

BACKGROUND DOCUMENT

1. INTRODUCTION

The Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*¹ which met in The Hague from 27 September 2002 until 1 October 2002 made the following recommendation:

*"The Permanent Bureau should continue to gather information concerning the measures adopted in different Contracting States to prevent abductions from taking place. The experience of non-governmental organisations in this field should be taken into account. The Permanent Bureau should prepare a report on the subject with a view to the possible development of a Guide to Good Practice."*²

Further, it was noted at the Special Commission that "the development of new parts of the Guide to Good Practice" would "require the gathering of information on national legislation, as well as on practices in the States Parties".³ To this end, the Permanent Bureau is intending to constitute a Consultative Group consisting of experts who can advise on preventive measures. Additionally, all Central Authorities and some international organisations will receive a detailed Questionnaire requesting information relating to preventive measures. This Background Document will accompany the Questionnaire and aims to present an introduction to the relevant issues. It should also be noted that this initiative may be of value to non-Convention States and this must be borne in mind as the drafting develops.

The desire to prevent abductions lies at the heart of the 1980 Convention.⁴ Indeed, seeking to "counter the increase in abductions" is stated to be the underlying basis upon which the objectives of the Convention were founded.⁵ It is clear, therefore, that it was not envisaged that the Convention would be a purely reactive instrument, providing relief where abductions had occurred, but also, and perhaps predominantly, the existence of the Convention was intended to prevent abductions. The Convention is designed to protect children internationally from the harmful effects of their wrongful removal or retention⁶ and it establishes procedures to ensure that, in the event of wrongful removal or retention, the child will be returned promptly to enable the authorities of the State where the child is habitually resident to decide issues of relocation and custody.⁷ Preventing the initial removal or retention will avoid the need for such procedures and consequently will reduce emotional distress and disruption for all parties, including the child, as well as saving time and expense.

¹ Hereafter 'The Convention'.

² See Report of Meeting No 8, Tuesday 1 October 2002 at p. 4.

³ Ibid.

⁴ The need to Protect children from their unlawful removal or retention can be highlighted by reference to the range of multilateral and bilateral agreements which operate in this area. The United Nations Convention on the Rights of the Child of 20 November 1989 states at Article 11 that:

*"1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements"*.

⁵ E. Pérez-Vera, Explanatory Report at paragraph 10, p. 428 in *Actes et documents de la Quatorzième session, Tome III, Enlèvement d'enfants/Child abduction*. (Hereafter 'Actes et documents').

⁶ See *Preamble* to the Convention.

⁷ It is the object and purpose of the *Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children*, to establish world wide uniform rules on jurisdiction for these issues.

2. STAGES OF PREVENTION

Preventive measures operate at different levels or stages. Some general legal measures operate at a stage prior to contemplation of abduction, such as the mere existence of the Convention as a deterrent. These measures are as important in the prevention process as those which operate on a highly practical and specific level during an attempted abduction. There are perhaps four stages or levels which can be identified.

2.1 Reducing the incentive to abduct

The very existence of international instruments such as the Convention, and national laws restricting, prohibiting or even criminalising⁸ parental child abduction, may act as a deterrent. In the absence of reliable empirical evidence, it is difficult to assess the actual deterrent effect of these instruments. However, it is clear that if parents are aware that removing their child from a jurisdiction, or retaining their child in another jurisdiction, could be unlawful and would result in the immediate return of the child this may prevent some parents from contemplating abduction. On the other hand, some would-be abductors are aware that their intentions are unlawful and the existence of restrictions when crossing borders or in obtaining necessary documentation for travel may act as a deterrent.

2.2 Preemptive measures

Orders or agreements may be sought during, for example, divorce or custody hearings, which prohibit the unilateral removal of a child from a jurisdiction. Such preemptive prohibitions, at a stage when parents have possibly never even contemplated abduction, may alert them to the potential illegality of any removal. Thus abductions may be averted as a parent is made aware of the need to contact the other parent in order to discuss potential removals, and possibly to seek additional orders or agreements if at a later stage relocation is being considered. Sensible rules on relocation may reduce the incentive to abduct.⁹ Additionally, restrictions on the issuance of passports and visas to children may alert parents to the need to co-operate with regards to travelling with their child.

2.3 Preventing an imminent abduction

Some preventive measures can be put into effect when there is an imminent risk of abduction. Such measures are diverse including prohibitions on the issuance of passports and travel documents. Information and advice given by Central Authorities and specialist non-governmental organisations, and other professionals who may be the point of first contact for a parent, are also important. Such information must be easily accessible and

⁸ See *Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)* drawn up by the Permanent Bureau, (hereafter 'Report of the Third Special Commission'), at paragraph 4 in relation to the role of criminal proceedings as a preventive measure. See also note 10.

⁹ The *Conclusions and Recommendations of the Fourth Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001)* drawn up by the Permanent Bureau, (hereafter 'Conclusions and Recommendations of the Fourth Special Commission'), stated at paragraph 7.3 that:

"Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention."

relevant. This highlights the importance of publicity. Court orders which can be obtained at this stage are also vital in preventing abduction, either by restricting a child's removal from a jurisdiction or by allowing a parent to relocate with a child where appropriate so that a removal will not be considered as an abduction.

