

Questionnaire concerning the practical operation of the Convention and views on possible recommendations

RESPONSE BY THE DELEGATION OF THE NETHERLANDS

(1) The role and functioning of Central Authorities

General questions:

1:1 *Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.*

The Dutch Central Authority has in general not experienced difficulties in achieving effective communication or co-operation with other Central authorities. It must be admitted that in the handling of particular cases it has predominantly contacts with a limited number of Central Authorities. Contacts are frequent especially with the neighbouring States in Western Europe, with the United States of America, Canada and some other States. With the Central Authorities in these States the communication was effective and adequate. Only in some incidental contacts with other Central Authorities there were delays in the handling of cases and in the follow-up of the requests made by The Netherlands.

With Denmark there are additional formal requirements in connection with the requirements in internal Danish law: in most of the return cases an affidavit confirming that according to Dutch law the removal of the child in question is wrongful in the sense of the convention, is asked for. This causes some delay in the processing of cases.

One technical difficulty arises regularly. It is often found impossible to transmit documents or information by fax: Urgent requests (for supplementary information) cannot be communicated. It is suggested that all Central Authority personnel should be equipped with e-mail as soon as possible.

1:2 *Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?*

No.

Letter a: to discover the whereabouts of a child, the Dutch Central Authority has the competence to request information from the local Population Registers. Further the help of the competent Public Prosecutor can be requested to search the child, subject of an application, when there is only a minimum of information concerning the whereabouts, or when a child is put into hiding by the abducting parent. There is further a close co-operation between the Dutch Central Authority and the Dutch Centre for missing children where also information by Interpol is gathered and where a databank is put up to date.

Letter b: to prevent further harm to the child or prejudice to the interested parties, applications for adequate measures of child protection may be filed. More in particular at the request of the Dutch Central Authority a guardianship institution can be entrusted by the Children's Judge with the temporary guardianship over the child if there is a great risk that the abducting parent will prevent the child's return to the State of its habitual residence if the court might order so. Other measures of child protection can equally be taken, such as the supervision by a family guardian and the subsequent placement of the child in an institution or a foster family.

In case the child is in the Netherlands the Central Authority will assist in preparing the application for the appropriate measure of child protection by the Child Care and Protection

Board. It will ask for the information from abroad, necessary for the Board to file the petition with the Children's judge. If measures of child protection are to be taken in the requesting State after the return of the child, or other measures for its well-being, the Dutch Central Authority will draw the attention of the Central Authority in the requesting State on this issue.

In case the abducting parent tries to obtain a new custody decision in The Netherlands, the Central Authority provides the competent Family Court with information about the application for the return of the child involved, and with reference to Article 16 of the Convention requests the court to postpone the decision on parental responsibility.

Letter c: according to the Dutch Implementing Act, the Dutch Central Authority must first address itself by registered mail to the abducting parent requesting him or her to voluntarily return the child. If the parent is not ready to do so, but presents arguments that raise hope that an amicable resolution might be reached, the Central Authority starts mediation between the parents. If there are no prospects for an amicable resolution, the Central Authority starts civil proceedings in order to obtain a return order, as prescribed in the Dutch Implementing Act to the Convention.

Letter d: on the basis of the Implementing Act, the Dutch Central Authority may request the Child Care and Protection Board to examine the social background of the child and report about that to the requesting parent or Central Authority. There may also be contacts with the International Social Service ISS on this subject.

Letter e: on request the Central Authority will provide general information about Dutch law, or the Dutch court system.

Letter f: the Dutch Central Authority starts civil proceedings before the competent (Children's Judge in the) District Court in order to obtain a return order. In this procedure it is acting on behalf of the applicant parent. It represents this parent in court on the same conditions as a normal attorney does in family cases. Depending on the particulars of each case, in its initial petition the Central Authority may request immediately that measures be taken to prevent the abducting parent to preclude the effective return of the child (see letter b. above).

Letter g: as the Central Authority represents the applicant parent in court, the latter does not need to have an attorney. He will not incur any costs. Upon request the Central Authority provides information about the Dutch legal aid scheme, and how to apply for that aid. It is in the process of compiling information about legal aid in the Hague Convention States with whom it has frequent contacts. It intends to submit that information to the Special Commission.

Letter h: if the abducting parent does not reconduct the child to the place of its habitual residence, there may be arranged another escort to bring the child to the national airport where the left behind parent comes to pick it up.

Letter i: the Dutch Central Authority keeps other Central Authorities informed about the operation of the Convention, especially in the particular case at stake. During the procedure all relevant information is given. Every progress or development is explained, if necessary. The Central Authority further forwards Dutch case law to the Permanent Bureau, returns the filled out questionnaires and presents every year the statistical data.

Particular questions:

1:3 *What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c)? Do these measures lead to delay?*

The Dutch Central Authority is under the obligation first to request the abducting parent to

voluntarily comply with the application for the return of the child, unless it considers immediate action to be essential, or if there are serious grounds to suspect that the person with whom the child is staying will not voluntarily comply with the request. In doing so the Central Authority attempts to mediate between the parents. If civil proceedings were started immediately this might unnecessarily polarize relationships between the parents. The person with whom the child is residing is allowed a term of about ten days to respond. If there is no reaction, or a negative one, a formal petition is filed with the competent court. The request for voluntary return will cause some delay in the process. But since it is complied with in more than half of the cases, the delay is worthwhile. See also the response to question 1.2.

