

**REPORT ON THE FIRST REGIONAL SEMINAR OF THE
WORKING PARTY ON MEDIATION IN SOUTHEAST ASIA**

held in Malaysia from 28 to 29 November 2014

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**RAPPORT DU PREMIER SÉMINAIRE RÉGIONAL DU
GROUPE DE TRAVAIL SUR LA MÉDIATION EN ASIE DU SUD-EST**

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Foreign Affairs, Trade and
Development Canada

Affaires étrangères, Commerce
et Développement Canada

First Regional Seminar of the Working Party on Mediation in Southeast Asia
International Islamic University Malaysia (IIUM)
28-29 November 2014

Background

On 28-29 November 2014, high ranking government representatives, judges and academic and child rights experts from Australia, Canada, Egypt, Indonesia, Japan, Malaysia¹, Pakistan, Philippines, Qatar, Saudi Arabia², Singapore, Thailand, Turkey, the United States of America, the Secretary General of the Hague Conference on Private International Law (HCCH), a representative of the UNICEF East Asia and Pacific Regional Office and a member of the UN Committee on the Rights of the Child³ participated in the first Regional Seminar of the Working Party on Mediation in Southeast Asia held in Malaysia.

The regional seminar was organised by Canada, co-Chair of the Working Party, in cooperation with the Permanent Bureau of the HCCH, and hosted by the International Islamic University Malaysia.

The aim of the seminar was to:

- explore regional perspectives on children's rights in the context of family disputes involving the wrongful removal of a child across international borders and to inform about relevant Hague Conventions;
- examine existing dispute resolution mechanisms, including family mediation, of Shari'a-based or Shari'a-influenced legal systems and other legal systems in addressing such disputes; and
- further strengthen international legal co-operation in the search for solutions in these complex cases which are in the best interests of the child.

Summary of Discussion

The seminar was formally opened with keynote presentations from Dato Sri' Professor Zaleha Kamaruddin, Rector of the International Islamic University Malaysia (IIUM), Mr. William Crosbie, Assistant Deputy Minister and Legal Adviser, Department of Foreign Affairs, Trade and Development Canada (co-Chair of the Working Party), Chief Justice (ret'd) Tassaduq Hussain Jilani of Pakistan (co-Chair of the Working Party) and Secretary General Dr. Christophe Bernasconi of the HCCH. In setting the stage, the presenters discussed the background to the Malta Process and the Working Party on Mediation, the objectives and significance of hosting the first Southeast Asia Regional Seminar in Malaysia. It was noted in particular that the Malta Process is a dialogue between Contracting States to the 1980 Hague Convention and non-Contracting States with Shari'a-based or influenced legal systems. Established in the context of the Malta Process in 2009, the Working Party on Mediation aims to promote the development of

¹This report does not include the views of Malaysia's Attorney General's Chambers representatives attending the seminar.

²The representative of Saudi Arabia was not present at the final session of the seminar.

³The Geneva based UN Committee on the Rights of the Child is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child (CRC) by its States Parties.

international family mediation structures to help resolve cross-border child abduction disputes involving States that are not party to 1980 Hague Convention.⁴

The discussions in the Malta Process and the Working Party on Mediation are guided by the principles set out in the *United Nations Convention on the Rights of the Child* of 1989 (UNCRC), the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 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*, as well as relevant regional instruments, such as the Organisation of the Islamic Cooperation's Covenant on the Rights of the Child in Islam.

Specifically, the recognition that the 1980 Child Abduction and the 1996 Child Protection Conventions enshrine the same fundamental principles set out or implicit in the UNCRC, including:

- the best interests of the child as a primary consideration in all actions concerning children;
- the right of a child whose parents reside in different States to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents;
- the obligation of States to take measures to combat the illicit transfer and non-return of children abroad;
- the opportunity for a child to learn, to know and respect the culture and tradition of both parents.

It has been noted that all of these principles are also underlying principles of Shari'a.⁵

The seminar objectives were explored in three plenary sessions. At the first plenary, presenters from both Contracting States and non-Contracting States provided an overview of domestic responses and challenges in addressing the wrongful removal and retention of children across international borders. The presentations from the Contracting States Australia, Japan, Thailand and Singapore focused on the domestic judicial and administrative mechanisms and experiences to date in implementing and operating the 1980 Hague Convention. The presentations from the non-contracting States Malaysia, Indonesia and the Philippines examined the existing mechanisms and challenges in responding to cases of wrongful removal and retention of children across international borders. Non-contracting States were encouraged to nominate liaison judges to the international Hague network in order to further judicial dialogue and practice in this area. Overall, there was a general recognition of the importance of international co-operation for the protection of children in cross-border family disputes in the region and in ensuring the best interests and welfare of the children.

In highlighting the legal remedies and judicial experiences in protecting the best interests of the child in abduction situations, expert panellists in plenary two focused on domestic experiences of Malaysia, Indonesia and the Philippines concerning mediation, precedent setting cases, and the judicial and jurisdictional diversity in the region, including the commonalities and challenges of dual Shari'a and civil legal systems in the region. The presentations highlighted the value of the best interests of the child and its entrenchment in the domestic jurisdictions of the region.

