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UEPLAC-HAGUE CONFERENCE Joint Training Initiative in Ukraine Hague Convention(s) of 1980 (and 1996)

(Fact-finding mission in Ukraine – 27/28 May 2008)

With Inserted responses derived from the fact-finding meetings.

PART 1 – THE 1980 CHILD ABDUCTION CONVENTION

Section 1 - General Introduction

1) Volumes

a) Since the Convention has been in operation in Ukraine how many applications have there been for return of children and from and to which States –

- i) Incoming, and
- ii) Outgoing?

R Attached is a fact sheet produced by the ministry of Justice showing the figures.

b) Where possible please indicate the number of cases for which –

- i) the Central Authority in Ukraine has been approached directly as regards an application for return of a child from Ukraine, and
- ii) an application for return of a child to Ukraine has been made direct to the Central Authority in another Contracting State?

R Following information supplied by the Central Authority it seems that all incoming and outgoing cases are made through the Central Authority.

2) Statistics

a) Does the Central Authority in Ukraine have arrangements in place to maintain accurate statistics concerning the cases it deals with under the Convention, and does it submit annual returns of statistics to the Permanent Bureau in accordance with the forms established by the Permanent Bureau in consultation with Central Authorities? If not, please explain why.

R Provisionally manual collection and retention of statistics is the current method. The Central Authority has not so far submitted returns to the Permanent Bureau but is aware of the need to do so.

b) Does the Central Authority use any special software for case management / statistical purposes?

R Not yet. See R (c).

c) Would the Central Authority be interested in using the iChild software which is available free of charge from the Permanent Bureau and WorldReach Software Canada?

R iChild would be of interest, KS reports. Following the 2006 SC the ministry was planning to work on implementing a system based on iChild but this has been suspended.
T A special presentation would be worthwhile during the training.

3) Implementing legislation

a) Was implementing legislation necessary to bring the Convention into force in domestic law?

R It seems to be the case that no legislation was necessary to bring the Convention into force. The position however is not quite so clear as to whether domestic law needed to be amended to enable the Convention to function correctly. There is a growing realisation that at least some procedural law needs to be enacted to meet a number of problems. It may be also that a review will have to be made of the substantive family law to see if it fits correctly.

According to the judge Mr Bida Mikhailov, the basis of the law applied in Convention cases is Ukraine Family law and the Family Code so long as these do not contradict the Convention. Only if there are gaps is the Convention applied as such though he did prephrase his comments by noting that there had so far been little experience. There are, he added, no specific rules of procedure law for Hague Convention cases.

According to MVL, one of the Ministry lawyers who takes applications to the courts, the Convention itself is the material law for the purposes of cases in the Ukraine but there are serious problems in the procedures applied to Convention cases. The normal family law procedures are applied to Hague Convention cases but there are early indications that the respondents' lawyers are using every possible device to prolong and frustrate proceedings.

One particularly serious issue is the use of counter-claim. In the first case to be heard in Kyiv the court itself, according to MVL, encouraged the respondent to counter-claim against the applicant in the return proceedings to seek in the same procedure a decree for divorce and a custody order. This is of course quite wrong since the Convention itself provides that there should be no decision on custody in the court of the State to which the child is abducted until the return order proceedings have concluded.

All attempts to persuade the court to separate the proceedings were to no avail and appeal was not possible as the judge ruled that the decision to combine the two procedures was not to be appealable. Ultimately an appeal on this ground may be possible but that will be a long process – the case has already taken six months.

b) If so, has the necessary legislation been enacted, and is it in force? (Please provide a copy or indicate where copies of the legislation may be obtained.)

R See (a).

c) If not what plans are there to prepare, enact and implement the necessary additional measures and what are they to be.

R According to KS the Ministry has plans to legislate on the role of the State Authority in incoming and outgoing cases and also as a part of a broader procedural law proposal to limit the number of courts which will hear Hague Convention cases to one per Oblast to be located in the place where the local office of the Ministry of Justice is situated; this will also deal with other Conventions including the Council of Europe Convention on protection of children's rights [DN What about the 1996 Convention – ask KS]

Appeals would also be limited to one Appeal court per Oblast.

4) Locating children

Please indicate the agencies involved in, and the processes available for, the location of missing children in Ukraine?

R OZ Location of children is the responsibility of the Ministry of the Interior with whom there is normally very good co-operations. The Ministry operates through the police criminal department and through their local divisions they can provide information as to the whereabouts of children in Ukraine. Although this arrangement is in place in general reliance is placed on information from parents as to the whereabouts of children abducted into Ukraine as there is in general no legal entitlement to declare a nation wide search in the country. Information from NGO's can be helpful as where parents go into hiding say in a refuge

[The discussion broadened out in to considering the problems associated with prevention of abduction and border controls.]

DV The national border guard service does have some functions which allow it to stop children being removed unlawfully from the Ukraine but in general this has to be based on the law and a court order is most often needed to enable the Border Guards service to operate. There are certain limited situations where action can be taken without a court order.

Under the relevant provision (Art. 6/25 of the statute of the Border Guards) free passage must be given to those nationals who are entitled to cross the border. There is no clear rule which would allow the guards to intervene.

KS However the Family Code does contain certain provisions which effectively can allow the guards to intervene – these were prepared after consulting the border guard service - and Art 6 of the code of family procedure applies. In terms thereof a list of documents was prepared which require to be produced when people cross the border and an application to the court is usually needed to take a child across the border where the parents do not agree.

For a person who is not a National of Ukraine however there is no such restriction but in such a case the hope is that such a parent will realise that taking such a unilateral step will not help to solve the problem even if it remains the case that under the Family code parents have the right to determine where their children should reside. Even if taking a child across a border without the consent of the other parent can be a criminal matter on the civil side the main aim is to achieve a peaceful settlement.

DV From the point of view of the border guards it is difficult to see how a mother could ever be stopped from taking a child across a border although it is true that children of sixteen years of age and less cannot leave Ukraine without parental consent.