1:4 *What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 g)? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?*

As regards proceedings in The Netherlands: the applicant parent is represented by the Dutch Central Authority, also in court. He or she will not incur lawyers' fees. If so requested, the Central Authority will also give guidance to the opposing party and provide general information on the subject.

In general the application for legal aid does not delay the case: proceedings are started on the sole mention that legal aid is applied for (not yet granted).

As regards the proceedings in foreign jurisdictions: the Dutch Central Authority instructs the applicant parent (if necessary, if the parent has not an attorney) what documents and information about his income, indigency etc. must be submitted (through the Dutch Central Authority) to the requested State. It turned out in the past that in one case it took a considerable time in the requested State before legal aid was granted. During this period the case was delayed. In general the Dutch Central authority has the impression that the application for legal aid in the requested State causes no delay. Proof of indigency from the authorities in the Netherlands together with the explanation by the Central Authority is mostly accepted without any problem in the requested State.

1:5 *Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?*

Since the entry into force of the Convention for the Netherlands, in September 1990, the Dutch Central Authority represents applicant parents in Hague proceedings. In the year 2000 this gave rise to questions in Parliament about the Central Authority's alleged double role: the Central Authority was said to work for the defendant by giving information while at the same time representing the applicant in Hague proceedings.

It was pointed out by the Minister of Justice that the Central Authority will provide the abducting party with any information on the Convention and the relevant Dutch law he or she requires. It will further facilitate contacts and negotiations between the parties. However as soon as proceedings in court have started, the Central Authority will act only as representative of the applicant. It will explicitly state this in its letter to the defendant accompanying the copy of the petition for a return order.

The advantages of the Dutch system – specialisation of the Central Authority personnel and absence of costs and attorney's fees for the applicant parent - are considered to outweigh the disadvantages. In most of the cases the defendant parent has his or her own Dutch lawyer who knows the rules of Dutch civil procedure. The defendant will be informed by his or her attorney and will not be confused about possible double roles of the Central Authority.

1:6 *What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives*

appropriate protection, especially where issues of (alleged) abuse or violence have arisen?

In particular, does your Central Authority:

- a ensure that appropriate child protection bodies are alerted;*
- b provide information to either parent in respect of legal, financial, protection and other resources in your State;*
- c facilitate contact with bodies providing such resources;*
- d assist in providing any necessary care for the child pending custody proceedings;*
- e provide any other support, advice or information to a parent who accompanies the child on return;*
- f provide any assistance in ensuring that undertakings attached to a return order are respected.*

Upon reception of information from the requested State the Dutch Central Authority will refer the case to the competent office of the Child Care and Protection Board, at the same time explaining the basis for the Dutch obligation arising from the Convention and from the Implementing Act. If necessary each of the parents is informed as well, and contacts with other institutions of social welfare are facilitated. After the case is referred, the Child Care and Protection Board can handle it like any other normal (Dutch) case and will usually file a petition with the court in order to get some measure of child protection.

Undertakings attached to a foreign return order are taken into account by Dutch courts. In the interest of the child requests and suggestions by foreign authorities will be communicated to the competent authorities in The Netherlands who may convert them into measures which can appropriately be taken in The Netherlands.

If one of the parents involved wants to start further proceedings (e.g. to obtain a change of parental responsibility or measures of child protection) he or she will be advised about the possibility to receive legal aid. If he or she so desires, contacts can be established with a Dutch attorney, specialised in family law matters.

1:7 *What arrangements does your Central Authority make for organising or securing the effective exercise of rights of access (Article 7 f)?
In particular, in the case of an applicant from abroad, does your Central Authority:*

- a provide information or advice;*
- b facilitate the provision of legal aid or advice;*
- c initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;*
- d assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;*
- e assist in cases where modification of existing access provisions is being sought.*

In general, the tasks enumerated under letters a. and b. are always carried out. For details, reference is made to the above information. With respect to form and procedure the applications concerning rights of access are not different from those aiming at the return of a child.

When the applicant parent in a return case comes to The Netherlands for the hearing in that case, often arrangements are made so as to enable him or her to visit the abducted child. Arrangements can be reached at the end of the court session before the judge, or afterwards in the presence of the attorney of the defendant and the representative of the Dutch Central Authority acting for the applicant.

Applications for enforcement of existing access arrangements are regularly filed, but hardly

ever granted by the courts. In practically all cases one parent is not wholly content with the old agreement and presents objections. Then the provisions of the existing arrangements have to be modified. The Dutch Central Authority represents foreign applicants in proceedings before Dutch courts.

The applicant may also request that new access arrangements be determined where such arrangements did not exist previously. This is also possible under Article 21 of the Convention. Such a step is sometimes suggested by the Central Authority in cases where the initial application for the return of a child is declared irreceivable (e.g. because the removal of the child was not wrongful in the sense of the Convention) or after the return is definitely refused, provided the Dutch judge is competent to take cognizance of the case.

