



## *Second*

## *Meeting of Government Experts*

**Inter-American Program of Cooperation for the Prevention and Remedy of Cases of International Abduction of Children by one of their Parents**

*Palacio San Martín  
Buenos Aires, Republic of Argentina  
19, 20 and 21 September 2007*

(translation by the Permanent Bureau)

### **REPORT OF ROUNDTABLE 3 MODEL RULES OF PROCEDURE FOR THE INTERNATIONAL RETURN OF CHILDREN**

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The work of the roundtable was based on the consensus reached at the **Meeting of American international child abduction expert judges, held prior to the recent inaugural session on 19 September.**

That consensus related to: the **procedural structure** under the model rules.  
Summary proceedings.-

Once the application is received the return is ordered.

The person who allegedly removed the child is notified and measures are taken to ensure that they and the child remain available during the proceedings.

The child is heard.

If there is no opposition or agreement is reached, return is ordered.

If there is opposition it must be on the grounds solely of the defences under the Convention.

The hearing of evidence.

Judgment.

Single appeal, to the Tribunal Superior.

The same arrangements apply to access proceedings.

### **Principles:**

Speed  
Presence of a judge at all stages  
Economy of procedures and jurisdiction  
First and second instance proceedings  
Adversarial proceedings  
Requirement for participation by the Public Prosecutor as representative of the public interest  
Protection of the child's right to be heard -- Article 12 of the Convention on the Rights of the Child  
Conciliation  
International judicial cooperation.

**On the basis of that agreement, the roundtable approved the following:**

## **DRAFT LAW**

### **PROCEDURE FOR THE INTERNATIONAL RETURN OF CHILDREN**

In order to guarantee the immediate return of children wrongfully removed or retained and to ensure that rights of custody and access effective in one State are complied with in the State in question, domestic procedural rules shall be adapted in accordance with the following Draft.

The short time-limits for decision-making, protecting the best interests of the child, contribute to compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the Inter-American Convention on the International Return of Children of 1989 and improved protection of the right not to be wrongfully removed or retained between one State and another and access rights where the adults involved with the child live in different countries.

**Article 1.- Subject-matter.** The objective of the process laid down in this Law shall be to ascertain whether there has been a wrongful removal and/or retention of a child, wherever it has occurred in breach of custody rights and to protect rights to access. It is also intended to ensure that cases are processed in accordance with the principles under the aforementioned Conventions, their prompt resolution and where return is ordered, that it takes place in a manner which is safe for the child.

Without prejudice to the technical term used in the domestic legislation, for the purposes of this Law custody rights shall mean rights including rights relating to care and to decide on the place of residence of the child -- including removal abroad -- in accordance with the laws of the State of the child's habitual residence. Custody rights may arise from operation of law, from a court order or administrative decision or from an agreement effective under the laws of that State.

The rights must have been effectively exercised, whether individually or jointly, by parents, guardians, carers or institutions, immediately before the removal or retention.

The child, therefore, **must** have been wrongfully removed from his or her habitual home, and must be in a different State.

Any ruling on the merits of the custody case is expressly excluded, and is a matter exclusively for the courts of the State of habitual residence of the child. Whilst the application for return is being processed, any pending substantive custody proceedings shall be suspended.

Any person who has not reached the age of sixteen shall be regarded as a child for the purposes of this procedure. The expression shall include both sexes.

**Article 2.- Rules of procedure and interpretation.** The procedure shall be governed by the Constitution, the international treaties on international child abduction ratified by the State, this Law, national child protection legislation and procedural legislation.

The best interests of the child shall be a guiding principle of interpretation and where applicable of the incorporation of statute law. The child's best interests shall for the purposes of this law mean the right not to be wrongfully removed or retained and to have the decision on the child's custody heard before a court in the State of their habitual residence, the right to maintain fluid contact with both parents and their families and to obtain prompt resolution of the application for return or international access.

**Article 3. Jurisdiction.** This shall be determined in accordance with general provisions, with particular application of the principles of economy of jurisdiction and specialisation, both at first instance and on appeal.