MVL There is a problem under the constitution. Article 19 provides that authorities must act within the law. This includes resolutions of the Cabinet of Ministers. If it is not envisaged that a child cannot be stopped from leaving Ukraine without a court order then the authorities would have difficulty in doing so. It does indicate that there are certain gaps in the legislation which need to be addressed.

DV There is a data base of information as regards those seeking to leave the country and this can be used to place material say about court orders and also when a person is crossing the border illegally that person can be detained by the border guards at a border post. The system is on-line at Airports, Railway Stations and the other border crossing points.

[On enquiry from KS adds that information goes into the data-base on real time and is integrated at all relevant border posts but clearly would not apply where a person was not entered onto the system.]

MVL There is also a problem where the parents or one of them have not the same nationality of the child. In such a case where the applicable law enables the parent to take the child out of Ukraine no additional document is needed. This is especially that case where a citizen of Ukraine takes citizenship of another country after emigrating but comes back to Ukraine later. It can be very difficult to locate a child {In response to comment form DV that parental consent is usually needed and in its absence the parent and child can be stopped at the border, adds that in one case an Italian citizen formerly a citizen of Ukraine had obtained a stamp on her passport for a child to be removed, no formal consent was needed from the father {it seems!} and so when she crossed the border into Ukraine she was not acting unlawfully even though the removal of the child was {it seems} wrongful.

MS [in response to an enquiry from PMB as to what steps could be taken to prevent re-abduction] indicates that a court order can be sought to prevent removal but this can be counterproductive as it means that the parent concerned may be unwilling to co-operate in securing a voluntary return of a child and the need to go to the court will put them on notice and perhaps trigger a removal.

Training points It is agreed that there are issues to consider for the training session on location and prevention including the need to look at the legal position as well as the need to provide information as to what measures might be available to prevent or at least make removal more difficult.

5) Judicial procedures

What are the arrangements in place for the taking of measures by the Central Authority in Ukraine for the initiation or facilitation of judicial proceedings for the return of children as envisaged in Article 7 f) of the Convention?

R The Central Authority passes the cases to the officials responsible for taking cases into court who are based in the Justice Ministry They are acting all over Ukraine at least for the present and they take the cases themselves.

6) Legal aid

a) What facilities are available to foreign applicants to assist them in bringing their applications before the courts in Ukraine and in particular, is legal aid available and, if so, on what conditions?

b) What is the attitude of Ukraine to the issues of legal aid under the Convention and in particular the Article 26 reservation problem especially in applications for return to Ukraine from Contracting States which have made reservation under that Article?

R (a) Because of the arrangement noted at 5 the issue of legal aid does not arise.

(b) No comment was offered on this point.

7) Return and enforcement procedures

a) What procedures and measures exist for the enforcement of a return order and who is responsible for implementing such measures and for enforcement generally?

OS There are arrangements under the national law of Ukraine for enforcement of orders to return a child and remove the child from a parent. This domestic law is in force since 1999 and was not affected/amended when the Convention was brought into force. Experience so far has been based on recognition and enforcement of domestic decisions and orders of courts outside Ukraine – there have been no orders for return to enforce so far under the Convention. The officer

responsible for the execution will work with someone from the child protection authorities and will take the child to hand him/her over to a school/hospital or otherwise to a parent or other person. Non-compliance with an order has criminal sanctions.

One example of enforcement in action was a case in the Zakarpattya Oblast where the father of Czech nationality took a child from Ukraine and in 2006 the Czech court ordered return to the Czech Republic from Ukraine after the child had been removed to Ukraine. Ukraine was not party to the 1980 Convention at the time and the decision to enforce the Czech order was based on other grounds and on recognition of foreign orders. So the order was executed in Ukraine and the child returned to the father. The police and the enforcement officers came to take the child. It is possible for further application to be made to the court for a search for the child but the responsibility is with the police.

There are some requirements which can cause problems such as the need for the person to whom the child is to be delivered being present at the handover. [on enquiry from PMB as to whether this would mean for example that in a Convention case the applicant would always have to come to Ukraine where there was a return ordered] The court and therefore the order and the execution authorities cannot go beyond the application of the applicant. [On further enquiry from PMB as to whether there are arrangements for co-ordination between the various authorities over the mechanisms and arrangements for return so that these can be incorporated in the order itself OS repeats that the court will not go beyond the application so it has to be part of the claim. If the claimant includes details of how enforcement is to take place such as who will accompany the child then it will be in the order otherwise that will not happen.]

b) What measures are available for the purpose of ensuring safe return as envisaged by Article 7 h), in particular in those cases where there is evidence of domestic violence?

R No specific response to this point.

c) Please indicate the services responsible for the protection (where necessary) of returning children, as well as the services available (including legal advice and representation) to a parent accompanying the child on return.

R OF Gives the following details re the authorities responsible for child protection and related matters. There is in general a lack of understanding among the relevant authorities as to how the Convention is to operate and as to what lies at the essence of it and this goes for the bodies at local and at central level including the courts and the Ministry of Family, Sport and Youth.

The Family Code envisages a procedure for taking a child from the parent/s under certain conditions and this is mostly where there is need for protection of the health or life of the child. Only then can the family protection authority take a rapid decision to take measures of child protection which can involve informing the prosecutor's office and seeking a court order.

Then again in the Family Code there is a declaratory provision whereby the legal representative of a child can seek the return of a child from someone who is unlawfully retaining the child. This provision is not entirely clear as to its extent and meaning however.

Thirdly, as regards the location and place of residence of a child there is a clear rule in Ukrainian law as to how this is determined and by whom and as to the procedures for determining the habitual residence of the child but procedure for return of a child is different and it may be that the law will need to be changed.[NB BM had indicated during the meeting on 27/5 that the Habitual Residence of a child is determined by the parents and is in principle that of the parents – see further Qu 8 – question as to what happens when the child is only with one parent]

Normally the Child protection authorities will only be able to act in a situation where the child is obviously in need of care and is at risk. At present it seems that child protection services would only be able to act for example by being involved in the return of a child by accompanying him/her if the parents were not able to care for the child concerned. There are twelve categories of case identified in the law where this takes place and one of these is specifically where a parent

cannot accompany a child. Then the child protection authority might act by accompanying the child or accommodating him/her in an appropriate location.

