

# COMMENTS ON THE DRAFT LAW ON CIVIL

# PROTECTION OF CHILDREN FROM WRONGFUL

# CROSS-BORDER REMOVAL AND RETENTION

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## Some Introductory Comments

**The *Raison d’être* of the Draft Law**

Serbia is not alone in seeking to improve its law and procedure for handling applications made under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘the 1980 Hague Convention’). The Dutch, for instance, introduced a new system and procedure with effect from 1 January 2012, the Swiss introduced new legislation in 2009, the Swedes in 2007 and earlier than that, the Germans radically overhauled their system in the 1990s. A number of States have reformed their system so as to concentrate Hague Jurisdiction in a few courts, a strategy long recommended by successive Special Commissions on the practical operation of the Convention.

There is indeed every reason to seek to improve, in the light of experience, the internal national system for operating as efficiently as possible the 1980 Hague Convention to which Serbia has been a committed State Party since 1991.

First, in common with all States, Serbia has had to and, will for the foreseeable future, have to face increasing problems consequent on the growing mobility of families across international borders. A statistical survey conducted by this author[[1]](#footnote-1) showed that, globally, applications under the 1980 Hague Convention made in 2008 increased by 44% as against those made in 2003.

Second, the operation of the Convention in particular instances has come under increasing scrutiny by the European Court of Human Rights (Serbia is of course a State Party to the European Convention on Human Rights). Furthermore, there has been a trend towards a finding of violations particularly concerning delays in enforcing return decisions or, generally, taking undue time to process applications (see for example, *Ignaccola-Zenide v Romania* (App No. 3169/96), (2001) 31 EHRR 7, *Sylvester v Austria* (App Nos. 36812/97 and 40104/98), (2003) 37 EHRR 17, *Monory v Hungary and Romania* (App No. 71099/01), (2005), *Neulinger and Shuruk v Switzerland* (App No. 41615/07), (2010), *X v Latvia* (App No. 27583/09), (2011), *Shaw v Hungary* (App No. 6457/09), (2011) and *B v Belgium* (App No. 4320/11), (2012). There is every reason, therefore, to introduce as efficient a procedure as possible for dealing with Hague applications to avoid Serbia being brought before the European Court of Human Rights.

One final introductory comment – the Explanatory Note to the Draft Law mentions that it is intended to initiate proceedings for Serbia’s accession to the 1996 Hague Convention on the Protection of Children. This is to be encouraged. There is, at present, a clear international momentum in taking up this Convention – there are at present 39 Contracting States plus a further 3 signatories. The Convention provides important and useful mechanisms both to safeguard and protect children involved in cross-border disputes.

## The Strategy of the Draft Law

In general terms, there can be no quarrel with the aim of the Draft Law that, as stated in the Explanatory Report, based on the premise that abduction of children is not in their best interests ‘(1) that central executive authorities of Contracting Parties are obliged to cooperate in order to ensure urgent return of the chid; (2) that Contracting Parties are obliged to ensure at their respective territories the implementation of goals of the Convention by utilization of the most efficient available procedures; (3) that by making of decision upon the request for return the conflict of parents is not solved about exercise of parental rights but the state existing before the violation of rights, or illegal abduction, is reinstalled, (4) that it will make it hard to achieve advantage in the struggle for custody over the child of that parent who has acted in illegal manner.’

Furthermore, having separate sections dealing with (a) the Central Authority, (b) Court Procedure, (c) the Working of Auxiliary Court Authorities and (d) Systemisation of the Transitional and Final Provisions, seems both sensible and necessary. However, the propriety of having an opening section on the regulation and meaning of basic terms under the 1980 Convention may be questioned (see further below).

Although it is by no means unique for legislatures to draft their own version of Convention terms – Australia, for example, has long since done so via its Family Law (Child Abduction Convention) Regulations 1986 – the obvious danger is that by doing so there may be a divergence (sometimes intended and sometimes not) between “National” version and the “Convention” version, which in itself is neither desirable in principle since the whole idea of a Convention is to come to internationally agreed solutions, nor desirable in practice, since it could lead to challenges before the European Court of Human Rights.

