under this Act;

(j) "rights of access" in relation to a child include the right to take a child for a limited period of time to a place other than the child's habitual residence, or interaction with the child by any means of communication including electronic media;

(k) "right of custody" in relation to a child includes right to take care of the person of the child, to take long-term decisions about child's development and well-being and, in particular, to determine the child's place of residence;

(l) "State Commission" means the 'State Commission for Protection of Child Rights', as constituted in different States, under the Commissions for Protection of Child Rights Act, 2005;

3. Wrongful removal or retention.— (1) For the purposes of this Act, removal to or retention in India, or in any other country, after having been wrongfully removed from India of a child is to be considered a wrongful act where –

(a) such an act is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the laws applicable in the State in which the child was habitually residing immediately before such removal or retention; and

(b) at the time of removal or retention those rights were actually being exercised, either jointly or alone, by any person, an institution or any other body, but for the removal or retention of the child.

(2) The rights of custody specified in the Act, may arise in particular—

(a) by being natural guardian of the child; or

(b) by operation of law; or

(c) by reason of a judicial order; or

(d) by reason of an agreement having legal effect under the law of the country in which the child was habitually resident, immediately before removal or retention.

4. Constitution of Authority.— (1) The Central Government may, by notification in the official Gazette, constitute an Authority to exercise the powers conferred on, and perform the functions assigned to it, under this Act or any other law.

(2) The Authority shall consist of a Chairperson and not less than five members, as the Central Government may deem fit, to be appointed by a notification issued in this regard.

5. Qualification of Chairperson and Members of the Authority.—

(a) A person shall not be qualified for appointment as Chairperson of the Authority unless he/she is or has been a Judge of the Supreme Court, or Chief Justice or Judge of the High Court and has served as such for not less than five years, in total.

(b) In case of members-

(i) a person of proven ability, integrity and having standing of at least twenty years in legal field, having adequate knowledge and experience in dealing with matters relating to international parental child removal; and

(ii) a person of proven ability, integrity, qualification and having at least twenty years experience in the matters

relating to psychology and welfare of child. Out of the aforesaid three appointed members, one shall always be a woman.

(iii) An officer not below the rank of Joint Secretary in the Ministry of Women and Child Development, Government of India, as an ex-officio member;

(iv) Chairperson or any member of the National Commission for Protection of Child Rights, as an ex-officio member;

(c) Either or both of the following officers can be co-opted as ex-officio members of the Authority by the Chairperson keeping in view special circumstances of a case:

(i) an officer not below the rank of Joint Secretary in the Ministry of External Affairs; and

(ii) an officer not below the rank of Joint Secretary in the Ministry of Home Affairs.

6. Selection of the Members of the Authority.— (1) The Chairperson of the Authority shall be appointed after consultation with the Chief Justice of India or his nominee.

(2) The members of the Authority shall be appointed on the recommendations of a Selection Committee consisting of –

(a) Chief Justice of a High Court- Chairperson;

(b) Secretary/Additional Secretary, Ministry of Women and Child Development- Member;

(c) Secretary/Additional Secretary, Ministry of Foreign Affairs- Member; and

(d) Secretary/Additional Secretary, Ministry of Home Affairs-Member.

(3) The Secretary/Additional Secretary, Ministry of Women and Child Development shall be the Convener of the Selection Committee.

(4) The Selection Committee shall determine its procedure for recommending appointments under sub-section (2).

(5) No appointment of the members of the Authority shall be invalid merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

7. Term of office of Chairperson and Members.— (1)The tenure of the Chairperson shall be five years from the date on which he/she assumes office or till he/she attains the age of sixty seven years, whichever is earlier:

Provided that maximum age shall be read as seventy years in case of appointment of a retired Judge of the Supreme Court, as Chairperson.

(2) In case of members of the Authority, tenure shall be three years from the date on which he/she assumes office or till he/she attains the age of 65 years, whichever is earlier;

(3) If a casual vacancy occurs in the office of the Chairperson or any appointed member in the Authority, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled up on permanent basis within a period of ninety days by making fresh appointment in accordance with the procedure prescribed under the Act.