⁴Co-Chaired by Canada and Pakistan, the Working Party is comprised of 8 Member Contracting States (Australia, Canada, France, Germany, Morocco, South Africa, UK and the US) and 5 (non-) Member non-Contracting States (Egypt, India, Jordan, Malaysia, Pakistan and Senegal [Senegal is not a Member of the HCCH]). Bangladesh, Indonesia and Qatar have also been invited to formally join the Working Party.

⁵See for example, the Conclusions and Recommendations of the First Gulf Judicial Seminar on Cross-Frontier Legal Co-operation in Civil and Commercial Matters Doha, Qatar (June 2011); International Conference on Cross Border Co-operation in Civil and Commercial Matters through Hague Conventions, Tunis, Tunisia (October 2013) and International Seminar on Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children, The Hague (April 2014).

Mediation, including court-annexed and mandated, is increasingly used in family disputes, including in child custody matters. It was noted that children benefit from observing parents resolve conflicts amicably and effectively. There was a broad appreciation that the unilateral and illicit removal of a child from a parent across international borders is not condoned in the domestic contexts of non-Contracting States. However, lacking institutional and jurisdictional mandates, finding an amicable resolution in such cases remains a challenge.

The Philippines is gradually moving towards the ratification of the 1980 Hague Convention. Prevention efforts by States were also highlighted as a means through which parents can stop the illicit removals of the child from their habitual residence. In addition to the benefits of using mediation in family dispute resolution, a number of challenges were also highlighted. These include, for instance, the voluntary nature of the mediation process; enforcement issues; varying standards/processes/techniques; and the lack of knowledge about family mediation services in other countries.

In his keynote address to the seminar, The Right Honourable Dato' Lela Negara Tun Arifin bin Zakaria, Chief Justice of Malaysia, delivered by the Federal Court Judge YA Tan Sri Ahmad Bin Haji Maarop, welcomed the hosting of the regional seminar in Malaysia. This is the first such event held in Malaysia to examine international parental child abductions. The Chief Justice pointed out the 25 year anniversary of the adoption of the UN Convention on the Rights of the Child and its significance in promoting and entrenching child rights globally. His presentation underscored the significance of the use of mediation in resolution of family disputes, such as the enactment of the court-annexed mediation rules in Malaysia, and the utility of such measures in finding amicable resolution in cross-border child abduction situations.

Plenary three focused on identifying solutions, common legal principles and strengthening international legal co-operation with presentations from Egypt and the UNICEF East Asia and Pacific Regional Office (EAPRO). An overview of the Egyptian law pertaining to family matters was discussed, including the process of enforcing foreign child custody orders in domestic Egyptian jurisdiction. The role of the "Good Offices Committee" within the Egyptian Ministry of Justice was also highlighted. It plays a mediation role between the parties of a cross-border family conflict and attempts to resolve the conflicts amicably.

UNICEF EAPRO presented on the best interests of the child as highlighted in the CRC General Comment No 13. UNICEF EAPRO emphasized on the opportunities for international cooperation in child protection especially in terms of advocating for the ratification of international instruments such as the Hague Children's Conventions and strengthening the child protection systems (justice and social welfare), including through the ASEAN mechanisms. It was noted that UNICEF EAPRO and ASEAN will sign a formal agreement of cooperation in December 2014 in Jakarta, Indonesia, which among other things, will further strengthen strategic and technical cooperation in the area of child protection in the region.

Conclusions and Recommendations

At the end of the seminar plenaries, participants discussed options on how best to address cross-border child abduction issues in the region. The following conclusions and recommendations suggested during the course of the seminar were endorsed:

1. It was recognized that the 1980 Hague Convention is not about child custody. The Convention operates as a forum selection treaty, the underlying premise of which is that it is in the best interests of a child to have his or her parenting arrangements resolved in the jurisdiction to which he or she belongs and is most closely related, that is the State of "habitual residence".

2. It was recommended that Malaysia and Indonesia further research, with the support of the academic institutions present at the regional seminar, the 1980 Hague Convention with a view to possibly acceding to it. This research will be assisted by Contracting States sharing their relevant expertise; in assessing a possible accession to the Convention, consideration should be given to the advantages of a concentration of jurisdictions for child abduction cases.
3. It was recommended that issues of cross-border child abduction be considered in the broader context of children's rights and child protection in the ASEAN region, including during Malaysia's chairmanship of ASEAN in 2015, and in taking into account UNICEF EAPRO's work with ASEAN.
4. It was recommended that the Working Party continue its dialogue and engagements with non-Contracting States, and organizations, such as the League of Arab States and the United Nations bodies, such as UNICEF and the Committee on the Rights of the Child in Geneva.
5. It was recommended that the judicial and academic experts continue the ongoing dialogue on sharing expertise in mediation, and in the resolution of cases, if any, between the Contracting and non-Contracting States of the region.
6. It was recommended that the non-Contracting States consider the designation of a Judge or an alternative authority to participate in the International Network of Hague Judges.

At the conclusion of the seminar, participants thanked Canada, the International Islamic University Malaysia and HCCH for their financial and other support in relation to organizing the regional seminar, and to all esteemed presenters and participants for their role in promoting and providing an ideal setting for a successful regional dialogue. As hosts of the seminar, the IIUM staff and volunteers were also thanked for their exceptional professionalism and generous hospitality it offered to the organisers, participants and speakers.

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