# Specific Comments

## Chapter 1

*Article 1 –*In principle is satisfactory, though it might be pointed out that the 1980 Convention (see Art 3 of the Convention) refers to ‘right*s* of custody and right*s* of access’. Referring to ‘right of custody’ as ‘exercise of parental rights’ could be misleading in as much as it might suggest that only parents have such rights though it is clear from Art 2(1) of the Draft Law that that is not so confined. Further, although it is true that the 1980 Convention refers to ‘right*s* of custody’ the more modern term would be ‘parental responsibility’.

*Article 2*

Paragraph 1 – It would be more in keeping with Art 12 of the 1980 Convention if Art 2 if the Draft Law referred to the “duty or obligation” rather than the “*right* to return the child”. Given the existence of the exceptions to this obligation provided *inter alia* by Art 13 of the 1980 Convention, it is probably not a good idea to refer to it as being a “right” to return. The first sentence might also refer to a ‘Contracting State’ rather than simply ‘a state’. I would be inclined to omit the reference to “territory” as that term is usually understood as referring to a part of a Contracting State (see eg Arts 6 and 40 of the 1980 Convention).

Paragraphs 2 and 3 – In line with the comments in my Introductory Remarks above, I would caution against defining wrongful removal or retention at all since this is clearly expressed in Arts 3-5 of the Convention. If it is thought right nevertheless to have such a definition, why not simply use the exact wording of the Convention? On the wording as it stands, I would suggest in 1) “body” instead of “entity” and in 2) I would delete “domicile”. Art 5 of the 1980 Convention simply refers to the ‘child’s place of residence’ and, in any event, ‘domicile’ has no place in the 1980 Convention at all. To introduce it here would be contrary to the Convention.

Paragraph 3 – Of course, there is every reason to require satisfactory proof of any foreign court order or decision, agreements or rights obtained in operation of law but the danger of this paragraph is that it might suggest that the Convention can only operate where there are existing court decisions, when it equally applies to wrongful removals/retention in breach of rights of custody arising by operation of law, judicial or administrative decision or by reason of an agreement having legal effect under law. In these latter cases there frequently will not be a decision or certificate. In such cases, what will be the position under the Draft Law? Is this paragraph demanding that an Art 15 determination under the 1980 Convention be obtained in any case where there is no court decision or certificate? In many States proof of foreign law can be given by experts and help can be given by Central Authorities with regard to ‘operation of law’ issues.

Paragraph 4 (the final paragraph). I am assuming that the paragraph says in line 2 that the Court will not (the English translation says “note”) make a decision on the merits etc – which is obviously correct since that is prohibited by Art 16 of the 1980 Convention but I would question the wisdom of including the qualification ‘if the request to return the child under the Convention was submitted on time’. If this is meant to refer to applications brought more than one year after the wrongful removal or retention, the test is provided by Art 12 (second paragraph) of the Convention and Art 16 still operates to forbid the Court of the requested State to decide upon the merits of rights of custody.

*Article 3*

Paragraph 1 – Although one could question the need for it, given that it reflects the clear position under Art 13 of the Convention, it is unobjectionable in itself, except that it makes no reference to the power to refuse a return under Art 12 (second paragraph) which might well require clarification, since there can be a dispute as to whether upon establishing an Art 12(2) exemption to the duty to return the Court nevertheless makes a decision to return.

Paragraph 2 – I would instinctively caution against so definite a position being taken even with respect to competent 15 year olds – there may well be cases where it is still right to order a return (for example, where siblings are involved) despite an objection. I would simply provide “The Court will normally refuse” etc. Does this paragraph indicate the position where the child has not reached 15? Is it clear in the Draft Law *when* for the purposes of this provision the child should be 15. For example, is it at date of application or at the date of proceedings?

Paragraph 3 – I am unclear what this paragraph means. Is it intended to give a discretion to return notwithstanding the establishment of an exception and, if so, why should this be limited to cases where there is a final *Court* decision?

*Article 4* – Given that (a) ‘habitual residence’ is not defined by the 1980 Convention and (b) it has proved a difficult concept, it is perfectly legitimate to attempt to give some guidance on its meaning. Provided this provision is understood to be *guidance* since, being a factual concept, its application has to be determined upon a case-by-case basis, then Art 4, being clearly based upon the CJEU’s decisions particularly in *Re A* (C-523/07) and *Mecredi v Chaffe* (C-497/10 PPU) seems perfectly reasonable. It also seems reasonable in effect to provide a rebuttable presumption that a wrongful removal or return will not change a child’s habitual residence, though the final two paragraphs seem a little convoluted.