2.4 Preventing removal from the jurisdiction

Finally, there are preventive measures which can be invoked when an abduction has actually taken place but the would-be abductor has not yet removed the child from the State. These measures include procedures to put an alert at points of departure from a jurisdiction including ports and airports. Additionally, emergency court orders may be available, sometimes *ex parte*, which may grant powers to law enforcement to apprehend the abductor and/or the child. Co-operation between police officers, port authorities and other agencies at this stage in the prevention process is vital to ensure that preventive mechanisms can be invoked expeditiously.

3. TYPES OF PREVENTIVE MEASURES

In addition to operating at different stages of the abduction process, preventive measures can also be divided into different types. These types are diverse, ranging from legislation and court orders to the provision of information and advice, and involve many different authorities and agencies. However, there is a certain amount of overlap between these measures, highlighting the importance of inter-agency co-operation. There are perhaps six types of measures which can be identified.

3.1 Legislation and court orders

Legislation and court orders can have a preventive effect at all stages and levels of the abduction process mentioned above. The existence of such provisions may deter abductors and at the preemptive stage, legislation and court orders are also instrumental in alerting parents to the potential illegality of a unilateral removal or retention of a child. Additionally, orders aiming to prevent obstacles to contact/access rights¹⁰ may help to guard against abduction.

Where there is an imminent risk of abduction, court orders including *ex parte* orders may be available. Breach of certain orders if they have been registered with law enforcement authorities, may give rise to a criminal offence. The advantage of bringing the criminal law¹¹ into the arena is that it may result in law enforcement agencies having certain powers which they would not otherwise possess to apprehend the would-be abductor and/or the child.¹²

¹⁰ See Article 21 of the Convention.

¹¹ See *Report of the Third Special Commission*, at paragraph 4 in relation to preventive measures.

¹² Conversely, the existence of criminal procedures once an abduction has actually occurred can be detrimental to the return mechanism required under the Convention. Consequently, it may be beneficial if such procedures are dropped if the abductor succeeds in leaving the jurisdiction. Indeed reference was made to this issue in the *Conclusions and Recommendations of the Fourth Special Commission* at paragraph 5.2.

Conversely, not all laws are restrictive and operate to prevent abduction. There are many laws or agreements which promote the free movement of persons from one jurisdiction to another.¹³ There are several States between which it is possible to travel without a passport or a visa. Often these are geographically proximate States, and consequently States between which there are a large proportion of abduction cases. It is important to consider the issues that such laws pose for prevention of abduction and equally to consider preventive mechanisms which are operating effectively in States which adhere to these laws.

3.2 Border controls

Generally, some form of documentation is required to travel between States. This may be a passport and/or a visa. In many States if passport authorities are alerted to a possible risk of abduction they can restrict or prohibit the issuance of a passport to a child, or provide notifications on the passport limiting the child's ability to travel. Similarly, where there is a specific threat of abduction, certain courts can order passports to be relinquished or submitted to a relevant authority during a contact/access visit. Such measures may to some extent deter would-be abductors as they create added difficulties to someone wishing to remove a child. These measures are, however, limited, in that they usually cannot apply to passports which are issued by foreign States to children with dual nationality.¹⁴ Additionally, as noted above, there are many States between which it is not only possible to travel without the need to show a passport, but border controls are in fact considered wholly inappropriate.

In addition to restrictions relating to the necessary documentation for travel, some States operate border controls at points of departure from or entry into a jurisdiction. Many States have computer systems onto which police officers can enter details of endangered children which can then be accessed by port authorities and even airline companies at points of departure from the jurisdiction or by international organisations such as INTERPOL.

3.3 Information for parents

Provision of information increases awareness of the issues involved. It is widely understood that children may suffer emotional distress in situations of abduction, and if parents are made aware of this they may be deterred from considering such action. Some Central Authorities¹⁵ and specialist non-governmental organisations provide booklets or brochures, available on the Internet and/or in hard copy, which give detailed information to parents who suspect that their child may be abducted, or to parents who are contemplating abduction. Additionally, this information may be available at family law centres, police stations or refuges. Some organisations may also operate confidential advice lines for parents to receive information over the telephone.

¹³ For example, the Schengen Agreement and the Nordic Passport Agreement.

¹⁴ However some States may have co-operative agreements with other States concerning issuance of passports to dual national children where there is a threat of abduction. See paragraph 3.6 - Co-operation.

¹⁵ See *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Part I - Central Authority Practice*, drawn up by the Permanent Bureau at paragraph 6.2. (Hereafter 'Guide to Good Practice - Central Authority Practice'). Available at: <http://www.hcch.net/e/conventions/guide28e.html>.