8. Salary and allowances.— (1) The salary and allowances payable to, and other terms and conditions of service of the Chairperson shall be the same as admissible to him on the post, he was holding before his appointment as such.

(2) The salary and allowances payable to, and other terms and conditions of service of other appointed members, shall be such as may be prescribed by the Central Government from time to time.

9. Resignation by the members.— The Chairperson or any appointed member may, by notice in writing, under his hand, addressed to the Central Government, resign from his office:

Provided that the Chairperson or a member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government or until a person duly appointed, as his successor enters upon the office, whichever is earlier.

10. Removal of members:- (1) The Central Government may, after consultation with the Chief Justice of India or his nominee, remove from office the Chairperson or any appointed member of the Authority, who--

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that for removal of a member, consultation with the Chief Justice of India or his nominee shall not be required.

Provided that the Chairperson or the member shall not be removed from office, without giving him reasonable opportunity of being heard.

(2) Without prejudice to the provisions of sub-section (1), the Chairperson or the member shall not be removed from office except by an order made by the Central Government on the ground of proven misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such Chairperson or member has been informed of the charges against him and has been given a reasonable opportunity of being heard.

(3) The Central Government may, with the concurrence of the Chief Justice of India or his nominee, suspend from office, the Chairperson or member in respect of whom reference has been made to the Judge of the Supreme Court under sub-section (2), until the Central Government has passed order on receipt of the report of the Judge of the Supreme Court on such reference.

(4) The Central Government, after consultation with the Supreme Court, may lay down the procedure for inquiry for removal on the ground of proven misbehaviour or incapacity, referred to in sub-section (2).

11. Appointment of officers and other staff of Authority. — (1) The Central Government shall in consultation with the Chairperson of the Authority provide such officers and other staff as it considers necessary for efficient discharge of its functions.

(2) The salary and allowances payable to, and other terms and conditions of service of the officers and other staff of the Authority, shall be such as may be prescribed.

12. Seat of the Authority.— The principal seat of the Authority shall be at New Delhi. However, considering the requirements from time to time, the Chairperson can decide to hold hearings at any other place in India.

13. Functions of Authority.— (1) A Bench of minimum three members, including the Chairperson, shall be required to adjudicate on any application filed before the Authority.

(2) The Authority, or any other officer authorized by it in this behalf, shall take appropriate measures while performing all or any of the following functions, namely—

(i) to discover the whereabouts of a child who has been wrongfully removed to, or retained in India, or outside India. In case where the child's place of residence in India is not known, the Authority may obtain the assistance of any Local Authority to locate the child, where the child is believed or informed to be;

(ii) to take appropriate measures to prevent harm to any such child or prejudice to any other interested party;

(iii) to secure voluntary return of any such child to the country of its habitual residence or to bring about an amicable resolution of the differences between the parties to the dispute;

(iv) the process of mediation shall be mandatory at the first instance in all cases;

(v) to order return of the child to the country of its habitual residence except in the circumstances mentioned in Section 24;

(vi) to exchange, where desirable, information relating to any such child, with the appropriate authority in any other country;

(vii) to provide, on request, information of a general character, as to the laws applicable in India;

(viii) to facilitate provision of legal aid, where circumstances so require, or is requested;

(ix) to decide whether the child has been wrongfully removed from other country;

(x) to take security from any party to ensure compliance of any final order and make such administrative arrangements, as may be necessary, to secure safe return of any such child to other country, excluding the cost required to be incurred for travelling from India to other country:

(xi) to discharge such other functions as may be necessary or assigned.

Provided that the Authority may interview the child or seek opinion of any expert, before passing an order of return.

14. Confidentiality.— The proceedings of the Authority shall be held in camera, unless the parties to the case agree to otherwise. Entire information submitted by the parties before the Authority shall be kept confidential even after conclusion of the proceedings. The same can

be accessed either by the parties to the dispute or the child, whose custody was in dispute.

Provided that to access information under any other circumstances, the permission of the Authority shall be required.

15. Powers of the Authority.— (1) The Authority shall not be bound by the procedure laid down by the Code of Civil Procedure 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of the Act and the Rules framed thereunder. The Authority shall have the powers to regulate its own procedure.

(2) The Authority shall have, for the purpose of discharging its functions under the Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex-parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex-parte;

(h) any other matter which may be prescribed.