After an access decision has been taken, the effective exercise of access is in principle a matter of the parents. The Dutch judge usually tries to give a specific and detailed decision in order to avoid as much as possible that new conflicts arise between the parents. If (one of) the parents nevertheless do not comply with the decision, the Central Authority will try to convince them to do so, with reference to the interests of the child. It may also offer to mediate between the parents.

There are however no good prospects when the parent with whom the child is residing perseveres in refusing the other parent the exercise of his rights of access to the child. There is in The Netherlands the possibility of coercion by fines and sequestration, but in most of the family cases those measures are not successful. There are too many emotions at stake. Moreover coercive measures are usually considered not to be in the interest of the child.

Whatever the decision on the petition for determination of rights of access, in practically all cases the Dutch court orders that the caring parent must provide the other parent with information about important events and developments in the life of the child.

1:8 *Please comment on any developments in relation to the maintenance of statistics concerning the operations of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?*

The Dutch Central Authority recognises the importance of statistics and usually makes the figures available at the end of the year. It has always provided the Permanent Bureau with the data collected.

1:9 *Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?*

The Dutch authorities, present at the previous review conferences, contributed to the recommendations taken. They can still reaffirm the conclusions. This can be proven by the fact that the recommendations are implemented as was described in the above (questions 1:3 – 1:7).

1:10 *Would you support any other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?*

Yes. See the response to question 5.4. The protection of the effective exercise of access rights requires special attention.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation

2:1 *How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.*

In The Netherlands cases under the Convention are the competence of the Children's judge in the District Court. The Children's judge is a specialised judge within the District Court, and there are always a large number of them. The cases are mostly handled by a single judge, or (in the complicated cases) by a panel of 3 judges.

The Dutch territory is divided in nineteen districts in each of them there is a District Court.

From the decision in first instance, there is appeal in the Appellate Court. There are five of them, their jurisdiction comprising three or four District Courts.

Finally there is the Supreme Court of The Netherlands. This court only judges on matters of law and interpretation of law. The facts of the case can no longer be contested in the Supreme Court. They are taken as determined by the Appellate Court.

Apart from the normal proceedings described above there can be instituted injunction proceedings for most urgent situations, aiming at preventing the child's removal by the abducting parent or ordering him to immediately return the child. These proceedings are started with summons. The Dutch Central Authority is not empowered to conduct this kind of proceedings. As the injunction proceedings are handled by the Presidents of the District Courts, there are nineteen possible competent courts.

It should be noted that "normal" return proceedings (on the merits of the case) before the District and the Appellate Court are fast ones too: they have priority over all other family proceedings in the docket, there is short term for appeal and cassation (only two weeks and half of the normal term, respectively) and the decisions are immediately enforceable by law. So there is hardly the need to start urgent injunction proceedings. It is sometimes done by the attorney of an applicant parent in cases in which the Dutch Central Authority is not involved.

2:2 *Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?*

From the answer to question 2:1, it appears that there is no concentration of jurisdiction. It is not considered appropriate to designate specialised courts as it is not deemed in the interests of the defending party nor in the interests of the child that they have to go to court outside their own district. The court of the place of residence of the child is competent. It is the same court which would be competent in other family proceedings with respect to the same parents and child, if those proceedings were instituted.

2:3 *What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)? In particular:*

- a *is it possible for the application to be determined on the basis of documentary evidence alone?*
- b *what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?*
- c *who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?*

- d *what appeal is possible from the grant or refusal of a return application, within - what time limits do appeals operate, on what grounds and subject to what limitations?*

For the general answer to this question you are referred to the answer to question 2:1 above.

As regards a: The application cannot be determined on the basis of documentary evidence alone. The parties must be given the opportunity to explain their positions. Moreover the judge in most cases wants to pose questions directly to the parents. This applies in particular to the objections to the return, to recourse to the exceptions under Articles 12 and 13 of the Convention.

As regards b: The object of the Convention is to prevent that evidence is admitted indefinitely in Hague procedures. In most cases the Central Authority is successful in recommending the judge not to grant a party's request for extensive examinations by the Child Care and Protection Board, or by witnesses (except as far as the exception of Article 13, section 2, is concerned). In general the Dutch court system is characterized by the preparation of cases by an exchange of written documents. In the subsequent oral proceedings only a short oral explanation is given in addition to the papers submitted by the parties. Audiences take on average 1 to 1½ hours.

As regards c: no special control is exercised over the procedures. Sometimes the Central Authority after filing a petition endeavours to have as soon as possible set a date for the hearings. The obligation that procedures be expeditious is laid down in the Convention and the Implementing Act. In one case at the request of the requesting State the competent court was asked on the basis of Article 11 of the Convention for a statement of the reasons for delay. It gave a prompt declaratory decision, announcing also when it would take the (final) decision in the case.

As regards d: appeal terms in return cases are limited: two weeks instead of two months. In the second instance full appeal is possible: before the Appellate Court there can be a complete review of the case. So the appeal can be on all grounds: that the facts do not correspond with reality, but also that the law is not correctly interpreted and applied by the judge in first instance. In the third instance, before the Supreme Court of The Netherlands, grounds are limited: only complaints about the interpretation and application of the law are admissible. This means that an appeal in cassation from return decisions by the Appellate Court is usually unsuccessful, as in most cases the parent who wants further redress is not content with the decision with respect to the consent by the left behind parent or other exceptions. The decision about these issues is usually based on appreciations by the lower court about the facts as presented to it.