PMB –interim summing up and seeking clarification – there are it seems different bodies with responsibility for child protection and safe return and they understand very well their role under the law of Ukraine. Two questions arise however. First as to whether the law is well adapted to the (needs of) the Convention and secondly if it is the case as seems to be that the court cannot go beyond the terms of the application in making the order, whether it might be useful for there to be co-ordination and discussion to formulate the conditions and arrangements for return during the return application proceedings so that these can be part of the return order. The applicant might have particular ideas about securing the return safely say on a fast track but the formulation of these may not be possible until during the proceedings. The situation may also be confused if the applicant and the Ministry officials representing the applicant have not agreed precisely what should be sought in the return order. What can the applicant then do to ensure that the court grants an order in appropriate terms and further might it not be open to the court to devise an order whose terms are appropriate for the situation??

R further from MVL repeating that the court cannot go beyond what is sought in the application and so it is bitter if the application can formulate the requirements in as detailed and correct way as is possible. Foreign applicants have access to the courts for return applications but if an applicant wishes to have a quick and correct decision on return then he/she will have to be present in the Ukrainian court and be prepared to give certain guarantees as to the safe return to the State or Residence. From the procedural point of view the Ministry is acting for and representing the interests of the applicant and this is understood by both but the applicant and the representatives should not express different views on return as this will simply confuse the issues and the court.

MS adds that applicants should indicate in their application (to Central Authority?) that they will come to Ukraine to collect the child in order to facilitate return. Execution of return orders does not of course have effects as regards the rights of the parents.

OS Adds further that the child could not simply be put on a plane by the enforcement service and wonders how this could happen in other countries. The execution of judgments of the courts is neutral as regards the Convention terms and there has been a new statute on enforcement prepared but not yet enacted.

RL Wondered to what extent and how the question of the child's interests is taken into consideration on the West.

PMB Sums up by saying that it looks as if the appropriate institutional arrangements for return are in place but work would seem to be needed on co-ordination and perhaps some changes in legislation.

Training Need –There is a clear need to focus on return measures in the training. The impression from the meetings including that with the judge on the 27th is that no real thought has been given as to how this should be done in reality and in particular what sort of co-ordination is needed between the various services. Further is the procedural problem whereby it looks as if there is no flexibility within the procedure to enable a tailored order to be made once a decision on return has been made, It may be worth while looking out some examples of orders to show how this might be done. Also for the purposes of case studies at least one on this point would be useful to cover enforcement in general orders for return and the separation between domestic and convention cases.

d) Is the standard form for a Request for Return as recommended by the Fourteenth Session of the Conference available in the Ukrainian language?

R No response was offered specifically on this point. NB Can be followed up in correspondence.

8) Substantive law

a) What are the legal criteria by which custody and contact determinations are made?

b) Is there a difference in the legal status of mothers and fathers in custody or contact cases?

c) What are the legal rules for determining where a child was / is habitually resident for the purposes of the Convention?

R General -the bulk of the discussion on this point took place at the meetings on 27th. May. What follows is the gist of the discussions summarised.

Under domestic law of Ukraine both parents have custody of children under sixteen years of age unless one or both are deprived of these rights by order. So far it has not been necessary to consider the difference in the meaning under the Convention and domestic law - there have been few cases.

As for Habitual Residence the position under the law of Ukraine is that this is regulated to the effect that a child of sixteen years or under has the habitual residence of the parents though the Family Code deals with children up to the age of eighteen. As for determining the place of residence of a child apart from parents grand-parents have now rather more rights in this respect under Ukrainian law as have mothers. It is understood that this might be problematic in Convention cases as the situation can be quite other than under the domestic law and the Convention meaning of Habitual Residence is different.

In general it is thought that it will take some time for the Courts as well as the relevant officials in the Ministry at local level to fully understand the implications of the use of these terms in the Convention. On the whole though despite the variety of meanings available notably on custody, there is not felt to be any need to change the law on the matter.

Training Note – There is quite a lot of indication that there has not been very much thought given to how the basic concepts of the Convention are to be applied and as to what their meaning is. See also the note to the previous question. Again it would seem necessary to have material on this and also possibly a case study on both the meaning of custody for the Convention and Habitual residence based on some of the case law.

9) Social services and child protection services

Please –

a) describe the services which exist for the assessment, care and protection of children (including preventive measures) in the context of international child abduction, and

b) indicate what measures are available to be taken during a return order proceeding and especially those which serve to prevent re-abduction or concealment of a child, and

c) by whom the taking of such measures is to be initiated?

R No separate response is noted here as the import of this question was dealt with fully under qu. 7 to which reference is made.

Section 2 - Central Authority

10) General arrangements for the Central Authority

a) Please give a general description of the arrangements made in Ukraine as regards the establishment of an authority or authorities to discharge the “Central Authority” functions required by Contracting States under the Convention.

R General response as regards paras. a) to d) from discussions with KS, MVL and MS

In the Ministry of Justice there is a Division whose functions are devoted to the central authority role and to the giving an formulation of policy advice on Convention matters – this sits within

the Department for International Private Law (Headed by KS – pmb). This arrangement may have to be reviewed in the future depending on future volumes of business.

There is also a Division which provides representation for applicants in court under the Convention. Liaison in the applicant's State is carried out by the Central Authority often direct to the applicant – the applicant's representative does not always take responsibility to inform the applicant over court dates and so forth.

The procedure where the court to hear the application is situated in one of the Oblasts (including Kyiv) is that the case is transmitted to the local offices of the Justice ministry. The first step is for the abductor/respondent to be notified and an appointment is made for a meeting at the Justice Department offices at which the Convention and its purposes are explained and the implications made clear in an attempt to convince the Abductor to agree a return. This has proved to be successful in a number of cases.