(3) Any proceeding before the Authority shall be deemed to be judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860), and the Authority shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure 1973 (2 of 1974).

16. Procedure for making application to Authority.— (1) The Appropriate Government/Authority of any country or a person, institution or any other body claiming that a child has been wrongfully removed to, or retained in India, in breach of the rights of custody as defined under Section 3(2) of the Act, may apply to the Authority for assistance, for securing the return of the child.

(2) Every application made under sub-section (1) shall be in such form, to be accompanied by requisite documents and the fee, as may be prescribed**.**

(3) A certificate or affidavit from Appropriate Government/ Authority of other country in which the child had its habitual residence or from an attorney, setting out the law of that country relating to the rights of custody, alleged to have been breached.

(4) Any other document, as may be required by the Authority.

(5) The Authority shall not reject any application solely on the ground of deficiencies therein, without affording an opportunity to the party concerned to cure the defects, within the period prescribed. Extension of the period shall be at the sole discretion of the Authority, to be granted for the reasons to be recorded.

(6) The Authority may permit any third person to intervene in the matter in case it finds his assistance to be appropriate for just decision of the application, keeping in view the best interest of the child.

(7) The Authority may take assistance of an expert in any field, whatever is considered appropriate keeping in view best interest of the child.

(8) In case of death of the applicant, unless the Authority allows substitution, the proceedings shall be closed. An application for substitution can be filed within 30 days of the death of the applicant, unless the Authority, for reasons to be recorded, condones the period of delay.

17. Rights of access of person, institution or any other body to a child in India.— (1) The Appropriate Government/Authority, a person, institution or any other body of any country, may make an application to the Authority for assistance for securing effective exercise of rights of access of a person, specified in the application, to a child, who is in India.

(2) The child, whose custody is in dispute, shall also be entitled to move application for seeking access to the left-behind parent.

(3) Every application made under this section shall be in such form, to be accompanied by requisite documents and the fee, as may be prescribed**.**

18. Preventive measures.— (1) When the Authority has reasonable ground to believe that the child in respect of whom an application has been made under Section 16, is being or might be subjected to abuse, it shall inform the State Commission and direct for taking appropriate steps keeping in view in the best interest of the child.

Any direction received by the State Commission from the Authority shall be complied with in co-ordination with the Authority. Periodic reports thereof, as prescribed, shall be submitted by the State Commission to the Authority.

(2) If any applicant has reasonable apprehension that the child may be removed out of India, in violation of custody rights, an application can be file application before the Authority for restraining that person from removing the child. The Authority, on being satisfied, shall be competent to pass such order, as deems fit to prevent such an action.

19. Transfer of applications to other country.— Where, on receipt of an application under Section 16, the Authority has reason to believe that the child in respect of whom the application has been made is in any other country, it shall transmit the application to the Appropriate Government/Authority in the country concerned and shall inform the applicant.

20. Report from State Commission/Local Authority.—(1) The Authority may call upon any State Commission or local authority to submit report on the issues raised within a period of two weeks, unless the same is extended by the Authority in writing.

(2) The State Commission/local authority shall assist the Authority in discharge of its functions.

(3) Failure of the State Commission/local authority to furnish information within the time granted, shall entail imposition of fine, as may be prescribed.

21. Interim orders by Authority.— Where an application is filed before the Authority, it may, at any time before it is finally decided, give such interim directions as it deems fit, in the best interest of the child concerned, including a joint parenting plan and/or appointment of a guardian.

Provided that any application filed for interim relief shall be decided within 45 days from the date of commencement of proceedings.

22. Appeal before the High Court.— (1) Any person aggrieved against any order passed by the Authority may prefer an appeal to the High Court concerned, in whose jurisdiction the child is residing.

(2) No appeal shall be entertained unless the same is filed within 30 days of the receipt of the copy of the order by the party aggrieved.

Provided that the High Court may entertain the appeal in a further period of 30 days, if it is satisfied that there was sufficient cause for not filing the same within the period prescribed, but not thereafter.

(3) Any appeal filed under the Act shall be heard by a Bench consisting of not less than two Judges.