## Chapter II

*Article 5* – Seems straightforward and requires no comment.

*Article 6* – Equally, seems straightforward and requires no comment.

*Article 7*

Paragraph 1 – does not read well in the English version provided. I assume it is providing that the Serbian Central Authority is charged both with receiving and making applications under the 1980 Convention (though without prejudice to the right of applicants to bring a return/access application directly before a Serbian Court in accordance with Art 29 of the 1980 Convention?).

*Article 8*

Paragraph 1 – seems well put (also clearly reflective of Art 8 of the 1980 Convention). I would merely add that mention might also be made of rights of custody/access based on the operation of law.

Paragraph 2 – needs clarifying, namely, whether ‘official documents submitted in original’ means that *copies* in whatever form are excluded and, if so, what the position is in such cases.

*Article 9* – Overall, this Article seems sensible and correct. It is particularly helpful to have Para 3 clearly allowing for convenient forms of communication. The final paragraph governing private applications is also helpful. In Para 1, I would suggest, in line 2, making reference to a ‘Central Authority of another Contracting State’. I would also add a statement about what language applications should be made in (and what will not be accepted).

*Article 10* – seems straightforward and requires no comment.

*Article 11* – seems straightforward and requires no comment.

*Article 12* – Overall, this Article makes sensible provisions, making it clear,in line with Art 8 of the 1986 Convention, that applications for return can either be made to the Serbian Central Authority or directly to the Central Authority of the State of where the child is believed to be. But I would add that this Article is without prejudice to the right to make applications directly to the relevant foreign court. In terms of drafting, I would refer to ‘Contracting State’ rather than ‘country member’ (both in Para 1 and Para 3). In Para 2, it might be simpler to refer to requests submitted ‘by the person, institution or other body whose custodial rights have been violated by cross-border (query whether to add ‘wrongful’) removal or retention of the child’.

*Article 13* – it is obviously right that it falls to the Central Authority to locate the child (this is clear from Art 7(a) of the 1980 Convention) but the phrase ‘determines from the submitted evidence the habitual residence of the child’, by which it seems it will be left to the Central Authority to determine that question, is questionable since it goes against the recommendation of both the 5th and 6th Special Commission. Paragraph 13 of the latter Commission states:

“(a) …Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application;

(b) the discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution.”

It might be helpful in this and succeeding Articles to spell out what is meant by ‘custodial authority’.

*Article 14* – seems relatively unproblematic (though the numbering seems odd), except for the first 14(3) which, possibly because of the English translation, particularly using the word ‘incites’ is not easy to understand, nor is its relationship with Articles 15 and 16 clear. Until I know more as to what is intended by this provision, I cannot comment further.

*Article 15* – Seems fine in substance and reflects Art 7(f) of the 1980 Convention.

*Article 16* – Making express provision for mediation is a good idea and reflects an increasing trend to do so among Contracting States. However, I am not so sure about the opening qualification ‘If there are no chances of providing a voluntary return’, since it may be useful simply to oblige the Central Authority to inform the parties about the availability of the service. In any event, there may need to be discussions about access. Furthermore, as it is worded, the Draft Law makes no provision for mediation in access disputes – is this intended? The rest of this Article makes good and sensible provision for mediation.

*Article 17* – Seems fine in substance. However, I am unclear what the final sentence means. Does it say anything that the third paragraph has not already provided for, that is, that it is for the Central authority to assess whether the submitted request is in accordance with the Convention?

*Article 18* – Again, this seems fine in substance but for clarity, does this provision apply both to applicants *and* defendants?

*Article 19* – It is an excellent idea to provide a time frame within which the Central Authority should give written notice of the initiation of court proceedings. Three weeks seems reasonable.

## Chapter III

Article 20 – Insofar as this Article is making special provision for Hague proceedings, this is a welcome provision. However, it is difficult to comment in any detail on this provision since I am not familiar with general procedure under Serbian law.

Article 21 – This important provision very much reflects the need for prompt disposal of return applications, which is written all over the 1980 Convention and specifically addressed in Arts I(a) and 11. I note that in Para 2, a deadline of 3 days is mentioned though it appears a little vague in that “certain measures” are not defined. There is no overall time frame mentioned for the disposal of court proceedings. In their recent reform, the Dutch law specifically set a 6 week time limit for the disposal of first instance hearings and a further 6 weeks for any appeal.