**Article 4. Standing to bring proceedings.** The person entitled to bring return proceedings shall be the parent, guardian, carer or other person, institution or body which enjoyed custody rights in accordance with the law of the country where the child is habitually resident, immediately before the removal or retention.

**Article 5. Standing to defend proceedings.** The person with standing to defend proceedings shall be the person alleged by the person with standing to bring proceedings to have wrongfully removed or retained the child whose removal or retention has given rise to the application.

**Article 6. Assistance or representation of the child.** In accordance with the protection legislation in force, a lawyer may be appointed to act for the child, who shall assist or represent the child according to their stage of development, assessed by the court hearing the case.

**Article 7. Intervention by the representative of the public interest.** The representative of the public interest shall be informed of the proceedings and shall appear before the court in order to be given notice of the outcome of the procedure and to perform such acts as are within its powers. Absence of this representative shall not give rise to delay in the procedure.

**Article 8.- Police authority.** The police authority shall cooperate without delay whenever so requested.

**Article 9.- Central Authority.** So that it can comply with its functions under Article 7 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Article 7 of the Inter-American Convention on the International Return of Children, the Central Authority must be informed of the proceedings by the court and shall have free access to the case file.

**Article 10. Preliminary phase.** The petition or application for return, which must comply with the requirements under Article 8 of the Hague Convention on the Civil Aspects of International Child Abduction and Article 9 of the Inter-American Convention on the International Return of Children, may be filed directly with the competent court, by letter rogatory, or by direct application to the Central Authority (Article 8 of the Inter-American Convention)

The competent court shall enter the application immediately, and shall then order urgent measures to locate and protect the child, where necessary.

Once the child has been located, the court shall notify the requesting State immediately via the Central Authority or the body acting in its place.

The Central Authority of the State shall request or take the appropriate measures to achieve the voluntary return of the child

Where it has been requested that the child be located previously, and where the application has not been filed, a period of 30 days shall run from the above-referred notification for the corresponding petition or application for return to be filed. On expiry of that period, the preliminary measures taken shall automatically cease to have effect.

The documents filed with the petition or application for return, in order to establish the applicant's standing to bring proceedings (a copy of the court order or approved agreement) and other supporting documents must be submitted in translation where appropriate, and shall not require legalisation (Article 23 of the Hague Convention).

**Article 11. Proceedings.** Once the petition or application for return has been filed, the court shall assess compliance with the requirements for admissibility and standing to bring proceedings, as defined in Articles 1 and 4 of this Law.

For the purposes of this Law, the applicant must show prima facie case for their rights, demonstrating briefly in the initial application that they have custody, in accordance with Article 1.

The filing of the petition or application for return with the competent court in the country in which the child is located shall determine the date of commencement of the proceedings for the purposes of Articles 12(1) and 12(2) of the Hague Convention and Article 14 of the Inter-American Convention.

**Article 12.1.-** If the court does not admit the petition or application for return, the decision may be appealed within three days of being served.

**12.2.-** Once the application has been admitted the court shall, within 24 hours, issue a return order. It shall give the person alleged to have removed or retained the child ten days in which to submit grounds of defence. It shall order the necessary preventive measures for protection -- keeping the child in the country --, or shall modify or continue the measures initially adopted. It shall appoint a guardian ad litem or defence attorney for the child where one has been appointed. It shall appoint a defence attorney or representative for the person alleged to have removed or retained the child where for economic reasons duly accredited in the application that person cannot travel to the country and shall inform the Public Prosecutor of the decision. It shall inform the Central Authority of that decision for its purposes.

No preliminary motions, interlocutory applications or counterclaims which hinder the proceedings shall be admitted.

**Article 13. Grounds of defence.** The person alleged to have removed or retained the child shall file their defence giving reasons in a written document which shall be supported by all the evidence on which it relies. The defence shall be valid where it is stated and demonstrated 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;
- 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;
- c) it is shown that the child has attained an age and degree of maturity at which it is appropriate to take account of its views and the child objects to the return.