If no agreement is reached the case goes forward for a court application in which one of the adminicles of evidence is an acknowledgment signed by the abductor that he/she has refused to return the child.

In response to an enquiry from PMB as to who carries out representation in the Oblasts there are four cases so far in court and it is still being done by the Central Division of the Ministry to build up expertise

b) If, and insofar as, there are several Central Authorities or otherwise that the Central Authority functions are divided or shared among several authorities, please indicate the precise functions of each, the relations between them and the nature and methods of communication in general and on specific cases as regards each.

c) What role does the Ministry of Justice play as regards the operation in Ukraine and between Ukraine and other States and the Hague Conference as regards the 1980 Convention and how does this role relate to the roles / functions of other authorities in Ukraine in this regard?

d) Please indicate the measures taken to ensure that the Central Authority is in a position to carry out the functions set out in Article 7 of the Convention?

e) In particular, please describe the measures implemented in Ukraine to prevent child abductions.

R See note above on qu 4 as regards the location of the child.

Training Issues – The key issues that come out of this section relate to the role of the Ministry and questions relating to administration in the handling of cases (for which see also qu. 14). The use of the Good Practice Guide in setting up the arrangements appears to have been partial but it has been taken into consideration. However as will appear later it is not available to all involved with the Convention.

11) Central Authority details

Please give an update of the following details –

a) The designation and contact details of the Central Authority, and

b) Contact persons within the Central Authority, languages of communication (spoken and written), and contact details for each.

R See separate paper with the relevant information.

12) Information and training

What measures are being / have been taken to ensure that persons responsible for implementing the Convention (including the judiciary, court officials and Central Authority personnel) have received appropriate information and training?

R (with qu. 13) MS There has been no specific training so far on the 1980 Convention so that in July will be the first opportunity. As regards training in general there are training sessions held several times per year on various topics but as yet there is insufficient expertise to include training on the 1980 Convention although the intention is to do so. Mostly the training is carried out by officials from the Justice Ministry and includes discussions on common problems/issues arising in the operational areas. It will take some time to work this out for the Convention.

Other interests such as those in the Execution service and the Ministry of FSY have training initiatives the former within the Justice Ministry structure and the latter around eleven seminars in the remainder of 2008 and it would be quite possible to envisage joint training. The State Border Service will also be present at the July training session.

13) Specific arrangements within Ukraine as regards operation of the Convention

What arrangements are in place for effective operational liaison between the Central authority and the other authorities in Ukraine designated to deal with aspects of Child Abduction cases notably –

- The courts and the judiciary
- The legal profession(s)
- Police
- Social work and other agencies responsible for child protection
- Agencies responsible for enforcement of return orders
- R See qu. 12.

14) Operational arrangements including time limits

a) Are there operational arrangements in place to ensure that cases are dealt with promptly by the Central Authority and with due expedition both for incoming and outgoing cases; give examples and if possible copies of any desk or other instructions available to assist in the fulfilment of this function?

b) What specific time limits or objectives have been set to deal with applications in both incoming and outgoing cases and how are these monitored?

c) What arrangements are in place for the Central Authority to make the request envisaged under Article 11(2) of the Convention?

d) What steps do the Central or other Authorities in Ukraine take to seek prompt and, where possible, agreed return of abducted children as envisaged by Articles 1 *a*), 7 *c*) and 10 and to ensure that this does not lead to delay in proceedings?

e) Have the Central or other Authorities in Ukraine put in place any arrangements specifically to deal directly with applicants either within Ukraine or in other Contracting States and if so please indicate what these are?

R This is a resume of responses gleaned at the second meeting on the 27th and at the round table. There are issues about the length of time cases take. The need to communicate with the oblasts is

one area where time is spent and also the attempts to seek the agreement of the abductor to return the child.

The arrangements for the ministry are established by the Cabinet of Ministers. In general attempts are made to observe the time limits set/indicated in the Convention and the Central Authority is primed to act swiftly in response to an application. Problems can arise which are not directly related to the removal as for instance with translation - one example was a case from Israel where despite repeated request it took several months before translations were made available by the Central Authority in Israel.

Initially as noted above a lot of time was spent trying to secure agreement for return but now the practice is to go into the court as soon as possible.

The authorities in the Oblasts are set a time frame for completion of the various steps which they have to take and that is 30 days. This covers the seeking of an agreed return and trying to put in place any necessary measures of protection.

Another area of concern is the time taken in court. Under the Family Code decisions are to be reached in two months however the time taken in the court is proving to be rather longer and this is exacerbated by the time taken to hear an appeal which can be much longer. In the meantime the Central Authority in the requesting State is kept fully informed.

MVL added that in the context of the two month time limit for court proceedings the court may also set put a time limit for the proceedings and require the respondent to produce only necessary evidence. Problems can arise if additional evidence is required by the court from the applicant and this can lead to the suspension of the two month time for the decision to be taken. In addition if a case is appealed execution of the return may be suspended and this can take a long time.

OS adds on this point that the appeal procedures take far too long and this is in part due to lack of experience with these cases. This should change with increasing experience but the courts may not be too keen to accelerate the process.

On enquiry from PMB as to whether it is thought that the most expeditious procedures are being used as is required by Art 2 of the Convention, MVL responds to say that this depends on the sensibilities and sense of responsibility of the institutions concerned. As regards the Ministry the officials there are doing their best but there is doubt as to whether that is so in the courts.

Training notes- This discussion together with that reported above at qu. 3 suggests that there is a training issue on the time cases are taking and what steps can be implemented to speed things up. This is a particular problem in the courts where the procedural situation is such that there are no rules dealing with Convention cases as such. Also it looks as if there are Evidence issues in the background and a continuing issue about the length of time taken for appeals.