*Article 22* – Unobjectionable in itself provided it is not taken too far. Article 16 of the 1980 Convention needs to be borne in mind, namely, that in return applications the court “shall not decide on the merits of rights of custody”.

*Article 23* – Seems fine and requires no further comment.

*Article 24* – Seems fine and requires no further comment.

*Article 25* – It is clearly right that provision be made for either party to be able to appeal but some States have limited the number of appeals while others (such as England and Wales) have restricted the right by requiring permission to appeal. I am not familiar with the Serbian ‘rules of extra-judicial procedure’ nor with the significance of not permitting ‘Extraordinary legal remedies’ in the procedure for the return of the child and it may be that this effectively imposes some restrictions on the right of appeal.

*Article 26* – Seems fine and requires no further comment.

*Article 27* – Is a most welcome provision. The Special Commissions have long recommended concentration of jurisdiction and this proposal is in line with a growing trend in Contracting States to limit the number of courts that can hear Hague return applications.

Should it be clarified as to whether this provision also applies to private applications made directly to the court from abroad, as permitted by Art 29 of the Hague Convention?

*Article 28* – Seems a good and practical provision and is to be welcomed.

*Article 29* – Seems an excellent provision and is to be welcomed.

*Article 30* – There can be no quarrel with providing that the court determines what the expenses of the procedures are, nor can it be objected to as a matter of principle that the court could decide that all expenses should be borne by the party (normally the defendant) who “caused the procedure” (which, presumably means the person whose actions/behaviour forced the need for proceedings to be taken). The common practice in England is to leave costs where they lie and one might be wary of being too draconian in making the defendant (commonly mothers) bear the expenses since, ultimately, that might not be in the child’s best interests.

*Article 31* – Seems a sensible provision and requires no further comment.

*Article 32* – Again, this seems a sensible provision. The only issue is how the list of Attorneys can, in the course of time, be expanded and how work between listed Attorneys can fairly be allocated.

*Article 33* – Overall, this provision seems straightforward though I am not familiar with the significance of the ‘extra-judicial’ procedure.

*Article 34* – Seems straightforward and requires no further comment.

*Article 35* – Seems straightforward and requires no further comment.

*Article 36* – The timing of court proceedings is a crucial element in the handling of Hague applications and the generally accepted yardstick (based on Art 11 of the 1980 Convention and of Art 11(3) of the revised Brussels II Regulation) is six weeks. It is perhaps not entirely clear whether Art 36 is giving time frames for the *completion* of court proceedings. If it is, well and good since the time frames mentioned clearly comply with the above mentioned expectations (though the 2 day period would seem extremely fast). If it is not, and is only intended to define the time within which proceedings must be started, then the period of 6 weeks in relation to a due proposal, would seem too long.

I assume that a distinction is being made between private applications made by individuals directly to the court and those made by the Central Authority. On the assumption that the time frames are for the completion of court proceedings, in the case of the former, the six weeks time frame seems entirely right. In the latter case, is two days (presumably “working” days) practical? Is the difference in time frames based on the supposition that the Central Authority application is likely to be more complete?

*Article 37* – Seems straightforward and requires no further comment.

*Article 38* – This provision vesting power to make interim decisions is a very important and necessary augmenting provision to the 1980 Convention. It is to be welcomed.

*Article 39* – Seems straightforward and requires no further comment.

*Article 40* – Seems straightforward and requires no further comment.

*Article 41* – Seems straightforward and requires no further comment.

*Article 42* – This is a useful provision. It is clearly important that an appeal should not *of itself* prevent enforcement of a temporary measure but should not provision be made giving some power to stay enforcement? Should there not be an equivalent power to that provided by Art 50 of the Draft law?

*Article 43* – I am assuming that this Article aims to make Hague hearings an expedited process and that it is not usual in domestic proceedings in Serbia for there to be no preliminary hearing or to have a normal maximum of two main hearings. It is clearly in the spirit of the 1980 Hague Convention for there to be an expedited court process and in that sense this Article is to be welcomed. Nevertheless human rights considerations have to be borne in mind so that adequate time has to be given to obtaining the child’s views (though this is clearly addressed by Art 48 of the Draft Law) and, possibly, to hear the parties. In this regard close attention will have to be paid to the Grand Chamber of the European Court of Human Rights’ ruling in *X v Latvia*, which is currently being awaited.