23. Modification/vacation of the order of return of child.— Even after the passing of final order of return of the child, if the Authority or the Court finds that it is no longer appropriate to maintain the order of return of child, due to change in circumstances, the Authority or the Court may modify or vacate such order on an application filed by the aggrieved party. However, no such application shall be maintainable after the child has already been returned to the country of its habitual residence.

Provided that the order already passed shall not be modified or vacated without an opportunity of hearing to the opposite party.

24. Possible exceptions to the return of the child.— Notwithstanding anything contained in Section 13(2)(ix), the Authority may not pass an order of return of the child if any person, institution or any other body, opposing the return, establishes that-

(a) the return is not in the best interest of the child;

(b) the person, institution or any other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in such removal or retention;

(c) there is grave risk that the child on return would be exposed to physical or psychological harm or otherwise place the child in a non-conducive atmosphere;

(d) the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of domestic violence or any mental or physical cruelty or harassment;

(e) the Authority finds that the child objects to being returned and has attained an age and level of maturity at which it is appropriate to take into account his views;

(f) the return is not permitted under the fundamental principles relating to the protection of human rights and fundamental freedoms;

(g) the petition for return of the child has been filed after expiry of one year from the date the child was removed or the child has settled in his new environment as such;

(h) if the child attains the age of 18 years during the pendency of the proceedings;

(i) for any other reason to be recorded in writing by the Authority.

Provided that the Authority shall not dismiss or allow an application solely on the ground that a judicial order pertaining to the custody of the child, has been passed by any authority/court in any other country. However, the Authority may take into account the reasons recorded in aforesaid order.

25. Use of technology.— For the purpose of filing applications, hearings, exercising rights of access or for any other purpose, IT tools may be utilised.

26. Cost.— The Authority can levy exemplary cost for any frivolous application filed before it.

27. Arrangements to return a child to any other country.— (1) Arrangements for return of the child under Section 13(2)(ix) shall be made within a period of sixty days from the date the order attains finality. Any default in this regard may entail imposition of fine.

(2) Before the child is returned to the country of its habitual residence, the Authority shall ensure, through diplomatic channels or otherwise, about its proper education, living, well-being and security.

28. Application to Authority for return of child to India.—

(1) Any person, institution or other body in India, claiming that a child has been wrongfully removed to, or is being retained in any other country, in breach of the rights of custody of such person, institution or the body, may apply to the Authority for assistance for securing return of such child.

(2) Every application made under this section shall be in such form, to be accompanied by requisite documents and the fee, as may be prescribed**.**

(3) On receipt of application under sub-section (1), the Authority shall forthwith apply to the appropriate Government/Authority of the other country to which the child is

alleged to have been removed or retained, for assistance for securing the return of such child to India.

29. Rights of access of person, institution or body in India.—(1) Any person, institution or other body in India, claiming that a child has been wrongfully removed to, or is being retained in any other country, in breach of the rights of custody of such person, institution or the body, may apply to the Authority for assistance in organizing or securing effective exercise of the rights of access, in such form and manner, as may be prescribed.

(2) Any such application filed shall be forwarded forthwith to the Appropriate Government/Authority of the country concerned, to which the child has allegedly been removed to and/or retained.

30. Expeditious process.— The Authority shall make every endeavour to conclude the proceedings in any application filed for return of child within one year from the date of commencement of proceedings.

31. Reports and returns.— (1) The Authority shall submit annual report giving full account of its activities under the Act to the Central Government in such form and manner, as may be prescribed.

(2) The Authority shall, in addition to the report under sub-section (1), furnish such returns or other relevant information with respect to its activities, as the Central Government may require from time to time.

(3) The report submitted under sub-section (1) shall include–

(a) brief record of applications for the return of children submitted by applicants to the Authority;

(b) detailed information on applications for the return of children that remained pending for more than one year

after the date of filing and steps taken by the Authority to resolve such cases;

(c) a list of countries to which the children mentioned in clause (b) were wrongfully removed to/retained and who failed to co-operate with the Authority;

(d) total number of cases where return had been ordered by the Authority;

(e) total number of cases where effective visitation rights /rights of access were afforded to the applicants, including access/visitation through IT solutions; and

(f) instances of non co-operation by the State Commissions/local authorities and fines imposed thereon;

32. Maintenance of records.— The Authority shall maintain records concerning the applications filed before it, in such manner as may be prescribed.