15) Website and information dissemination

a) Has the Central Authority in Ukraine prepared and does it maintain a website and / or a brochure / information pack? (Please provide the website address or check if the information on the Hague Conference website is accurate, see < www.hcch.net > → Child Abduction Section → Links to related websites)?

b) If so –

i) was this information prepared in co-operation with other agencies responsible for the functioning of the Convention in Ukraine and if so which, and

ii) does the website and / or brochure / information pack contain the following information as recommended by the Special Commission of 2001:

- “a) the other Contracting States in relation to whom the Convention is in effect;*
- b) the means by which a missing child may be located;*
- c) the designation and contact details for the Central Authority;*
- d) application procedures (for return and access), documentary requirements, any standard forms employed and any language requirements;*
- e) details, where applicable, of how to apply for legal aid or otherwise for the provision of legal service;*
- f) the judicial procedures, including appeals procedures, which apply to return applications;*
- g) enforcement options and procedures for return and access orders;*
- h) any special requirements which may arise in the course of the proceedings (e.g., with regard to matters of evidence);*
- i) information concerning the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return;*
- j) information, if applicable, concerning liaison judges”?*

iii) If not, is it the intention to prepare such information and what steps will be taken to do so?
 R MS/MVL As regards public information there is a Ministry of Justice web –site on which there is some information but this is rather hard to locate in the site. There is also a public web-site which records all court decisions so any return order will be posted on that site. It may well be that further information could be made available. There has been some information disseminated through the media on radio and TV (in Kyiv City and Oblast) and it would clearly be possible to produce further material in printed form for distribution to the public. Internet may not be the best method yet but it is clear that further co-ordinated initiatives are needed to prepare and distribute information. There is contact by the Central Authority with the Oblasts and also directly with members of the public who are able to access the officials in the Central Authority by phone but generally all the authorities involved need to work together to inform the public.

Training note –The need to set up a concerted campaign of information is clear from this exchange; as regards the training itself this is a question of practice as much as anything but it could be that some ideas on this subject could be included were there to be a document of conclusions and recommendations to be prepared which could draw on the material inter alia the 2001 Conclusion

Section 3 - Judiciary

General Comment; only certain of the questions are treated here with responses as the Judge, Mr. Bida Mikhailov prefaced most of his responses by saying that there had been few cases and hence little direct experience of the use of the Convention (and its implications) so far. Some material relevant to this section is included from discussions at the Round Table on the 27th and also at the Ministry in the afternoon of the 27th. Except as specifically noted therefore, the responses are derived from the discussion with Mr Mikhailov on the 27th.

16) Judicial procedures

a) Which courts / administrative bodies within Ukraine have been given jurisdiction to consider applications for return orders (and questions of access) under the Convention?

R KS At present all courts in Ukraine are competent to hear the cases under the Convention and that means more than one thousand.

b) Have any steps been taken or arrangements made, by concentrating jurisdictional competence or otherwise, to create the conditions for expertise and specialisation in dealing with return order applications to be built up?

R Not yet.

c) If not are such steps or arrangements in contemplation?

R KS See R to qu. 3 (c) as to plans to concentrate jurisdiction in one court per Oblast.

17) Expedition

a) What measures exist to ensure that Hague 1980 Convention applications are dealt with promptly (Article 7) and expeditiously (Article 11) both at first instance and on appeal?

b) Are there set timetables at both first instance and appellate level to ensure the speedy determination of return applications?

R See the R and discussion ref. qu. 14 above

18) Enforcement procedures

a) What procedures and measures exist for the enforcement of a return order?

b) What orders can be made by the courts in Ukraine as regards arrangements for return notably as regards the safety of a returning child in general (and the accompanying parent, where relevant) in particular where issues of (alleged) domestic violence or abuse are raised?

c) Is the court / administrative body within Ukraine having jurisdiction to consider applications for return orders also responsible for the enforcement of such return orders? If not, please explain.

R See the discussion above at qu.7. The comment from BM was that there had been no order yet under the Convention and that he thought that Ukrainian domestic law would apply to the content and enforcement of any such order.

19) Substantive law

a) What are the legal criteria by which custody and contact determinations are made

b) Is there a difference in the legal status of mothers and fathers in custody or contact cases?

c) How do the judiciary inform themselves as to the meanings of the important expressions in the Convention such as the meaning of 'habitual residence', 'custody', 'acquiescence' and 'settlement'?

R See the material at qu 8 above which covers the points made by BM also.

20) Information and training

a) What measures are being / have been taken to ensure that judges having to apply the Convention have received appropriate information and training?

R BM general training is organised by the Appeal and Supreme Court judiciary and the centre for Judicial Studies and this includes International Private Law. There has not yet been any specific training on the 1980 Convention.

b) Do Judges in Ukraine have the opportunity to read the Judge's Newsletter published by the Hague Conference on Private International Law?

R BM In theory that would be possible but it has not happened in practice partly because of the language issue.

21) Information about judicial procedures

Does there exist in Ukraine a website or other information by way of a brochure / information pack regarding the judicial procedures and jurisdiction and other arrangements for dealing with cases under the Convention (Please provide the website address [or check if the information on the Hague Conference website is accurate, see < www.hcch.net > → Child Abduction Section → Links to related websites]). If so, does the website and / or brochure / information pack contain the following information [as recommended by the Special Commission of 2001]:

“f) the judicial procedures, including appeals procedures, which apply to return applications;

g) enforcement options and procedures for return orders;

h) any special requirements which may arise in the course of the proceedings (e.g. with regard to matters of evidence);

i) information concerning the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return;”

R The Ministry of Justice has responsibility for the provision of information which it does to the judiciary as regards new legislation. As regards public information this is also for the Ministry but the Register of Court decisions is public and contains all published court orders. General legal information should be available in public libraries.

22) Hearing of children

a) In what circumstances and by what procedures / methods are children heard in Hague 1980 Convention proceedings in Ukraine?