- 2:4 *In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?*

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

Usually it is the parent who objects against the return of the child who will state that the child is objecting. Depending on the age of the child, and the opinion of the court that it has attained an age and degree of maturity at which it is appropriate to take account of its views, the court will hear the child in chambers. Under the age of twelve, the child's opinion is usually not decisive in the judgement about the return. The fact that in the State of habitual residence proceedings on parental responsibility are already pending, tends to favour a decision for the return, also if the circumstances of the exception in question might be considered to be present.

When in appeal one of the complaints is that the judge of first instance unjustly did not hear the child, the Appellate Court resolves this problem mostly in a practical manner by interviewing the child (in chambers) provided it is not too young. During the subsequent hearing of the

parents, the court first reports briefly about what the child has told.

The hearing of the child shall take place in accordance with the rules of procedure for minors in family cases. A child of twelve years or older must be given the opportunity to voice its opinion. This rule is also laid down in the Implementing Act to the Convention. However this Act does not specify an age.

With respect to the final decision on the petition for return: current practice is that, if a child of twelve years and older does not want to go back and puts reasonable grounds, its opinion will lead to a refusal of the return. In general, siblings are not separated. So when the return of the older brother or sister is dismissed on the present exception, the younger children can remain in the Netherlands as well.

In response to questions raised by Parliament in 2000 about the child's position in return proceedings, the Minister of Justice has committed himself to consider representation of the child by a guardian *ad litem* in appropriate cases.

2:5 *Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?*

In most cases the parent who opposes the return specifies the reasons for his or her opinion already in reply to the registered letter by the Central Authority containing the request for voluntary return. This enables the Central Authority to try to refute the arguments by the opposing party in the petition for the return that is subsequently filed with the Children's Judge in the District Court. The opposing party has the opportunity to raise a written defence and both parties have finally the opportunity to clarify their views during the oral session. Within the course of this procedure any evidence may be presented. Given the object of the Convention – the immediate return of the child - the Central Authority will object against requests for further examinations by experts (such as the Child Care and Protection Board) or witnesses. In most of the cases the judge takes a decision after hearing the parties without asking for further evidence. From the foregoing it appears that the delay caused by the defences is in general minimal.

If an examination is ordered, the Central Authority can hardly contest such an order as it is mostly given in an interlocutory decision, against which no redress is generally given.

2:6 *Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?*

Under Dutch law return orders are immediately enforceable, even if an appeal is lodged against them. In response to a question raised by Parliament, whether immediate enforceability of return orders is not too harsh a measure, the Minister of Justice reaffirmed that immediate enforceability by operation of law is a most important instrument as it prevents abducting parents from lodging appeals against return decisions for the sole purpose of suspending enforcement of such decisions. The Minister further explained that in very exceptional circumstances a return order may not be enforced.

An overriding reason not to enforce a return order may be an overruling court order in the requesting State. It once happened that before the Dutch Central Authority was able to return the child (which had been put into hiding) the family court in the requesting State ordered that

parental responsibility was (provisionally) entrusted to the abducting parent alone, who, as the court knew, was living in The Netherlands. In another case during appeal proceeding the applicant parent waived the immediate enforceability in the interest of his children as they were in hiding and had supposedly restricted freedom of movement, whereas proceedings might still last for a considerable time.

When the return order cannot be enforced because the abducting parent puts the child into hiding the intervention of the competent Public Prosecutor, and subsequently the (youth) police, is required. The Implementing Act empowers the Central Authority to request the Public Prosecutor to locate the child and have the return order enforced. In this process the use of coercive measures from the Code of Criminal procedure can be granted by the Court.

Return orders do not require separate enforcement procedures in the Netherlands. There is appeal against the return order but that remedy does not suspend the enforcement. The order is immediately enforceable by law, in accordance with the aims of the Convention. Appeal against the return order is often lodged, but it cannot be said that such appeals are instituted as a matter of routine. Sometimes the abducting parent accepts the decision and returns with the child.

2:7 *Would you support any of the following recommendations?*

- a *calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.*
- b *underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.*
- c *calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.*
- d *calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.*
- e *calling upon States Parties to enforce return orders promptly and effectively.*
- f *recommending that the "grave risk" defence under Article 13 should be narrowly construed.*
- g *proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.*

From the above answers it appears that most of the recommendations are already implemented in The Netherlands.

As regards letter a: The Netherlands Government is fully aware of the potential advantages of concentration of jurisdiction with respect to return cases. It would stress, however, that the need to bring about such concentration depends on factors which may vary from one country to another. In The Netherlands the disadvantages of concentration would outweigh the advantages.