33. Protection of action taken in good faith.— No suit, prosecution or other legal proceeding shall lie against the Authority or any member or officer thereof, or any officer acting under the authorization of the Authority, in respect of anything which is done in good faith or intended to be done in discharge of duties assigned under the Act or the Rules framed thereunder.

34. Members and officers of Authority to be public servants.— Every member and officer of the Authority and the officers authorized by the Authority to perform functions under this Act or the Rules framed there under, shall be deemed to be public servant within the meaning of Section 21 of the Indian Penal Code 1860 (45 of 1860).

35. Power to give directions.— (1) In the discharge of its functions under this Act, the Authority shall be guided by such directions, on

question of policy relating to national interest, as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Authority, as to whether a question is or is not a question of policy relating to national interest, the decision of the Central Government shall be final.

36. Power of Central Government to make Rules.— (1) The Central Government may, by notification in the official Gazette, make Rules to carry out the provisions of the Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such Rules may provide for all or any of the following matters, namely:-

(a) the salary and allowances, and other terms and conditions of service of the members appointed under sub-section (2) of Section 8;

(b) the salary and allowances, and terms and conditions of service of officers and staff of the Authority under sub-section (2) of Section 11;

(c) form of application alongwith documents and fee, to be filed before the Authority for assistance in securing return of child wrongfully removed or retained in India, under sub-section (2) of Section 16;

(d) form of application alongwith documents and fee, to be filed before the Authority for assistance for securing rights of access of child under sub-section (2) of Section 17;

(e) form of application alongwith documents and fee, to be filed before the Authority for assistance for securing return of child wrongfully removed or

retained in any other country, under sub-section (2) of Section 28;

(f) form of application alongwith documents and fee, to be filed before the Authority for assistance for securing rights of access of child under sub-section (1) of Section 29;

(g) the form in which annual report shall be prepared under sub-section (1) of Section 31;

(h) maintenance of records concerning the applications under Section 32.

(3) Every Rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised of one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both the Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, any such modification or annulment shall be without prejudice to the validity of anything previously done under that Rule.

37. Power to remove difficulties.— (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removal of such difficulty.

Provided that no such order shall be made under this Section after the expiry of a period of two years from the commencement of the Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

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ABBREVIATIONS

Abbreviation	***Full Form***
ADR	Alternate Dispute Resolution
ARRK	Action on Relocation and Return with Kids
ATM	Automated Teller Machine
CD-ROM	Compact Disc Read-Only Memory
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CWC	Child Welfare Committee
DV	Domestic Violence
DV LEAP	Domestic Violence Legal Empowerment and Appeals Project
EC	European Commission
EU	European Union
FAQs	Frequently asked Questions
GWA	Guardianship and Wards Act 1890
HCCH	Hague Conference on Private International Law
HMA	Hindu Marriage Act 1955
HMGA	Hindu Minority and Guardianship Act 1956
ICCPR	The International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMEC	International Centre For Missing and Exploited Children
IHNJ	International Hague Network of Judges
IIT	Indian Institute of Technology
INCASTAT Database	International Child Abduction Statistical Database
IPC	Indian Penal Code
IPCA	International Parental Child Abduction
IT	Information Technology
JJ Act	Juvenile Justice (Care and Protection of Children) Act 2015
LBP	Left -Behind Parent
MHRD	Ministry of Human Resource Development
NCPCR	The National Commission for Protection of Child Rights
NGO	Non-governmental Organization
NRI	Non-resident Indian

OCI	Overseas Citizenship of India
OP-CEDAW	Optional Protocol to the Convention on Elimination of all Forms of Discrimination Against Women
PIO	Person of Indian Origin
POCSO Act	The Protection of Children from Sexual Offences Act 2012
RCR	Recent Civil Reports
RPO	Regional Passport Office
RTE Act	The Right of Children to Free and Compulsory Education Act 2009
SCC OnLine P&H	Supreme Court Cases Online Punjab & Haryana High Court
SMA	Special Marriage Act 1954
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
US/USA	United States of America
URL	Uniform Resource Locator