R BM Under Ukrainian law children of 10 years and over must be heard and that will be applied in 1980 Convention cases. Under domestic law this can determine where and with whom the child can live. Children under 10 can also be heard having regard to their age and the quality of their understanding. The views of children are considered to be important as are their interests especially in issues relating to their welfare and whether they are being treated properly.

b) In particular how will a determination be made as to whether a child objects to return, and in what circumstances might judges refuse to return a child based on his or her objections?

R See (a). Added by KS A child of 14 and over can determine where he/she is going to live and with whom confirmed by OF at the Round Table – [NOTE this was contradicted to a degree in

the Round Table by OG who indicated that a child of 12 can indicate in court where and with whom he/she wishes to live. This may indicate a difference between internal substantive and procedural law pmb.]

c) Are any special facilities available to allow the views of children to be heard or their evidence to be taken?

R BM There are special procedures for taking a child's views and other services may be present to support the child. Also special consideration applies to younger children under 10 years of age and there is a need to take account as to whether a child may be adversely affected by such an experience.

OG Under domestic procedure in Ukraine the child protection officer will go to see the child and the parents and possibly any GP involved and will assess the conditions in which the child is living; a report is prepared and submitted to the court. The child is not required to be part of or present at the proceedings and his/her interests will be represented by parent or if they cannot by child protection officers. There are no specific procedures for the 1980 Convention.

MVL adds that the position in Germany seems to be that the child can give views frankly in a very informal setting and can narrate their story using images and symbols. The German courts can also see children. In Ukraine children do not as a rule provide information direct to the Courts.

RL adds that there are particular issues as regards children's views as concerns parental influence such that it may be necessary for psychologists to be involved in taking the views.

OS adds that there is a risk that courts in Ukraine will assume that a child has settled in Ukraine after a period of a year has elapsed and MS comments that this is certainly an issue for Art 12.

d) Are there agencies in place which have as a function assisting in the hearing of children and if so how do they do so within the time frame envisaged (under Articles 2 and 11) for return applications?

R See elsewhere in this qu. No material as regards expedition.

e) Do children have the right to legal representation in Ukraine and if so under what circumstances / conditions?

R BM A child of 14 and above can be a party to an action and could be represented. There are varying views as to the desirability of separate representation for children. In any event from the age of 18 a person has full legal capacity under the law of Ukraine.

KS added that there is some consideration being given to changes in the law as regards representation of children and the hearing of their views. NOTE This to be followed up with KS Training Note (on qu. 22) – the discussions revealed a limit understanding of the tolerance between the position under domestic law on the one hand and the position under the Convention on the other especially as regards the procedural situation of a child and also the issues surrounding article 12. Apart from any material in presentation form it may be worth thinking about a case study which could involve such issues.

23) Fundamental law

Please comment on any Constitutional procedures or principles which make it difficult to implement the Hague Convention fully.

R BM No such issues have emerged as yet.

24) Use of “undertakings”

a) To what extent are courts in Ukraine entitled and prepared to employ “undertakings” (*i.e.* promises offered by, or required of the applicant) as a means of overcoming obstacles to the safe return of the child? Please describe the subject matter of any undertakings required / requested.

b) Will courts / authorities in Ukraine enforce or assist in implementing such undertakings in respect of a child returned to Ukraine? Is a differentiation made between undertakings by agreement between the parties and those made at the request of the court?

Not discussed.

Section 4 - General Concluding

25) Criminal charges

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.

R There are some cases where criminal charges are an issue as abduction can be a crime in Ukraine but it seems that there is as yet no experience of the situation where problems arise as to return of a child because the abductor faces criminal charges in the home State.

MVL reported that in one of the cases in Lviv the court asked about criminal charges against the father of the child dating from 2001 for a return application in 2007 but this was not a situation where that parent faced charges over the abduction. In general there is no extradition from Ukraine for Abduction. If there are criminal charges against a parent, say the left behind parent which may have a bearing on the return application then the court is likely to await the outcome before deciding the case which will have a bearing on the speed of the proceedings.

Training Note- This issue does not seem to be particularly important as yet apart from the influence of the existence of pending criminal charges on the speed of decisions and it is doubtful whether it is necessary to treat it in the training.

26) Guide to Good Practice / INCADAT

a) In what ways has it been possible to you use the Guide to Good Practice – Part I on Central Authority Practice, Part II on Implementing Measures and Part III on Preventive Measures to assist in implementing for the first time, or improving the implementation or operation of, the Convention in Ukraine?

R from BM; This would in principle be interesting to the judiciary but it would have to be in Ukrainian – it is not so available.

b) Has the Guide to Good Practice assisted Ukraine in making policy or practical decisions relating to the implementation or operation of the Convention?

R Ms The Central Authority did use the First part in setting up systems and continues to do so but not parts two and three which are only in English and French and would need to be translated.

c) Have the relevant authorities in Ukraine been made aware of, and have had access to, the Guide to Good Practice and to the extent that this is the case how has this been ensured?

See (b)

d) Would it be helpful to the Central and other Authorities in Ukraine responsible for the operation of the Convention if the Part I of the Guide to Good Practice, as well as Parts II and III, were to be available in the Ukrainian language?

R Yes it would be necessary to have translations into Ukrainian of the Guide and other information from HCCH as to good practice.

e) If so how this might be achieved?

R None

f) Please comment or state your reflections on the INCADAT website service provided by the Permanent Bureau to assist with the implementation and operation of the Convention.

R form BM not sure if this would be for every judge but it could be made available at least to one or two people to gain experience. Judges tend to do their own research and they have their own field of knowledge so in each court there is a degree of specialisation. (Civil/Criminal/Administrative) NOTE as an aside the judge confirmed that he thought that a degree of specialisation in Hague Convention cases would be a good idea to build up expertise. MS INCADAT would be interesting in the training so it is to be hoped that a demonstration can be arranged as, especially in the Oblasts, the courts and the Departments have very little knowledge about it.

Training Note – There is clearly a wish to have more information both at departmental and judicial level so some thoughts on this would be helpful. As regards INCADAT the green light is there for a demonstration at the training so that should be arranged for all, including the judiciary – that is a question of timing.