The return may also be refused where it is manifestly in breach of the fundamental principles in the requested State for the protection of human rights and fundamental freedoms.

The court shall dismiss without hearing any ground of defence not falling within the grounds listed in this article.

**Article 14.-** If no grounds of defence are pleaded, the return order shall become final and an order shall be made to enforce and the Central Authority shall be notified.

Any grounds of defence shall be heard once they have been served on the applicant for six days.

**Article 15.-** Once a defence to the application has been filed or the time-limit has expired, a hearing shall be set within three days after the case file has been prepared for that purpose. In that order the court shall rule on the evidence provided by the parties, dismissing in a preliminary order any inadmissible, superfluous or manifestly irrelevant evidence.

The decision admitting or refusing evidential procedures shall not be subject to appeal.

The number of witnesses shall be limited to three for each party.

**Article 16.-** The court shall preside over the hearing which shall be held notwithstanding the absence of the persons summoned.

Conciliation shall be attempted at the hearing, and if successful shall be recorded in a certificate and approved by the court. Otherwise, the representative of the public interest shall be heard and any procedural matters preventing a final decision shall be resolved. The issues in dispute shall be identified and evidence shall be heard, for which purpose the hearing may be adjourned for up to 72 hours.

The child shall be heard if in the opinion of the court he or she is capable of forming their own opinion, and the parties and the representative of the public interest if present shall be briefly heard.

In order to make its ruling, the court may adjourn the hearing for up to 24 hours.

**Article 17.- Appeal.** The final judgment shall be subject to appeal brought within three days and heard once it has been served for the same period on the parties, the representative of the public interest and any defence attorney of the child.

Admission of the appeal shall suspend the effect of the judgment.

The case file shall be transferred within 24 hours after service has been effected.

The appeal court shall make a ruling within six days. It may do so at the hearing or may deliver a summary decision.

The appeal shall be processed within the maximum time-limits under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the Inter-American Convention on the International Return of Children of 1989.

**Article 18.1. Contents of the order.** Return shall be ordered in any event in the case of a child under 16 who has been wrongfully removed or retained in breach of custody rights effectively exercised at the time of the removal or retention in the country of the child's habitual residence.

**18.2. Safe return.** The court may not refuse the return of the child in reliance on Article 13(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction or Article 11(b) of the Inter-American Convention on the International Return of Children

of 1989 if it is shown that appropriate measures have been taken to ensure the protection of the child after the return.

**18.3.** If more than one year has elapsed between the wrongful removal or retention and the date of the application or petition for return, return may likewise be ordered, depending on the circumstances of the case, unless it is demonstrated during the proceedings that the child has become integrated into its new environment, and in that case, if in the opinion of the court it is in the child's best interests to remain in that environment. Otherwise, the return may be ordered at any time (Article 18 of the Hague Convention and Article 17 of the Inter-American Convention).

**Article 19.- Appeals.** Appeal shall lie only against a decision refusing admission -- in which case the appeal is not heard -- and the final order.

At the second instance a hearing may be set or a summary decision issued, in the latter case the time-limit for filing the further appeal for clarification and better particulars shall be 48 hours, and it must be determined within 48 hours.

No appeal whatsoever shall lie against the decision at second instance.

**Article 20.- Access.** An application seeking enforcement of rights of access by the holder of those rights in the cases referred to in the International Return Conventions shall follow the procedure laid down in this Law.

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.

For an application for access to be granted in the context of the International Return Conventions it shall not be a requirement that there was a previous wrongful removal or retention nor that there are previously established access arrangements.

The court in the requested State may even modify previously established access arrangements should this be necessary.

**Article 21. Direct judicial communications.**

A Liaison Judge shall be appointed with responsibility for facilitating direct judicial communications between the foreign and national courts in relation to pending cases covered by this Law.

Enquiries may be reciprocal and shall be made via the Liaison Judge, recorded on the relevant case files and notified to the parties.