2:8 *Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:*

- *rights of custody (Article 3 a and Article 5 a);*
- *habitual residence (Article 3 a and Article 4);*
- *rights of access (Article 5 b);*
- *the actual exercise (of rights of custody) (Article 3 b and Article 13 a);*
- *the settlement of the child in its new environment (Article 12);*
- *consent or acquiescence to the removal or retention of the child (Article 13 a);*
- *grave risk (Article 13 b);*

- *exposure to physical or psychological harm (Article 13 b);*
- *intolerable situation (Article 13 b);*
- *fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).*

There are no important developments since 1996 with respect to the principal concepts of the Convention:

- rights of custody: Dutch law with respect to custody was amended in 1997 to the effect that after divorce, parental responsibility remains with the two parents unless either of them requests that the court should decide otherwise. In practice, ex-spouses usually continue to share parental responsibility.
- the Dutch courts have no particular difficulty in accepting the situation with respect to custody/parental responsibility, according to the law of the requesting state. Even rights of custody as interpreted in Anglo-American law systems or case law from those systems in which the removal of the child in a particular situation is declared wrongful in the sense of the Convention, which all may differ considerably for the continental Dutch law system, do not give rise to problems. The Dutch courts respect the learned opinions and decisions from the courts and authorities in the other system.
- habitual residence: in the Dutch case law there is a tendency also to weigh the intention of the parent to establish himself definitely in the requesting state. So the duration of the residence in order to be "habitual" is not primordial. Habitual residence was accepted even after the child was living in the requesting state for just a bit more than one month before it was removed by the abducting parent, given that it was manifest that the left behind parent intended to live there permanently.
- effective exercise of parental authority by the left behind parent: in Dutch case law this exercise is presumed if the parent in question has parental responsibility. According to Article 13, beginning and section 1, letter a, the opposing party has to prove that there was no effective exercise of parental responsibility.
- settlement of a child in its new environment: there are hardly cases in which the judicial proceedings have commenced only after the expiration of the period of one year. Given Article 12, the exception cannot be invoked within this first year. In the rare cases where for some reason the petition is filed after expiration of one year (because the whereabouts of the child were unknown) the recourse to the exception was mostly honoured.
- consent or acquiescence by the left behind parent is a difficult question as the alleged consent is mostly given in a tête-à-tête conversation with no witnesses present. In most cases there is enough circumstantial evidence for the judge to conclude that the alleged consent is not accepted.
- exceptions of Article 13, and Article 20: in accordance with the object of the Convention recourse to these exceptions is usually dismissed. The exception of Article 13, letter b, is interpreted in a narrow sense.

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)

3:1 *To what extent are your courts, when considering a return application, entitled and prepared to employ "undertakings" (i.e. promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?*

Statements by both parties during hearings are taken into account by the court in its decision on the return petition. Sometimes those statements amount to a promise or an offering by a parent: "If the court might order the return then I will return with the child". or "I will evacuate the former matrimonial home on behalf of the abducting parent and the child upon their return, etc. Those "undertakings" are usually not laid down in a written document or inserted in the

court decision.

Dutch courts are always prompted by the Central Authority to give as detailed decisions as possible. So sometimes the court gives a specific date for the return of the child. The more practical arrangements that cannot be part of a court decision, are left to be dealt with by the Central Authority. It always offers the court to advise competent authorities in the requesting State, or to try to favour arrangements between the parents about housing and other issues in connection with the return. "Undertakings" in the sense in Anglo-American law systems are unknown in the Netherlands. The farthest reaching is that the judge requests the Central Authority to advise the requesting Central Authority of the need or desirability to contact organisations for child protection after the child's return, and likewise suggestions.

In most cases the need for arrangements arises during hearings in the case or after the decision by the court. It is mostly the abducting parent who asks for settlement of his problems, to take away his objections.

3:2 *Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?*

If after the return of a child to The Netherlands a case concerning this child is brought before the Dutch Family Court, the undertakings made in a foreign country during return proceedings may play a role in the Dutch proceedings, provided the contents is clear. In principle, parties remain obliged by their previous undertakings or agreements, unless the new situation gives rise for a new amicable agreement or an overruling court order.

In cases where a court is not involved, the Dutch Central Authority may assist in implementing the undertaking provided it is communicated to it by the Central Authority of the requested State. Mostly, measures of child protection are considered desirable. The Dutch Central Authority then contacts the Child Care and Protection Board for further implementation (see above 1:2).

3:3 *To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?*

Safe harbour orders or mirror orders are not known in the Dutch system. The Dutch courts rely upon the jurisdiction and the justness of the decisions of the court in the State of habitual residence which is considered the forum conveniens according to the Convention.

3:4 *Is consideration being given to the possible advantages 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, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?*

The Netherlands Government is fully aware of the possible advantages of the new Child Protection Convention 1996. This Convention will offer in the future better possibilities for child protection measures and for co-operation, but it has not yet entered into force for the Netherlands. Once it is in force, Dutch authorities will certainly request measures according to the new Convention in appropriate cases.

3:5 *Have you experience of cases in which questions have arisen as to*

the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?

With respect to the right of the abducted child to re-enter the country of habitual residence, there have never arisen problems. If so, that would have been in contradiction with the application for return.

It occurred some rare times that the abducting parent was not admitted as an alien to the requesting State. It is not known if after the return of the child a solution was reached on the issue.

3:6 *Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.*

There is experience of some cases where the abducting parent was subject of a warrant of arrest or was prosecuted by the judicial authorities of the requesting State. Where the abducting parent under these circumstances nevertheless wanted to return with the child, the problem was submitted to the Central Authority of the requesting State. Sometimes the arrest warrant was withdrawn in connection with the effective return of the child as it was mainly intended as an incentive to persuade the abducting parent to return the child.