27) Political discussion / Publicity issues

a) Has the 1980 Convention given rise to (a) any publicity (positive or negative) in your country, or (b) any debate or discussion in your national Parliament or its equivalent?

b) By what methods is public information about the Convention disseminated in Ukraine?

R No discussion on this point – premature.

28) Relations with other Central Authorities

a) Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities? If so please specify these.

R YP The largest problem has been with Israel notable as concerns translations from Hebrew (NOTE There are quite a lot of cases with Israel as not a few people from Ukraine have settled in Israel – pmb). Many of these have been resolved but only after voluminous correspondence. Part of this was due to the need to respond to a request by the court (in Ukraine) for production of evidence of a criminal conviction from 2001. Other questions related to the need for information about the status of a father who was not married to the mother of the child and not on the birth certificate because he was already married. The court in Ukraine always needs a certificated translation of such documents (not with an apostil – pmb)

MS MS There are other countries where there are issues notably on translation – it is necessary that documents should be in English or French if not in Ukrainian. The courts in Ukraine have certain requirements about the presentation of documents and this can lead to delays.

Some cases had to be rejected as they related to matters which had arisen before the Convention was in force in Ukraine.

b) More specifically, how are “modern rapid means of communication,”¹ used by your Central Authority in order to expedite communications, bearing in mind the requirements of confidentiality?

¹ See the Guide to Good Practice – Part I on Central Authority Practice, Chapter 1.3.3.

MS The Central Authority uses e-mail and the phone as much as possible and tries to use as little procedural bureaucracy as possible and to do things swiftly. However there are times when other central authorities are not interested in such informal methods of communication and do not respond. Such problems are soluble but can take quite a time to work out.

c) In accordance with the Guide to Good Practice – Part I on Central Authority Practice, has your Central Authority shared its expertise with another Central Authority or benefited from another Central Authority sharing its expertise with your Central Authority?²

MS a meeting with the German Central Authority proved very beneficial in dealing with issues and as a result relations with Germany go well and the German Central Authority is fully apprised of the requirements of the Ukrainian courts and authorities.

d) Are there any other problems of co-operation with other Central Authorities to which you wish to draw attention?

OZ a particular problem arose with the Italians where some documents were not translated and the application was completed in pencil by the Italian Central Authority so much that it was not clear if it had been signed properly by the applicant. The Italian central authority did not respond to enquiries on this point. Art 27 can be applied if the application is simply not sufficient for the purposes of the Convention.

Training Notes. The majority of issues raised in this discussion turn on good practice as regards co-operation with central authorities and the lesson can be learned from the experience with the German Central Authority. There is therefore a general point about co-operation and good practice for the training. There is also an issue about evidence matter lurking around in the background as also the perennial point about Moslem States not parties to the Convention.

29) Difficulties with particular contracting States

R see responses to qu. 28

a) Are there any Contracting States with whom you are aware that Ukraine has been having particular difficulties in achieving successful co-operation?

b) If so and if possible, please specify any such States and the nature of the difficulties.

30) Cases outside the scope of the Convention

a) Are you aware of any (troubling) cases of international abduction which fall outside the scope of the Convention and which are giving or are likely to give cause for concern?

R There are some cases where persons of Moslem background are married to Ukrainians and living in an EU State who threaten to remove children to a non-convention (Moslem) State

b) Do you have any comments on bilateral or other agreements between Ukraine and a non-Contracting State?

R there are particular arrangements under the Minsk convention with CIS States notably the Russian Federation which cover recognition though not specifically for the issue of Child Abduction and there are arrangements with certain other States of a similar nature. and enforcement of judgments legal assistance and applicable law .

² See, in particular, Chapter 6.5 on twinning arrangements.

PART 2 – THE 1996 CONVENTION ON CHILD PROTECTION:

R The general position is that there has been virtually no thought given to this and there have been no cases so far. The general view seems to be that it would be better to concentrate on the 1980 Convention and the most that should be attempted is a general presentation which should nonetheless highlight the differences and relationship between the two Conventions.

31) Implementation of the Convention

a) Given that the 1996 Convention is in now force in Ukraine, please give information so as to indicate -

- i) what legislative, administrative and other steps have been taken as regards the implementation of the Convention,
- ii) how it is operating, and
- iii) how many cases there have been under the Convention?

b) Which courts and other authorities have been designated as being competent to perform the functions required under the Convention?

c) Please indicate, in the context particularly, of Articles 33 and 44, how the functions relating to cases where cross-border placement of children is an issue are to be discharged, in particular as regards the consultation required between the relevant authorities in Ukraine and an other State concerned.

d) What arrangements exist for giving legal aid, advice or assistance to foreign applicants as regards applications under the Convention, notably those in relation to contact / access?

e) What conditions, if any, are likely to be imposed on contact/access as regards a non-custodial parent -

- i) in general, and
- ii) where that parent has unlawfully removed or retained the child concerned?

f) What facilities and procedures are available in Ukraine to encourage and support agreement between those seeking, disputing or exercising rights of access / contact or residence / custody in cross-border cases?

g) Has any guidance or training been given specifically on the 1996 Convention?

32) Central Authority

a) Please indicate in general terms the arrangements for the Central Authority required under the 1996 Convention, how they are staffed, what language capabilities both aural and written are required and how the authority or authorities designated for this purpose carry out their functions.

b) More particularly what desk or other instructions have been put in place to assist the Central Authority personnel to carry out their functions

33) Judicial Procedures

a) What arrangements, if any, are in place, by concentration of jurisdiction or otherwise, to create the possibility for expertise to be built up in dealing with international family law cases relating to matters of parental responsibility and the protection of children, in particular those under the 1996 Convention?

b) What arrangements are in place to ensure that applications for cross-border contact / access are dealt with expeditiously at first instance and on appeal, in particular are there any time-limits specified in the relevant rules of procedure?

c) Please give details of the measures which are available for enforcement of orders in international contact / access and other parental responsibility cases.