The time frames for fixing the first hearing within 8 days of the initiation of the procedure and of only allowing a maximum 8 day interval between hearings are fine in themselves, if they are really practical. However, it is by no means clear how these provisions relate to the general time frames set out in Art 36 of the Draft Law, nor to the time frames provided for in Art 47 of the Draft Law in relation to mediation hearings. In this latter instance should the qualified by saying ‘Subject to Art 47’?

*Article 44* – The first two paragraphs seem straightforward and require no further comment. But those paragraphs dealing with parties’ absence may have human rights implications, particularly with regard to the position of the child In any event these provisions may have to be revisited in the light of the awaited ruling in *X v Latvia,* mentioned above.

*Article 45* – Seems straightforward and requires no further comment.

*Article 46* – Seems straightforward and requires no further comment.

*Article 47* –Setting time limits for mediation is a good idea and again is in accordance with the general spirit of the 1980 Convention of having an expedited process for handling abduction applications. The time limits themselves, respectively of scheduling a mediation hearing within 15 days and limited mediation itself to 7 days, seem reasonable, but with regard to the former, how does this square with Art 43 of the Draft Law in normally having only 8 days between the main court hearings?

*Article 48* – The first paragraph is important and seems human rights compliant. The second and third paragraphs are unusual. Each, particularly the second paragraph dealing with 10 + year olds, are open to the charge of ‘arbitrariness’ and on that basis might be found to violate human rights. On what basis is the distinctive position for 10-14 year olds made? My instinct would be to delete this paragraph, especially as in any event, the substance is contained in the opening paragraph.

Making special provision for 15 year olds is clearly in line with Art 3 of the Draft Law (perhaps a cross reference might be useful as a matter of drafting) but, as I have already commented in relation to Art 3, I would caution against making too definite a provision.

*Article 49* – Seems straightforward and requires no further comment.

*Article 50* – Are the time frames practical and realistic? If so, they are fine and certainly within the spirit of the 1980 Convention that applications should be promptly dealt with. Should there also be a time frame within which the Appeal Court should deliver its decision? The Dutch has specified 6 weeks for this.

*Article 51* – Seems straightforward, but should reference be made to 3 *working* days?

*Article 52* – Provided the time limits are practical, this Article seems straightforward and requires no further comment.

*Article 53* – Making express provision for the enforcement of return decisions is important and follows the recommendation of the Hague Conference’s Good Practice Guide on Enforcement. The emphasis in paragraph 2 on the need for urgency in the execution of enforcement procedure and of the obligation of the court to prevent any misuse or any unjustified delay is welcome. There can be no quarrel with the third paragraph in seeking, without prejudice to ongoing contact, to achieve voluntary enforcement, nor with the final paragraph of only permitting the parties to agree to postpone enforcement if it is in the child’s best interests to do so.

*Article 54* – It is a good idea to make express provision for cases where, as permitted by Art 29 of the 1980 Convention, applications for return are made directly to the court and stipulating the need to inform the Central Authority of such applications is a useful provision.

## Chapter IV

*Articles 55, 56 and 57* – Seem straightforward and require no further comment, save to say that it might be helpful to define what is meant by ‘Custodial Authority’.

## Chapter V

*Articles 58 and 59* – Seem straightforward and require no further comment, save to say that the number of the final Article should be 59 and not 58.

## Final Overall Comment

Overall, the Draft Law seems to provide good implementing legislation for the better operation of the 1980 Convention and, in doing so, meets the objectives set out in the Explanatory Report. Moreover, the emphasis of the need for speed when handling Hague return applications is reflective of the clear spirit of the 1980 Convention and in line with the various Recommendations of the Hague Conference Special Commissions. Many of my comments are on points of detail, though no less important for all that, and a clear eye on Human Rights considerations needs to be kept in mind.

1. See Lowe and Stephens ‘*A Statistical Analysis of Applications Made in 2008 Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction’* http://www.hcch.net/index\_en.php?act=progress.listing&cat=7 [↑](#footnote-ref-1)