If the abducting parent is prosecuted for a (serious) criminal offence (other than child abduction), it depends on the prosecuting authorities in the requesting State whether to stop or suspend the criminal case or to continue it. When the abducting parent felt not safe enough to return to the State of habitual residence the applicant parent travelled to The Netherlands to reconduct the child.

It can be added that in Dutch case law the situation that a parent could not return with the child because of an imminent criminal prosecution in the requesting State, was once considered a circumstance presenting an intolerable situation as meant in Article 13, section 1, letter b, of the Convention: The child in question would be definitely separated from the suspected parent.

3:7 *Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?*

There are no cases known in which the Dutch judge communicated directly with the authorities of the other state, neither of the inverse situation. Such communication will become possible under the 1996 Hague Convention on Child Protection.

3:8 *Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?*

Such appointments will take place following the entry into force of the 1996 Hague Convention on Child Protection.

3:9 *Where a child is returned to your country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?*

In the Netherlands, irrespective of nationality or residence, the legal aid scheme is applicable to the parties in proceedings concerning parental responsibility pending in the Netherlands. A person is entitled to subsidized legal aid when he or she does not have sufficient income to pay an attorney. The decision is taken by the Legal Aid Board. It can be appealed against. The application for legal aid is prepared and filed by the chosen attorney of the party.

Legal advice (outside proceedings) can always be obtained, free of costs for the first half hour, and for a very low own contribution for further three hours, during which time a global assessment of a case can be made. If proceedings seem necessary, an application for subsidized legal aid can be filed. If granted there is always required an own contribution according to ability to pay.

3:10 *Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?*

When the child is returned to The Netherlands the abducting parent can file a petition for a change of the parental responsibility. It depends on the decision by the Dutch court whether the existing custody order is changed or reversed, or not.

3:11 *Would you support any of the following recommendations?*

a *that Contracting States should consider ratification of or accession to 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 provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.*

Yes.

b *that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.*

Yes.

c *that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.*

Yes.

d *that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.*

Yes.

e *that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.*

Yes.

- f that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.*

Yes.

(4) Procedures for securing cross-frontier access/contact between parent and child

4:1 *What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?*

Applications for access orders are subject to the same procedural rules as applications for return described in the fore-going chapters. So, if an application for an access order is dealt with by the Dutch Central Authority the applicant parent is represented by the Central Authority, also in court. He or she does not need an attorney.

If the parent files his petition directly in court through a Dutch attorney, he is entitled to legal aid in the same way as a person residing in The Netherlands (see above 3:9).

4:2 *On what basis do your courts at present exercise jurisdiction to:*

- a grant and*
b modify access/contact orders?

The Dutch courts exercise jurisdiction if the child has its habitual residence in the Netherlands, in accordance with the Convention on the Protection of Minors 1961.

4:3 *What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation 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?*

Foreign access orders can be recognized and enforced in The Netherlands on the basis of the 1961 Hague Convention on the Protection of Minors and the 1980 European convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children. In the future it will also be possible on the basis of Article 26 of the 1996 Hague Convention. The enforcement of orders given in States who are not a party to the mentioned conventions is possible according to the rules of the Code of Civil Procedure (articles 985 – 992). After special proceedings initiated by a petition are instituted, the court can give permission for the requested enforcement.

Practice of the enforcement of foreign access orders under the above-mentioned conventions shows that in nearly every case the parent holder of custody rights objects to that enforcement. Sometimes circumstances since the issue of the order have changed too radically for the order still to be reasonably enforced without adaptation of the conditions for enforcement. In enforcement proceedings the Dutch courts have room for such an adaptation.

If a long time has lapsed since the access order was given abroad and circumstances have

changed considerably since, courts will sometimes assess the present situation with no regard to the past. The applicant parent may then be successful in applying for the determination of a new international access order. A new order will also be applied for where no access order was given before. Under Article 21 of the Convention an application can be filed for new access regulations. Dutch courts (provided it has jurisdiction, which is practically always the case) usually give new access orders.

Attention is called to article 7 of the 1996 Hague Child Protection Convention, providing that in case of wrongful removal or retention of the child, the courts of the child's habitual residence retain their jurisdiction until certain conditions are fulfilled. This provision has been applied by anticipation in Dutch case law in the sense that jurisdiction was declined in respect of children habitually resident abroad. In practice, provisional protective measures are often taken on the basis of article 9 of the 1961 Convention (cf. article 11 of the 1996 Convention).

4:4 *What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?*

Applications for cross-frontier access are in general dealt with by the Central Authority as expeditiously as the return applications. In legal proceedings before a court, however, the petitions for access have no priority over all other family cases as return petitions have. However, family cases generally are processed expeditiously.

The processing of a particular access application depends on the fact whether examinations by experts are deemed necessary. In most cases the Children's Judge seeks advice from the Dutch Child Care and Protection Board that can only give its recommendations after an examination of the case. Within those examinations sometimes a trial contact arrangement is organized between the child and the applicant parent over a period of a few months in order to assess the possibilities of this particular form of access.