The provision of information and advice can enable potential left-behind parents to be prepared by collecting important documentation concerning their child and contacting schools, child carers and others who have care and control of the child to warn them to be vigilant.¹⁶ It may also deter would-be abductors by informing them of the relevant issues involved and encouraging them to seek necessary orders or agreements before planning on relocating with a child. Information at this stage including an understanding of the Convention, its summary return mechanism, and the authorities set up under it which are able to offer advice, may prevent parents from contemplating abduction. Such information must, therefore, be readily accessible.

3.4 Training and education for professionals

Often Central Authorities and specialist non-governmental organisations may not be the point of first contact for a parent fearing or contemplating abduction. Therefore, it is necessary that lawyers, social workers, mediators, police officers and others with whom such a parent may come into contact are aware of the issues and are able to offer appropriate advice and referral. Training for agencies and professionals involved in dealing with parents in these situations is thus essential. Such training may take the form of *inter alia* information packs, seminars, conferences, workshops, videos or meetings. To ensure that training and education is beneficial and addresses the issues concerned,¹⁷ it is important that notice is taken of the vast amount of research which has been and is being undertaken relating to the Convention.¹⁸ Training and education must extend not only to those operating preventive measures on a domestic level, but equally on an international level, and international conferences and training programmes are also valuable for sharing and disseminating information between States.

3.5 Publicity

For the Convention to operate efficiently and for preventive procedures to be invoked, people need to be aware of their existence. The contact details of Central Authorities need to be readily available. Some States use the Internet or the media including newspapers, articles, books and magazines in order to publicise the Convention and preventive measures. Central Authorities and non-governmental organisations are in a key position to publicise the Convention within their States.¹⁹ Awareness of the Convention and national laws relating to preventing abductions is also an essential component of inter-agency co-operation.

¹⁶ See information in prevention packs provided by Reunite - International Child Abduction Centre available at: <http://www.reunite.org/prevention.html>.

¹⁷ It is important the Contracting States keep up to date with information relating to the Convention. In this regard reference should be made to the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Part II - Implementing Measures*, drawn up by the Permanent Bureau, (hereafter 'Guide to Good Practice - Implementing Measures'), available at: <http://www.hcch.net/e/conventions/guide28e.html>. At paragraph 3.4 and chapter 11, reference is made to the importance of considering implementation as a continuing process. See also the Conclusions and Recommendations of the Fourth Special Commission which state at paragraph 2.1 that "implementation ... should always be seen as a continuing process of development and improvement".

¹⁸ As a starting point reference can be made to the bibliography to the Convention, available at: <http://www.hcch.net/e/conventions/bibl28e.html>.

¹⁹ Additionally, at an international level, the Permanent Bureau is able to draw attention to the Convention.

3.6 Co-operation

Preventative measures encompass a large number of different bodies and authorities and inter-agency co-operation both on a national and an international level is essential. Agencies and authorities must work together to ensure that available preventive measures are actually operating effectively. Information sharing, training and education are all important in encouraging co-operation. Additionally, seeking co-operation between parents is also important. Voluntary agreements relating to custody and contact/access of children are generally considered beneficial for all parties compared with contested court orders.²⁰ It is important that parents maintain contact with each other and keep channels of communication open for discussion especially where relocation is being considered by one parent.

The role of Central Authorities is also important. Good co-operation between these important authorities on an international level and sharing of information relating to procedures operative in different States, will help to prevent abductions.²¹ Some Central Authorities or non-governmental organisations have created guidelines or working practices or built relationships with personnel in relevant domestic authorities in order to assist the operation of preventive measures within their States. Bilateral agreements internally between different agencies and externally between different States are also important. Such agreements may include inter-agency co-operation between law enforcement officers and passport authorities or port authorities. Additionally, there may be some communication and co-operation between inter-State bodies falling short of official agreements, but allowing for information sharing and understanding.

4. CONCLUSION

It is clear from the foregoing discussion that this topic differs in substance from the current parts of the Guide to Good Practice.²² It is not directed specifically at the implementation or the operation of the Convention, although these are relevant, but instead has a broader scope. Preventive measures include any international or domestic procedures which help to prevent the wrongful removal or retention of a child. These measures may be operated by a variety of different agencies and organisations and consequently, the Guide to Good Practice will not be primarily addressed to any one authority. Instead, it is hoped that a general Guide which highlights a diverse range of measures, will be beneficial in alerting all authorities and all States to the issues as they exist not only in their own jurisdictions but also in others. This in itself may help to promote understanding and co-operation and a consequent improvement in the operation of an already effective instrument.²³

²⁰ Indeed, if an abduction does occur and Convention proceedings are invoked, Central Authorities are under a duty to attempt to seek a voluntary return or an amicable settlement – Articles 7(c) and 10.

²¹ Article 7 of the Convention requires Central Authorities to co-operate once an application is made. Such co-operative procedures should also include assistance and information relating to preventive measures. See also the *Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children*.

²² Guide to Good Practice - Central Authority Practice and Guide to Good Practice - Implementing Measures.

²³ It should be remembered that the general conclusion in the Conclusions and Recommendations of the Fourth Special Commission stated that, "[T]he Special Commission recognises that the Convention in general continues to work well in the interests of children and broadly meets the needs for which it was drafted".