34) Interpretation and the Practical Guide to the 1996 Convention

a) Have any particular difficulties been experienced by the judicial and other authorities in Ukraine concerning interpretation of particular provisions of the Convention?

b) Would the relevant authorities in Ukraine find it useful if there were available a Practical Guide or Handbook to implementation of the 1996 Convention similar to that for the 1980 Convention?

R Yes in principle but would it be available in the Ukrainian language? That would be necessary.

PART 3 – FINAL

35) Relocation

a) Have any steps being taken to inform and encourage parents, judicial and other agencies and lawyers as to the desirability of parents, before they move with children from one country to another, not to take unilateral action but to seek by agreement to make appropriate arrangements for residence of children and contact / access with them after relocation in particular where the outcome is that the children will be living with only one parent after the move?

R BM responding to enquiry from PMB as to whether there are any initiatives in Ukraine to assist parents to seek agreement or make arrangements where they wish to move across a border with a child, especially if this concerns one parent, and whether there is any legislation on the matter.

It is necessary for there to be two permits, one from each parent, if a child moves from Ukraine without the parents – one if the child leaves with one parent. Without such any departure would be unlawful.

If the removal of a child without permission in this way is intended to be permanent it will be a criminal offence if done by third parties. There is a possibility for the court to prevent or permit by order the removal of a child from Ukraine if a parent refuses to agree. The court has allowed a child to leave Ukraine for medical purposes against the wishes of a parent.

So it would be possible for the court to order that a child could leave Ukraine with one parent against the wishes of the other and the decision will take into account the interests of the child and his/her views/wishes depending on the relative age of the child and the capacities of the parents. As noted above the views of the child will often be taken into account and may be determinant of the outcome.

b) Have the relevant authorities in Ukraine taken steps by way of joint working, training or other initiatives to explore ways in which they might support parents who wish to seek agreement on such issues before cross-border relocation?

R None.

36) Mediation

a) Are there any programmes of mediation available in Ukraine for parents or other persons involved in Hague Convention cases? Please describe these, indicating *inter alia* the methods employed to ensure that mediated agreements are enforceable and respected by the parties, as well as the availability of, and training opportunities for, international mediators.

BM In principle mediation is a very interesting area but there is little experience with the subject in Ukraine; it would be worth-while looking at it. It is available in criminal cases and there is available some sort of conciliation in Family cases.

MS This has been discussed and it is understood that mediation is not in place in Ukraine in the way it could be This would be an interesting subject for the training and especially over best practices in mediation.

b) What steps may be / are taken to ensure that mediation procedures do not unduly delay proceedings for the return of the child?

R OZ There is relatively little experience in Ukraine but this is an issue as it is not clear how it would be possible to minimise the delays in procedure where it is attempted through mediation by third parties to reach agreement for example on voluntary return especially if agreement is not reached. A continuing issue is that it is necessary to explain to parents that any decision in the court on custody must await the decision as to whether there is to be a return order or not.

c) Do you have any other comments relating to mediation in the context of the 1980 Convention either at a preventive stage or when a removal or retention has occurred?

R See (b).

37) NGO's

Could you provide a list (including contact details and website addresses) of non-governmental organisations in your State which are involved in matters covered by the 1980 and / or 1996 Conventions?

R OZ There is relatively little experience in Ukraine of the involvement of NGO's. It is known that they are active in other countries most notably in seeking to secure agreement/reconciliation and agreed returns. It would be good to know more about this and notable how to deal with the problem of delay (see Qu 36 (b)).

Training Note:- at the Round Table the three questions 35 to 37 were discussed together at the end of the afternoon. It is clear that the issues raised are of interest in principle to those present and also to the judiciary so it would appear appropriate to seek to include materials on these subjects if possible.

38) Judicial Communication

a) Have judges in Ukraine participated in international conferences or training programmes in the relation to the 1980 or 1996 Conventions? Please give details.

R BM Not yet but this would be interesting in principle especially to have discussions and consultations on matters of mutual interest.

b) Are judges in Ukraine aware of the possibilities under the 1980 and 1996 Conventions for direct judicial communication?

R No response on this from Mr Mikhailov however he did indicate that earlier exercises with Swiss and French judges had been positive and had led to a 'twinning' arrangement with the Court in Toulouse.

c) Does Ukraine intend to designate a sitting judge as a member of the International Hague Network of Judges specialised in family matters? If not, please explain.

BM Yes in principle; KS asked for a view as to whether this should be first instance judge or an appeal judge.

Training need - certainly for the judicial training package this would appear to be an area of interest. In addition the question form KS could prompt reflection bases on the purpose and possibility of the initiative and practical issues like language and the position of any candidate within the judicial system/hierarchy in Ukraine.

39) Activities of the Permanent Bureau

Do you have any comments to make as regards the extent and nature of the activities in which the Hague Conference and its Permanent Bureau are engaged as regards assisting the effective functioning of the 1980 and 1996 Conventions and on the funding of such activities?

R None specifically on these points but there is clearly awareness and appreciation of the activities of the Conference notably in the production of the Good Practice Guide, INCADAT and IChild.

40) Other issues and instruments

Please give any further comments or observations on -

a) any other matters concerning the practical operation of the 1980 Convention or the implementation of the 1996 Convention - or

b) the impact of international instruments on the operation of the 1980 Hague Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

R MS Final comments that the Round Table had covered the issues that arise from the 1980 Convention and that it would be very helpful if these were to be covered at the training in July.

PMB Training Notes.

- 1) On the attendance of the judiciary BM expressed doubts as to how long the judges would be able to be at the training bearing in mind their work load. As a result some discussion took place at which it was suggested that there might be one day when the main judicial issues would be dealt with in the hope that all the judges would be present that day without ruling out the possibility that they could also be present on other days.
- 2) On case studies – it is clear that it will be necessary, as was the case in December, to prepare a sort of Guide as to how the case studies should be approached. That done for the December training could be resurrected and adapted for the purpose.