4:5 *What facilities/procedures are in place to promote agreement between parents in international access/contact cases?*

Attempts to mediate between the parties are made by the Central Authority. The problem with mediation is that the parents are living in different countries. Therefore there are considerable costs involved in getting both parents at the same time gathered around the table of the mediator for several times. Moreover, mediation is possible only if the parties are willing to participate in the process. Access cases left to be dealt with by the Central Authority are difficult. Parents who are prepared to reach agreement, do so in an amicable way or through their solicitors.

The Dutch Children's judge generally also prompts parents to reach agreement during the hearings in court, but there are time constraints. If one parent is forced into an agreement difficulties will immediately arise in the implementation of such agreement or order.

4:6 *Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?*

Yes, it is laid down in the Dutch Civil Code (Article 1:377a) that the non-custodial parent and his child have a right to access to each other. So the point of departure of the judge in the cases referred to the court always is that there should be access, unless one of the few exceptions in the law is present, or in this particular case there are other circumstances that make access, personal contact between the parent and the child, less desirable. Such a circumstance is that the child itself does not want access, or that the relationship between the parents is so hostile and negative that there cannot be reached even the slightest agreement and co-operation between them on dates, hours etc. When the parents mistrust each other and express their fear that the other will abduct or retain the child, exercise of access is too difficult. Then coercive measures cannot help. Then access is not considered in the interests

of the child in question, who threatens to be involved in the conflict between its parents. In almost all cases the non-caring parent is granted the right to regular information about the child, to be given by the caring parent.

4:7 *What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?*

The conditions depend on the person of the non-custodial parent and on the reasons he had to abduct or retain the child. In most cases there will be, at least at the beginning, supervision of access by the Child Care and Protection Board during its examination on the possibilities of the case, or by third persons to be agreed upon by both parents. The non-caring parent may also be required to leave his passport with a third person.

4:8 *What information concerning services and what other facilities are available to overseas applicants for access/contact orders?*

In principle services and facilities available for Dutch residents are also available for overseas applicants for access/contact orders. However, the problems lie in the distance at which the applicant parent is living and the costs he will incur by travelling to The Netherlands. As mentioned already, in almost all cases the parent living in The Netherlands, and sometimes the child itself, opposes to access taking place in the country of the applicant parent. The best that can be agreed upon is that the applicant parent, at least during an initial period, exercises his rights of access in The Netherlands, and that it will be contemplated later whether access can be extended to the country of the applicant parent.

4:9 *What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:*

- a *the effective exercise of rights of access in your/in the other jurisdiction;*
- b *the granting or maintaining of access rights to a parent residing abroad/in your jurisdiction;*
- c *the restriction or termination of access rights to a parent residing abroad/in your jurisdiction.*

The general problem in the cases under letters a. and b. is that the parent holding custody rights opposes against the exercise of rights of access by the other parent. Sometimes this opposition is very fierce, the custody parent not being prepared to any form of co-operation. He or she just wants to ban out the other parent out of his or her life and that of the child.

Letter a: Upon reception of an application concerning rights of access, the Dutch Central Authority mostly invites the custody parent by registered letter to co-operate in the exercise as requested. If this parent is not ready to do so, he or she is invited to give the motives for his decision to enable the Central Authority to gather information on other possibilities for the exercise of rights of access. On the basis of this information new suggestions and options are formulated to meet the objections of the custody parent. Those options and suggestions are submitted to the applicant parent for comment. Sometimes after some negotiation between the parties, by exchange of letters between the Central Authorities concerned, an agreement is reached. The custody parent then no longer opposes against the exercise by the other parent.

The fact that criminal proceedings are pending abroad against the abducting custodian parent may be an obstacle to reaching agreement about access.

After unsuccessful exhaustion of all possibilities for mediation, or if the process simply takes too long, the case can be referred to the competent Family Court for the establishment of modified access regulations. Courts often make access orders even though such orders are unlikely to be complied with. Such orders are to be regarded as a message to the non-custodial parent that the impossibility to exercise access is to be ascribed to the custodial

parent's attitude, not to the non-custodial parent's or the child's attitude.

Declaratory judicial decisions specifying the contents of the rights of access for one or more particular times as mentioned in the next paragraph, are hardly ever received from abroad.

Finally, in its decision on the enforceability of a foreign access order, the Dutch court may specify the way in which access is to be exercised or to be enforced (see answer to question 4:3).

As regards the exercise of access in another jurisdiction, article 14 of the Dutch Implementing Act provides that: "Any person who has rights of custody over a child in The Netherlands may ask the court for a ruling

- a. that the right of legal custody is held by him or her if such right was conferred on him or her by operation of law;
- b. a decision regulating the place and duration of the stay of the child outside The Netherlands and, where necessary, of other circumstances concerning that stay, without prejudice to previous decisions concerning rights of access; and
- c. the transmission of a request to the competent authorities of the State in which the child is staying during the exercise of rights of access to ensure or to order another agency to ensure that those rights are exercised correctly, with particular regard to the place and duration of the child's stay and, where necessary, to take measures to effect the return of the child once the period in which the rights of access may be exercised has lapsed.

By submitting the declaratory ruling to the authorities of the jurisdiction where the child is to stay during the exercise of access, it is presumed that this prevents the child's retention after the period of access has lapsed.

As far as can be ascertained, no declaratory orders have been made so far on the basis of this provision.

The Dutch Central Authority is ready to co-operate in the same way when access is to be exercised in The Netherlands.

Letters b and c: the co-operation with other jurisdiction is principally the same as described under letter a. In so far as the granting, maintaining, the restriction or termination of access rights is effected by court order, those orders can be given only if the child concerned is residing in the Netherlands. Dutch courts exercise jurisdiction if the child has its habitual residence in the Netherlands in accordance with the Convention on the Protection of Minors 1961 (see 4:2 above).

For all cases under a, b and c, reference is made to Article 35 of the 1996 Hague Convention on Child Protection, which provides for mutual assistance of competent authorities in access cases.

4:10 *What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (e.g. financial guarantees, surrender of passports)?*

To help guarantee adherence by parents to access conditions, first of all the courts try to attain as far as possible agreement between the parents about the contents of the order. In addition guarantees may be required such as the surrender of passports and the supervision of contacts by a third person.

Further, there are procedural measures to guarantee the exercise of access such as fees to be forfeited and sequestration. As in most other international cases these measures do not have much effect. They are moreover often considered not to be in the interest of the child. They are hardly used.

Recently experiments were started in the Netherlands with supervised access projects and "Access Houses". Here access takes place on a location where all sorts of facilities are available for children. Contact is supervised by the Child Care and Protection Board social workers, or other qualified persons. The persons supervising the access submit reports to the children's judge unless the parents solve the problem themselves. The aim of the exercise is

that supervision of access should stop after a six months' period. In one international case supervision was arranged for a longer period. Results so far are remarkably good.

4:11 *How in practice are access orders enforced?*

Access orders are difficult to enforce. They are a matter of co-operation between the parents. If one parent does not comply with an order, it sometimes helps if he is requested or demanded to do so by the Central Authority or put under some pressure by the court. The parent is then reminded that he (more or less) agreed with the order during the court hearings. Such reminder is usually forwarded through his or her attorney, who is hoped to have a beneficial influence on the parent/client.

4:12 *Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.*

Reference is made to the response to question 4.10. The role of mediation should be emphasized.

(5) Securing State compliance with Convention obligations

5:1 *Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.*

There are some cases with France, with Greece, Romania and Burkina Faso for the return of a minor which took a very long time to deal with. In spite of numerous reminders, the requested Central authorities did not transmit a decision on the application. The applications were sent far longer than a year ago.

5:2 *What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?*

In recent years the depositary of the Convention has been asked to verify whether the obligation under article 6 to designate a central authority has been complied with.

5:3 *Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?*

The Netherlands would be in favour of drawing up a checklist for implementing the Convention and submission of complete implementing legislation to the depositary by an acceding State before ratification.

5:4 *Are you in favour of an increase in the number of Special Commissions (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct*

communications between judges at the international level, or the enforcement of return orders by Contracting States)?

The existing system of quadrennial Special Commissions is considered sufficient. The exchange of views in the forthcoming Special Commission might show the need for specific meetings on the problems surrounding the effective exercise of rights of access. See 4.12 above.

5:5 *Are there any other measures or mechanisms which you would recommend:*

- a to improve the monitoring of the operation of the Convention;*
- b to assist States in meeting their Convention obligations;*
- c to evaluate whether serious violations of Convention obligations have occurred?*

Yes. The provision of guidance and assistance to States which are preparing the ratification of the Convention, requires special attention. See 6.1. below.

The absence in certain States parties of an adequate legal aid scheme has been found to influence custodial parents' decisions to object to the children's return after abduction or retention in another State. The issue of legal aid in proceedings relating to custody and access deserves the Special Commission's attention.

(6) Miscellaneous and general

6:1 *Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?*

Unlike later Hague conventions, the Convention does not specify that the Secretary General shall convene Special Commissions on a regular basis. It is important that this practice should be continued and that the forthcoming Special Commission should confirm this. Assistance and guidance by members of the Permanent Bureau to States which are considering ratification is indispensable. It would be most useful if the financial implications of the current supporting activities should be made clear to all States parties to the Convention and should be taken into account in the governments' decisions about the Member States' contributions to the Conference.

It is furthermore essential that the Permanent Bureau should continue its effort to encourage States to become parties to conventions which enhance the functioning of the 1980 Convention, in particular the 1980 Hague Convention on access to justice and the 1996 Child Protection Convention.

6:2 *Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?*

See 6.1.

6:3 *Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?*

A recent effort by the Dutch Central Authority to compile detailed statistical data has shown that such data only provide certain elements of information on the operation of the Convention or the way in which it is applied in situations involving the Netherlands. The numbers of cases vary from one year to another. The figures do show that the percentage of cases resolved without recourse to court proceedings is consistently high.

6:4 *Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?*

Yes. The two international conferences organised by the Permanent Bureau have proven extremely useful in promoting mutual understanding among judges of different countries. Such conferences should also be organised at the national level and involve both judges and attorneys.

6:5 *Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?*

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6:6 *Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.*

No such arrangements have been made so far.

6:7 *Do you have any comments on the following proposition:*

"Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention".

The proposition is correct. As far as can be ascertained, there are no Dutch court decisions imposing restrictions on the relocation of the caring parent and children.

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